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APPEALS.

A PARTY NEED NOT MAKE A MOTION TO SET ASIDE THE VERDICT TO BE ENTITLED TO A WEIGHT OF THE EVIDENCE REVIEW BY AN APPELLATE COURT; THE VERDICT FINDING DEFENDANT BUS DRIVER NEGLIGENT, BUT FINDING THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF'S SLIP AND FALL, WAS AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Connolly, overruling precedent and disagreeing with the Third and Fourth Departments, determined (1) a party need not make a motion to set aside the verdict to be entitled to an "against the weight of the evidence" review by the appellate court, and (2) the verdict finding defendant bus driver negligent but also finding the negligence was not the proximate cause of plaintiff's slip and fall was against the weight of the evidence. Plaintiff stepped into a pothole when getting off the bus which had stopped to let her off after she had missed her stop:

A … source of this Court's authority to review the weight of the evidence absent a motion to set aside the verdict comes from CPLR 4404(a), the provision authorizing postverdict motions for a new trial. CPLR 4404(a) provides, in pertinent part: "After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may . . . order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence" … . Insofar as the trial court is permitted to order a new trial "on its own initiative" (CPLR 4404[a]), and "the power of the Appellate Division . . . is as broad as that of the trial court" … , this Court also possesses the power to order a new trial where the appellant made no motion for that relief in the trial court. …

… [I]t was logically impossible for the jury to conclude that [the bus driver] was negligent in failing to provide the plaintiff with a safe location to alight from the bus but that such negligence was not a proximate cause of the accident. It was uncontradicted that the plaintiff stepped directly from the bus into the pothole, and immediately fell to the ground. The unbroken chain of events was witnessed by … a neutral witness with no relationship or prior affiliation with the parties, and corroborated by photographs of the scene taken immediately after the accident occurred. Assuming, as the jury found, that [the driver] was negligent, it is logically impossible under the circumstances to find that such negligence was not a substantial factor in causing the accident. Under these circumstances, the issues of reasonable care and proximate cause were so inextricably interwoven that the jury's verdict could not have been reached upon any fair interpretation of the evidence … . Evans v New York City Tr. Auth., 2019 NY Slip Op 07872, Second Dept 11-6-19

ATTORNEY-CLIENT PRIVILEGE.

THE ATTORNEY-CLIENT PRIVILEGE DID NOT PASS TO THE FOREIGN (DELAWARE) CORPORATION AFTER A MERGER AND ACQUISITION OF NEW YORK BUSINESS ENTITIES; THEREFORE THE NEW YORK PARTIES, IN THEIR CLAIMS AGAINST THE ATTORNEYS WHO REPRESENTED THEM IN THE TRANSACTION, CAN SEEK ACCESS TO THE ATTORNEYS' PRIVILEGED COMMUNICATIONS CONCERNING THE TRANSACTION (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Austin, reversing Supreme Court, determined that New York law applied to a party's assertion of the attorney-client privilege for documents associated with a corporate acquisition and merger involving New York and Delaware business entities. The opinion is fact-based and far too complex and comprehensive to summarize here. The Second Department, disagreeing with Supreme Court, held that the choice of law was governed by public policy, and the proper theory for access to the privileged documents is New York's law of replevin. In a nutshell, the Second Department held that the attorney-client privilege did not pass to the foreign corporation after the merger and acquisition, but rather remained with the the New York parties (Sina and Askari) and allowed the New York parties to pursue claims against the attorneys (McDermott) who represented them in the transaction:

In a situation where documents are sought, New York will apply the law of the forum where the evidence will be introduced at trial or the location of the proceeding seeking discovery of those documents … . Here, the privileged communications being sought by the plaintiffs in this New York replevin action were made in New York between New York-based attorneys at McDermott and Sina, a New York corporation, involving its then-majority shareholder and president, Askari, a New York resident. The sole nexus that Delaware has to this action is that Specialty is a limited liability company formed under the laws of that state. Consequently, New York law applies in this action sounding in replevin seeking the disclosure of McDermott's files … . …

It would indeed be incongruous to enforce a law which effectively forecloses New York corporations merging with foreign corporations from having the ability to pursue their claims against their counsel or the newly formed, post-merger entities based on the post-merger entities' control of the documents needed by the former entities to prosecute potential claims. Here, Delaware law gives the new corporation, a putative defendant, sole access to and control of the merger-related documents by the exercise of the attorney-client privilege. This is contrary to New York public policy … . * * *

Here, Business Corporation Law § 1006 specifically provides that a dissolved corporation, like Sina, may commence an action in any court under its corporate name. Sina's dissolution does not affect Sina's right or capacity to maintain this replevin action since the claim arose from McDermott's representation of Sina which began before Sina's dissolution. … Thus, the plaintiffs demonstrated their prima facie entitlement to judgment as a matter of law in this action for replevin since the plaintiffs submitted evidence, through Askari's affidavit, that McDermott represented Sina and Askari during the "transactions." As a result, the plaintiffs demonstrated, prima facie, their superior possessory right to McDermott's files. Askari v McDermott, Will & Emery, LLP, 2019 NY Slip Op 08547, Second Dept 11-27-19

ATTORNEYS, WITHDRAWAL OF.

SUPPORT MAGISTRATE SHOULD NOT HAVE ALLOWED FATHER'S ATTORNEY TO WITHDRAW WITHOUT NOTICE TO FATHER AND SHOULD NOT HAVE PROCEEDED IN FATHER'S ABSENCE (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the Support Magistrate's findings should not have been confirmed because the Support Magistrate allowed father's attorney to withdraw without notice to father and proceeded in father's absence:

… [T]he Support Magistrate erred in allowing the father's attorney to withdraw as counsel and in proceeding with the hearing in the father's absence. "An attorney may withdraw as counsel of record only upon a showing of good and sufficient cause and upon reasonable notice to the client . . . [, and a] purported withdrawal without proof that reasonable notice was given is ineffective" … . Here, the father's attorney did not make a written motion to withdraw; rather, counsel merely agreed when the Support Magistrate, after noting the father's failure to appear for the hearing, offered to relieve her of the assignment. The absence of evidence that the father was provided notice of his counsel's decision to withdraw in accordance with CPLR 321 (b) (2) renders the Support Magistrate's finding of default improper … . Matter of Gonzalez v Bebee, 2019 NY Slip Op 08027, Fourth Dept 11-8-19

BANKRUPTCY, FORECLOSURE.

FEDERAL BANKRUPTCY STAY TOLLED THE STATUTE OF LIMITATIONS IN A FORECLOSURE ACTION COMMENCED BEFORE THE STAY WENT INTO EFFECT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a three-judge dissent, determined an automatic bankruptcy stay tolls the statute of limitations where a party has a pending action at the time the stay was imposed:

New York law tolls the statute of limitations where "the commencement of an action has been stayed by a court or by statutory prohibition" (CPLR 204 [a]). Federal bankruptcy law automatically stays the commencement or continuation of any judicial proceedings against a debtor upon the filing of a bankruptcy petition (see 11 USC § 362 [a]). We must determine whether the bankruptcy stay qualifies as a "statutory prohibition" under CPLR 204 (a), and, if so, whether a party may later avail itself of the toll where, at the time the stay was imposed, that party had a pending action asserting the same claim. … [W]e answer yes to both questions … . * * *

CPLR 204 (a) provides, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." The result here depends on our reading of the term "commencement."

Plaintiff argues that it is impossible for defendant to have been prohibited from "commencing" an action because a foreclosure action had been commenced prior to plaintiff's bankruptcy filing. Application of plaintiff's rule would be as follows: Because defendant filed the first foreclosure claim and defendant responded by filing a bankruptcy petition, invoking the automatic stay, commencement of that first action was not "stayed" under the statute and the toll is inapplicable. And when defendant filed a second foreclosure action, and plaintiff again responded by again filing a bankruptcy petition that invoked the automatic stay, "commencement" of that second action was not stayed, once again making the toll inapplicable … . * * *

Neither this Court nor the Legislature has restricted the term "commencement" to the first time a party files a complaint asserting a cause of action; instead the term may also include the commencement of subsequent actions asserting the same claim … . Lubonty v U.S. Bank Natl. Assn.., 2019 NY Slip Op 08520, CtApp 11-25-19

BANKRUPTCY, FORECLOSURE.

THE DISCHARGE IN BANKRUPTCY DID NOT ACCELERATE THE DEBT AND THEREFORE DID NOT START THE STATUTE OF LIMITATIONS RUNNING; THE IN REM FORECLOSURE ACTION REMAINS VIABLE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Carni, determined that the mortgage debt was not accelerated by a discharge in bankruptcy, therefore the statute of limitations was not triggered and an in rem foreclosure action remains viable:

… [O]nce a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" … . "Where the acceleration . . . is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation" … . Here, the mortgage provided plaintiff the option to accelerate the debt under certain circumstances, but did not state that the debt would be automatically accelerated if defendant obtained a discharge in bankruptcy.

We reject defendant's contention that the discharge in bankruptcy automatically accelerated the debt and thus triggered the statute of limitations with respect to the entire debt … .

"[E]ven after the debtor's personal obligations have been extinguished [by chapter 7 discharge], the mortgage holder still retains a right to payment in the form of its right to the proceeds from the sale of the debtor's property," and a bankruptcy proceeding does not "impair [the mortgage holder's] right to commence an action against [the debtor] in rem to seek payment from the proceeds of a foreclosure sale" … . … [C]hapter 7 discharge removes the "mode of enforc[ement]" against the debtor in personam, but the obligation otherwise remains intact and does not impact an action in rem … . Wilmington Sav. Fund Socy., FSB v Fernandez, 2019 NY Slip Op 08290, Fourth Dept 11-15-19

BORROWING STATUTE.

PLAINTIFF TRUSTEE'S RESIDENCE IS CALIFORNIA AND THE CAUSES OF ACTION IN THIS RESIDENTIAL-MORTGAGE-BACKED-SECURITIES BREACH OF CONTRACT ACTION THEREFORE ACCRUED IN CALIFORNIA; UNDER NEW YORK'S BORROWING STATUTE, CPLR 202, THE ACTIONS MUST BE DISMISSED BECAUSE THEY ARE UNTIMELY UNDER CALIFORNIA LAW (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two-judge dissent, determined that California, the residence of the plaintiff, here a residential-mortgage-backed-securities trustee, was where the breach of contract action accrued, not New York. Therefore, pursuant to CPLR 202, New York's borrowing statute, the action must be timely under both California and New York law. The action was not timely under California law which has a four-year statute for breach of contract:

Defendants argued that as a resident of California, plaintiff suffered economic injury in California, and therefore plaintiff's causes of action accrued in California for the purposes of CPLR 202. Plaintiff conceded that it was a resident of California. It argued, however, that instead of applying the general rule that an economic injury is suffered where the plaintiff resides to determine where the cause of action accrued, the court should apply a multi-factor analysis. Plaintiff asserted that because it was suing in a representative capacity on behalf of the trusts, it did not suffer real economic loss, and its residence was irrelevant, or at least not the primary consideration, for determining the place of accrual. * * *

We reaffirm that "a cause of action accrues at the time and in the place of the injury" … . Although courts may, in appropriate cases, conclude that an economic loss was sustained in a place other than where the plaintiff resides, we decline to apply the multi-factor analysis that plaintiff proposes. * * *

… [W]e conclude that plaintiff's residence applies to determine the place of injury in this case. As trustee, plaintiff is authorized to enforce, on behalf of the certificateholders, the representations and warranties in the relevant agreements. Accordingly, it is appropriate for us to look to plaintiff's residence as the place where the economic injury was sustained and, consequently, where plaintiff's causes of action accrued for purposes of CPLR 202. Deutsche Bank Natl. Trust Co. v Barclays Bank PLC, 2019 NY Slip Op 08519, Ct App 11-25-19

CLASS ACTIONS.

FOUR CLASSES PROPERLY CERTIFIED TO BRING CLASS ACTION SUITS BASED UPON THE CONTAMINATION OF AIR, WATER, REAL PROPERTY AND PEOPLE WITH TOXIC CHEMICALS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Lynch, determined that Supreme Court properly certified four classes bring class action suits against a manufacturer alleging the contamination of water, air, real property and people with toxic chemicals, PFOA and PFOS:

Plaintiffs, residents of the Town, commenced this action as a proposed class action, alleging that defendant's use and improper disposal of PFOA and PFOS caused personal injury and property damage. In their complaint, plaintiffs proposed four classes: (1) a public water property damage class; (2) a private well water property damage class; (3) a private well nuisance class; and (4) a PFOA invasion injury class. Generally, the putative class members were individuals who owned or leased property in the Town or who ingested contaminated municipal or well water or inhaled PFOA or PFOS particulates in the Town and had demonstrable evidence of elevated levels of the chemical in their blood system. * * *

We agree with Supreme Court's determination that, in addition to those questions common to the property classes, the answers to certain additional common questions will be applicable to all members of the invasion injury class, for example: (1) whether medical monitoring is an available remedy; (2) the extent of the health hazard presented by exposure to PFOA; and (3) whether the members of the class are at significant increased risk for disease based on the excess accumulation of PFOA in their bodies. Although defendant contends that there are myriad factual questions that are not common to the class, we do not agree that those predominate. Importantly, this is not a case where there is an issue of fact regarding exposure — rather, each class member must establish exposure and accumulation through blood work … . Burdick v Tonoga, Inc., 2019 NY Slip Op 08461, Third Dept 11-21-19

CLASS ACTIONS.

STATUTE OF LIMITATIONS TOLLED BY THE FILING OF SIMILAR ACTIONS ALLEGING THE UNDERPAYMENT OF WAGES TO HOME HEALTH AIDES (SECOND DEPT).

The Second Department determined defendants' motion to dismiss these "wage-underpayment" actions as time-barred to the extent they seek damages for underpayment more than six years before the suits were brought was properly denied. The Second Department held that, pursuant to American Pipe & Constr. Co. v Utah, 414 US 538, the statute of limitations was tolled based upon the filing of prior similar actions:

The plaintiffs, home health aides who were employed by the defendants Americare Certified Special Services, Inc., and Americare, Inc. (hereinafter together Americare), and who often worked 24-hour "live in" shifts, seek to recover damages for underpayment of minimum, overtime, and "spread of hours" wages in violation of the Labor Law and New York State Department of Labor wage orders and regulations. * * *

We find that … applying American Pipe tolling under the circumstances, where a court has not previously addressed the impropriety of class certification, is consistent with the policies underlying the tolling doctrine: avoiding multiplicity of suits and vexatious litigation … . Accordingly, we agree with the Supreme Court's denial of the defendants' motion to dismiss … . Badzio v Americare Certified Special Servs., Inc., 2019 NY Slip Op 08389, Second Dept 11-20-19

DISCLOSURE.

DEFENSE MOTION TO PRECLUDE PLAINTIFF FROM PRESENTING EXPERT EVIDENCE BECAUSE OF LATE DISCLOSURE AND DEMANDING THE MATERIAL RELIED UPON BY THE EXPERT PROPERLY DENIED IN THIS STAIRWAY SLIP AND FALL CASE (FIRST DEPT).

The First Department determined defendant's motion to preclude plaintiff from offering his expert's report and to turn over the materials relied upon by the expert was properly denied in this stairway slip and fall case:

"Preclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101(d)(1)(i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to

the party seeking preclusion" … . "Prejudice can be shown where the expert is testifying as to new theories, or where the opposing side has no time to prepare a rebuttal" … . * * *

Here plaintiff withheld information about an expert he retained and who performed a comprehensive inspection and report before the demand for expert disclosure was served, failed to disclose this in response to such demand, and continued to withhold such information over the course of many court conferences and the years that the case was pending. He offers no excuse for his delay or for having served a response to defendant's expert disclosure demand that was arguably misleading.

However, when plaintiff eventually did disclose the expert, it was not on the eve of trial … . His disclosure was made on or about March 9, 2018, about six weeks before the originally-scheduled trial date of April 30, 2018, a lead time further expanded with the court's 60-day adjournment … . Moreover, notwithstanding defendant's claims to the contrary, plaintiff's expert did not advance a different theory of liability from that which plaintiff had previously advanced. * * *

Defendant also fails to show grounds to disturb the court's denial of its motion to direct plaintiff to turn over materials relied on by his expert. Defendant claims it is entitled to these materials because, given the passage of time, any expert it would retain now would not be inspecting premises that resemble the premises at the time of the accident. However, defendant does not adequately explain its failure to timely retain an expert of its own. Rivera v New York City Hous. Auth., 2019 NY Slip Op 08366, First Dept 11-19-19

DISCLOSURE.

DISCOVERY OF DEFENDANT'S SOURCE CODE, A TRADE SECRET, SHOULD HAVE BEEN ORDERED FOR "ATTORNEYS AND EXPERT EYES ONLY" (FIRST DEPT).

The First Department, reversing Supreme Court, determined the discovery-production of defendant's source code, a trade secret, should have been for "attorneys and expert eyes only."

The production of defendants' source code, which is a trade secret … , should have been ordered to be produced for "attorneys and expert eyes only" … . Plaintiffs' assertion that they have the expertise to review and opine on the source code and should not be subjected to retaining an expert, does not support unfettered access to defendants' confidential algorithm. BEC Capital, LLC v Bistrovic, 2019 NY Slip Op 08144, First Dept 11-12-19

DISMISS COMPLAINT, MOTION TO.

WHETHER PLAINTIFFS WILL BE ABLE TO ESTABLISH THE CLAIMS IN A COMPLAINT IS NOT CONSIDERED ON A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; HERE THE DEFENDANTS' ARGUMENT THAT PLAINTIFFS WILL NOT BE ABLE TO LEARN AN ESSENTIAL ASPECT OF THEIR CASE IN DISCOVERY BECAUSE OF STATUTORY IMMUNITY WAS NOT RELEVANT TO WHETHER THE COMPLAINT STATED CAUSES OF ACTION (FIRST DEPT).

The First Department determined defendant school's motion to dismiss the complaint was properly denied. Plaintiffs alleged the school retaliated against them after they complained about race-related issues by making a false child neglect report to Child Protective Services (CPS). The school argued the plaintiffs will not be able to learn the identity of the person who reported the alleged neglect because of the immunity provided by the Social Services Law. The Second Department explained that the immunity question is not relevant to whether the complaint states causes of action:

… [P]laintiffs assert causes of action for intentional infliction of emotional distress, defamation, violations of the New York State and City Human Rights Laws, and negligent hiring, training and supervision … .

Defendants moved to dismiss all of these causes of action on the basis that plaintiffs would be unable to prove any of these claims because they did not know the identity of the CPS reporter and would be unable to learn it in discovery. …

… [I]n the context of this motion to dismiss, the Court does not assess the relative merits of the complaint's allegations against defendant's contrary assertions or to determine whether or not plaintiffs can produce evidence to support their claims … . Whether plaintiffs "can ultimately establish [their] allegations is not a part of the calculus in determining a motion to dismiss" … . Thus, regardless of whether plaintiffs will be able to obtain disclosure concerning the identity of the CPS reporter (Social Services Law § 422[4][A] …), defendants have not demonstrated entitlement to dismissal of the well-pleaded complaint for failure to state a cause of action … . M.H.B. v E.C.F.S., 2019 NY Slip Op 08276, First Dept 11-14-19

FORECLOSURE.

DEFICIENCIES IN THE BANK'S PROOF OF DEFAULT, STANDING AND THE AMOUNT OWED COULD NOT BE CURED BY SUBMITTING ADDITIONAL PROOF IN THE REPLY PAPERS IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not submit sufficient proof of defendants' default, standing or the amount owed, and the deficiencies could not be cured by a second affidavit submitted in reply:

… [T]he plaintiff submitted the affidavit of its assistant vice president, Keith Weinkauf. As to the defendants' alleged default, Weinkauf stated that the defendants "fail[ed] to make the full payment due on the [m]aturity [d]ate" of the note. On the issue of standing, Weinkauf averred that "[e]ffective March 31, 2016, Montauk Credit Union merged into Bethpage Federal Credit Union." Further, with respect to the amount owed by the defendants, Weinkauf stated that the current unpaid principal balance due on the note was $58,165.61, plus interest, late charges, and fees. However, apart from producing a copy of the note itself, Weinkauf submitted no evidence in admissible form with his affidavit to establish the existence of a default, the plaintiff's standing, or the calculation of the unpaid amount owed by the defendants … . Although the plaintiff later submitted, with its reply papers, a second affidavit from Weinkauf, along with supporting documentary evidence, to establish its standing, the plaintiff could not, under the circumstances presented, rely on the second affidavit to correct deficiencies inherent in the original one … . Bethpage Fed. Credit Union v Luzzi, 2019 NY Slip Op 08550, Second Dept, 11-27-19

JUDICIAL ESTOPPEL.

FORMAL ADMISSIONS, INFORMAL ADMISSIONS AND JUDICIAL ESTOPPEL EXPLAINED (SECOND DEPT).

The Second Department explained the nature of an admission and the doctrine of judicial estoppel in this action to determine whether defendant, Weber, was a shareholder of plaintiff RMNY:

Weber's prior admissions made in other actions that he was not a shareholder of RMNY did not constitute formal judicial admissions entitling RMNY to summary judgment. Formal judicial admissions are facts admitted by a

party's pleadings … , and are conclusive of the facts admitted in the action in which they are made … . The admissions relied upon here were not made in this action.

Furthermore, RMNY failed to establish that the doctrine of judicial estoppel applies. Under the doctrine of judicial estoppel, also known as estoppel against inconsistent positions, a party may not take a position in a legal proceeding that is contrary to a position he or she took in a prior proceeding, simply because his or her interests have changed … . The doctrine applies only where the party secured a judgment in his or her favor in the prior proceeding … . This doctrine "rests upon the principle that a litigant should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise'" … . "The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts" … .Here, since RMNY failed to show that Weber secured any formal grant of relief in the other actions based upon his prior statements, they do not implicate the doctrine of inconsistent positions … . Rather, the statements constitute informal judicial admissions that are not conclusive but are "merely evidence of the fact or facts admitted" … , "the circumstances of which may be explained at trial" … . Re/Max of N.Y., Inc. v Weber, 2019 NY Slip Op 08432, Second Dept 11-20-19

JURISDICTION.

ALTHOUGH THE ISSUE WAS NOT RAISED BY THE PARTIES, SUPREME COURT SHOULD NOT HAVE DISMISSED PLAINTIFF'S NEGLIGENCE ACTION BEFORE THE WORKERS' COMPENSATION BOARD RULED ON WHETHER PLAINTIFF WAS INJURED WITHIN THE SCOPE OF HIS EMPLOYMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court and reinstating the negligence action, determined Supreme Court did not have jurisdiction over the matter because the Workers' Compensation Board had not yet ruled whether plaintiff was injured when acting in the scope of his employment. The parties did not raise this issue:

Although not raised by the parties, we conclude that Supreme Court erred in entertaining defendant's motion. "It is well settled that primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board [(Board)] . . . [I]t is therefore inappropriate for the courts to express views with respect thereto pending determination by' the Board" … . Whether plaintiff was injured within the scope of his employment "must in the first instance be determined by the [B]oard" … , and the court thus should not have entertained defendant's motion at this juncture. Rather, the

case should have been referred to the Board for a determination of plaintiffs' eligibility for workers' compensation benefits … . Warren v E.J. Militello Concrete, Inc., 2019 NY Slip Op 08300, Fourth Dept 11-15-19

JURISDICTION.

NEW YORK DID NOT HAVE JURISDICTION OVER FATHER, A KENTUCKY RESIDENT, IN THIS DIVORCE ACTION: THE COUPLE HAD NOT LIVED TOGETHER IN NEW YORK STATE FOR 23 YEARS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined New York did not have jurisdiction over father, a Kentucky resident, in this divorce action. The couple had last lived in New York in 1995 and had resided in Kentucky from 2003 to 2015:

Assuming, without deciding, that the wife established one of the predicates for jurisdiction under CPLR 302 (b), we find that the quality and nature of the husband's activities in New York were such that it would be unreasonable and unfair to require him to defend an action in this state. Although the parties married in New York in 1991 and resided here until 1995, they have not resided together in this state in over 23 years. From 2003 until 2015, the parties resided together in Kentucky, where, at the time of commencement of this action, the husband was employed as a university professor and the parties owned real property. With the husband's consent, the wife moved to New York with the parties' son in August 2015 and, as vaguely asserted by the wife, the husband has visited them in New York. The parties have not rented or purchased a home in New York. Rather, the wife and the son have lived rent-free with the wife's parents, with the husband providing additional financial support. In our view, the husband's contacts with New York are insufficient to warrant the exercise of personal jurisdiction over him … .Accordingly, Supreme Court should have granted the husband's motion to dismiss the complaint for lack of personal jurisdiction. Crosby v Crosby, 2019 NY Slip Op 08469, Third Dept 11-21-19

LAW OFFICE FAILURE.

LAW OFFICE FAILURE WAS AN ADEQUATE EXCUSE FOR A TWO-WEEK DELAY IN FILING PAPERS OPPOSING SUMMARY JUDGMENT, SUPREME COURT REVERSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined law office failure was an adequate excuse for failing to timely response to summary judgment motions:

We disagree with the motion court that plaintiff failed to demonstrate both a reasonable excuse for her default and a meritorious cause of action … . We find that the law office failure that resulted in plaintiff's two-week delay in filing opposition to defendants' motions was not willful and that a meritorious cause of action as to both incidents has been set forth … . Knight v Acacia Network, Inc., 2019 NY Slip Op 08365. First Dept 11-19-19

NECESSARY PARTIES.

THE BUILDER OF THE HOUSE WAS NOT A NECESSARY PARTY IN THIS ACTION AGAINST THE SELLER BY THE PURCHASER; EVEN IF THE BUILDER WERE A NECESSARY PARTY, THE COURT SHOULD HAVE SUMMONED THE BUILDER ITSELF PURSUANT TO CPLR 1001 (b) RATHER THAN DISMISSING THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the complaint should not have been dismissed for failure to join a necessary party because (1) defendant (Accent) was not a necessary party and (2) even if Accent were a necessary party, the court should have summoned Accent itself pursuant to CPLR 1001 (b). The action concerned alleged defects in a house plaintiffs had purchased from defendants and claimed fraud, negligence, deceptive practices, breach of implied warranty, and breach of contract . Accent had constructed the house:

CPLR 1001 "limit[s] the scope of indispensable parties to those cases and only those cases where the determination of the court will adversely affect the rights of nonparties" … . Here, the defendants failed to demonstrate that Accent ought to be a party if complete relief is to be accorded between the plaintiffs and the defendants (see CPLR 1001[a]), and also failed to demonstrate that Accent will be inequitably affected by a judgment in this action absent its joinder … . Accent has no connection to the plaintiffs' cause of action for

breach of contract, which alleges only that the defendants breached their contract with the plaintiffs. As for the balance of the plaintiffs' claims, Accent is, at best, a joint tortfeasor, with the plaintiffs having the option to proceed against any or all joint tortfeasors … . Accordingly, we reverse the order insofar as appealed from and remit the matter to the Supreme Court, Nassau County, for a determination on the merits of the remaining branches of the defendants' motion, and for further proceedings, if necessary, thereafter.

We note that, even if Accent was a necessary party, it appears to be subject to the jurisdiction of the court, and therefore, the Supreme Court should have "order[ed] [it] summoned," rather than granting that branch of the defendants' motion which was to dismiss the complaint for failure to join a necessary party (CPLR 1001[b] …). Blatt v Johar, 2019 NY Slip Op 07901, Second Dept 11-6-19

PLEADINGS.

COMPLAINT DID NOT STATE CAUSES OF ACTION FOR FALSE ARREST AND MALICIOUS PROSECUTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint did not state causes of action for false arrest and malicious prosecution:

"A civilian defendant who merely furnishes information to law enforcement authorities, who are then free to exercise their own independent judgment as to whether an arrest will be made and criminal charges filed, will not be held liable for false arrest or malicious prosecution" … . "To be held liable for false arrest, the defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his [or her] own volition" … . "Similarly, in order for a civilian defendant to be considered to have initiated the criminal proceeding so as to support a cause of action based on malicious prosecution, it must be shown that defendant played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act" … . "Merely giving false information to the authorities does not constitute initiation of the proceeding without an additional allegation or showing that, at the time the information was provided, the defendant knew it to be false, yet still gave it to the police or District Attorney" … . Here, the plaintiff's complaint and his affidavit in opposition to the motion merely alleged that the defendants provided false information to the police, and therefore, did not establish that the plaintiff has a cause of action to recover damages for malicious prosecution or false arrest against the defendants … . Williston v Jack Resnick & Sons, Inc., 2019 NY Slip Op 08247, Second Dept 11-13-19

PLEADINGS.

COURT SHOULD NOT HAVE CONSIDERED A NEW THEORY OF MEDICAL MALPRACTICE RAISED FOR THE FIRST TIME IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the court should not have considered a new theory of medical malpractice raised for the first time in response to defendant's motion for summary judgment:

… [T]he complaint and bill of particulars were only sufficient to put defendant on notice of an allegation that, in January 2013, he failed to properly compare the 2013 EC [echocardiagram] with the 2011 EC contained in decedent's medical record, and determine that a dilation in decedent's aorta had increased. Plaintiffs' papers were insufficient to put defendant on notice of plaintiffs' new theory of liability – raised for the first time in her expert's opinion – that he deviated from the standard of care in August 2011, when interpreting the 2011 EC … . Here, where negligence is specifically alleged to have occurred only between December 2012 and January 2013, we conclude that the vague, ambiguous, nonspecific and open-ended assertion "prior or subsequent thereto" contained in plaintiffs' bill of particulars failed to put defendant on notice of a claim that he acted negligently in August 2011. Carroll v New York City Health & Hosps. Corp., 2019 NY Slip Op 08524, First Dept 11-26-19

PRIVATE RIGHT OF ACTION.

PUBLIC HEALTH LAW 230 DOES NOT CREATE A PRIVATE RIGHT OF ACTION FOR MALICIOUS REPORTING OF INSURANCE FRAUD BY A PHYSICIAN TO THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined that Public Health Law 230 (11) (b) does not create a private right of action. Plaintiff surgeon provided medical care to four patients injured in an automobile accident and submitted claims for payment to the defendant insurer. The insurer fully or partially denied the claims and then filed complaints against plaintiff with the Office of Professional Medical Conduct (OPMC) alleging insurance fraud. The OPMC declined to discipline plaintiff. Plaintiff then sued defendant

insurer for bad-faith and malicious reporting in violation of Public Health Law 230 (11) (b). The Court of Appeals noted a split of authority in the First and Second Departments re: whether a violation of this statute give rise to a private right of action:

Public Health Law § 230 (11) (b) does not expressly create a cause of action authorizing licensees to commence civil litigation against a complainant that files an allegedly bad-faith and/or malicious report with OPMC (compare Public Health Law § 230 [10] [j] [creating an express right to commence a CPLR article 78 proceeding in certain instances]). Consequently, "recovery may be had . . . only if a legislative intent to create such a right of action is fairly implied in the statutory provision[] and [its] legislative history" … . …

We have consistently identified three "essential factors" to be considered in determining whether a private right of action can be fairly implied from the statutory text and legislative history: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme"… . Critically, all three factors must be satisfied before an implied private right of action will be recognized … . Applying these factors here, we conclude that the legislature did not intend to create a right of action under Public Health Law § 230 (11) (b). Haar v Nationwide Mut. Fire Ins. Co., 2019 NY Slip Op 08445, CtApp 11-21-19

REPLY PAPERS, FORECLOSURE.

THE BANK DID NOT PRESENT SUFFICIENT PROOF OF COMPLIANCE WITH THE NOTICE OF DEFAULT PROVISIONS OF THE MORTGAGE; THE BANK NEED NOT AFFIRMATIVELY ADDRESS COMPLIANCE WITH RPAPL 1304 NOTICE REQUIREMENTS IF THE ISSUE IS NOT RAISED IN THE ANSWER; REPLY PAPERS CAN PRESENT EVIDENCE FOR THE FIRST TIME IN RESPONSE TO ISSUES FIRST RAISED IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; BUT REPLY PAPERS MAY NOT PRESENT, FOR THE FIRST TIME, EVIDENCE ADDRESSING AN ISSUE RAISED IN THE DEFENDANT'S ANSWER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank (Aurora) did not provide sufficient proof of providing notice of default to defendants. The Second Department noted that the bank need

not affirmatively prove compliance with the notice requirements of RPAPL 1304 because the issue was not raised in defendant's answer. The court also noted that evidence submitted in reply papers addressing matters raised for the first time in opposition to plaintiff's motion for summary judgment can be considered, but evidence submitted for the first time in reply papers addressing issues which were raised in the answer should not be considered:

In support of its motion, Aurora submitted two affidavits. The first affidavit was from Laura McCann, Vice President of Aurora, the loan servicer responsible for sending the notices of default. The second affidavit was from A.J. Loll, Vice President of Nationstar Mortgage, LLC, the current plaintiff and loan servicer. While McCann attested that Aurora was responsible for "providing notices pursuant to the terms of the note and mortgage evidencing the mortgage loan at issue, and specifically for providing notices such as the notice required under Section 22 of the mortgage," nowhere in her affidavit did she attest to the actual mailing or delivery of those notices. As to the second affidavit, while Loll attested, inter alia, that "[t]he servicing records show that a 30-day letter was mailed to [the] defendants . . . … , which letter advised Defendants of their default," and attached a purportedly "true copy" of the 30-day letter as Exhibit I, the affidavit did not contain a statement that the 30-day notice was sent in a manner according with the terms of the mortgage, i.e., "mailed by first class mail or . . . actually delivered to [borrower's] notice address if sent by other means." Moreover, Loll's affidavit "did not contain a statement that [Loll] was familiar with [Aurora's] mailing practices and procedures," so as to establish "proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" … . While Loll claimed that servicing records show that a 30-day letter was mailed to the defendants, she did not identify what those records are and did not authenticate them as business records and attach them to her affidavit … . Nationstar Mtge., LLC v Tamargo, 2019 NY Slip Op 08197, Second Dept 11-13-19

SERVICE OF PROCESS, FORECLOSURE.

DEFENDANT IN THIS FORECLOSURE ACTION PRESENTED SUFFICIENT EVIDENCE REBUTTING THE PROCESS SERVER'S AFFIDAVIT TO WARRANT A HEARING ON WHETHER SHE WAS PROPERLY SERVED WITH THE SUMMONS AND COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, over an extensive concurring memorandum, determined that defendant made a sufficient showing to warrant a hearing on whether she was served with the summons and complaint in this foreclosure action:

Although the defendant did not deny having actual notice of the action, "[w]hen the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents" … . "Service is only effective . . . when it is made pursuant to the appropriate method authorized by the CPLR. Actual notice alone will not sustain the service or subject a person to the court's jurisdiction [when there has not been compliance with] prescribed conditions of service" … . * * *

The defendant rebutted the process server's affidavit of service through her specific and detailed affidavit, in which she averred that "[t]he [a]ffidavit of service falsely states that a copy of the Summons and Complaint was affixed to my door." The defendant's affidavit set out in great detail that the defendant was at home each time that the process server purportedly attempted service, as she was recuperating from a kidney transplant. The defendant averred that April 3, 2009, which happened to be her birthday, was a Friday, and that as an observant Jew she did not leave her home. The defendant submitted a Sabbath calendar printout showing that the sun did not set until 8:04 p.m. on April 4, 2009, approximately one hour after the process server purportedly affixed the summons and complaint to her door. The defendant averred that she never heard anyone knock at her door or ring her doorbell and that, despite various medical problems, she has no issues with her hearing. The defendant averred that her daughter came to pick her up for dinner at 8:30 p.m. on April 4, 2009, and that upon leaving her home, she did not see any documents affixed to her door. The foregoing detailed averments were sufficient to rebut the process server's affidavit and to warrant a hearing on the issue of whether service was properly made … . HSBC Bank USA, N.A. v Assouline, 2019 NY Slip Op 07891, Second Dept 11-6-19

STANDING, FORECLOSURE.

A FORECLOSURE ACTION DISMISSED FOR LACK OF STANDING DOES NOT ACCELERATE THE MORTGAGE DEBT AND DOES NOT TRIGGER THE SIX-YEAR STATUTE OF LIMITATIONS (SECOND DEPT).

The Second Department determined the prior foreclosure action which was dismissed on the ground the bank did not demonstrate standing did not serve to accelerate the mortgage debt. Therefore the statute of limitations did not start running and the current foreclosure action is timely:

… [T]he Supreme Court in the 2009 action determined that the defendant was entitled to dismissal of the complaint insofar as asserted against him for lack of standing. "Where, as here, the prior action is dismissed on the ground that the plaintiff lacked standing, the purported acceleration is a nullity, and the statute of limitations does not begin to run at the time of the purported acceleration" … . Further, the record contains no evidence of

either a written assignment or physical delivery of the underlying note to the plaintiff prior to April 2, 2009, so as to establish the plaintiff's standing to commence the 2009 action … . Thus, contrary to the defendant's contentions, the commencement of the 2009 action did not accelerate the mortgage debt, and the statute of limitations did not begin to run when the 2009 action was commenced … . HSBC Bank USA v Rinaldi, 2019 NY Slip Op 07878, Second Dept 11-6-19

STANDING, FORECLOSURE.

THE UCC CRITERIA FOR PROOF OF POSSESSION OF A LOST NOTE WERE NOT MET; PLAINTIFF BANK THEREFORE DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate it had standing to bring the foreclosure action. The UCC's requirements for demonstrating ownership of a lost note were not met:

… [T]he affidavit of possession of the original note, sworn to by a vice president of loan documentation for the plaintiff, does not contain any details of delivery of the note, except for the claim that it was delivered to the plaintiff sometime after its execution, and that the plaintiff "had possession of the Promissory Note on or before … the date that this action was commenced." The lost note affidavit of another vice president of loan documentation employed by the plaintiff stated vaguely, and in a conclusory manner, that the note was "inadvertently lost, misplaced or destroyed," that the plaintiff had not "pledged, assigned, transferred, hypothecated or otherwise disposed of the note," and that the plaintiff had made "a diligent and extensive search of its records in a good faith effort to discover the lost note in accordance with its procedures for locating the lost note." The lost note affidavit did not provide any facts as to when the search for the note occurred, who conducted the search, or when or how the note was lost … . Thus, it "failed to sufficiently establish the plaintiff's ownership of the note" … .

Since the plaintiff failed to demonstrate its ownership of the lost note (see UCC 3-804), or that it had standing, "as the lawful holder or assignee of the subject note on the date it commenced this action, to commence the action … . Wells Fargo Bank, N.A. v Meisels, 2019 NY Slip Op 08243, Second Dept 11-13-19

SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED A MOTION TO AMEND THE COMPLAINT IN THE ABSENCE OF A MOTION AND PROPOSED PLEADINGS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judges should have, sua sponte, granted plaintiff leave to file a second amended complaint in the absence of a motion and a proposed pleading. The leave to amend was vacated:

The motion court should not have sua sponte granted plaintiff leave to file a second amended complaint to assert an unpleaded negligent misrepresentation claim in the absence of a cross motion and an accompanying proposed pleading (CPLR 3025[b]). The lack of a proposed pleading precludes meaningful review of the sufficiency of the allegations, including defendant's contention that such a claim is time barred … . Sutton Animal Hosp. PLLC v D&D Dev., Inc.. 2019 NY Slip Op 08263, First Dept 11-12-19

VERDICT, MOTION TO SET ASIDE.

EXPERT'S OPINION THAT DEFENDANT'S IMPROPER INSTALLATION OF A SIDEWALK/MANHOLE CAUSED THE SIDEWALK HEIGHT DIFFERENTIAL IN THIS SLIP AND FALL CASE WAS NOT SUPPORTED BY EVIDENCE IN THE RECORD; THE DEFENSE MOTION TO SET ASIDE THE VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court. determined the motion to set aside the verdict in this slip and fall case should have been granted. Although plaintiff's expert was properly qualified, his opinion that defendant's improper installation of the sidewalk/manhole caused the sidewalk height-differential over which plaintiff tripped and fell was not supported by evidence in the record:

… [T]he expert reached his conclusion as to the defendant's negligence by assuming material facts not supported by the evidence and by guessing and speculating in drawing that conclusion … . For example, the expert testified to having no knowledge of when the sidewalk was constructed, when the manhole had been installed, or the

weight and inside dimensions of the manhole structure. Yet, he opined that the defendant was responsible for the settling of the sidewalk flag and manhole due to improper backfilling, simply because the manhole belonged to the defendant at the time of the plaintiff's fall.

Contrary to the plaintiff's contention, absent the expert's assumptive and speculative testimony, there was no evidence of the defendant's negligence. " Ippolito v Consolidated Edison of N.Y., Inc., 2019 NY Slip Op 08179, Second Dept 11-13-19

VERDICT, MOTION TO SET ASIDE.

THE FAILURE TO AWARD DAMAGES FOR FUTURE PAIN AND SUFFERING AND FUTURE ECONOMIC LOSS WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE MOTION TO SET ASIDE THOSE ASPECTS OF THE VERDICT SHOULD HAVE BEEN GRANTED; THE FUTURE ECONOMIC LOSS ISSUE WAS NOT ABANDONED ON APPEAL (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined that the failure to award damages for future pain and suffering and future economic loss in this back-injury case was against the weight of the evidence. The motion to set aside those aspects of the verdict should have been granted. A new trial was ordered on those elements of damages. The dissenters argued the future economic law issue was abandoned on appeal:

… [T]he jury's failure to award any damages for future pain and suffering is " contrary to a fair interpretation of the evidence and deviates materially from what would be reasonable compensation' " … . Although the evidence at trial established that plaintiff was permitted to return to work with no restrictions, the evidence also established that the injuries she sustained in the accident severely affected her ability to perform the same sorts of tasks that she had performed with ease prior to the accident. Moreover, as noted, the parties' experts agreed that the injury to plaintiff's lumbar spine was caused by the accident, and plaintiff presented uncontroverted medical testimony at trial establishing that she continues to experience pain as a result of that injury … .

We also agree with plaintiff that the jury's failure to award damages for future economic loss is against the weight of the evidence. Initially, we disagree with our dissenting colleagues that the contention was abandoned on appeal … and conclude that plaintiff adequately raised that specific contention in her brief … . Mast v DeSimone, 2019 NY Slip Op 08288, Fourth Dept 11-15-19