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APPEALS, DISCOVERY, PRIVILEGE.

AN ORDER ADDRESSING WHETHER DOCUMENTS SOUGHT IN DISCOVERY ARE PRIVILEGED IS APPEALABLE AS OF RIGHT (FOURTH DEPT).

The Fourth Department, reversing (modifying) an order concerning whether documents sought in discovery were privileged, noted that the order was appealable as of right:

During discovery, a dispute arose over allegedly privileged documents that plaintiff withheld or redacted. In its privilege logs, plaintiff asserted that many of the documents were protected from disclosure on three grounds, i.e., that they were material prepared in anticipation of litigation (see CPLR 3101 [d] [2]), attorney work product (see CPLR 3101 [c]), or protected by the attorney-client privilege (see CPLR 4503 [1]). Plaintiff asserted that a few documents were not discoverable on the sole basis that they were materials prepared in anticipation of litigation. Campany and the Travelers defendants separately moved, inter alia, to compel plaintiff's disclosure of various documents or, in the alternative, for an in camera review of the documents. Plaintiff moved for, among other things, a protective order, contending that all communications involving attorneys or litigation experts on and after October 24, 2016 were presumptively privileged because the Travelers defendants and plaintiff contemplated litigation at that time. Supreme Court denied the Travelers defendants' motion, denied in part Campany's motion, and granted plaintiff's motion by, as relevant here, ordering that all documents of plaintiff created on and after October 24, 2016 were not discoverable because they were material prepared in anticipation of litigation. Campany and the Travelers defendants appeal.

Initially, we reject plaintiff's contention that the order is not appealable. CPLR 5701 (a) (2) (v) provides that, with limited exceptions, which are not applicable here, an appeal may be taken to this Court as of right from an order where the motion it decided was made upon notice and it "affects a substantial right." An order granting a protective order and precluding discovery of numerous documents affects a substantial right of Campany and the Travelers defendants, and the order is thus appealable as of right … . John Mezzalingua Assoc., LLC v Travelers Indem. Co., 2019 NY Slip Op 09157, Fourth Dept 12-20-19

BILL OF PARTICULARS.

MOTION TO AMEND THE BILL OF PARTICULARS MADE AFTER THE NOTE OF ISSUE WAS FILED SHOULD HAVE BEEN GRANTED DESPITE THE ABSENCE OF A GOOD EXCUSE FOR THE DELAY; THE MOTION HAD MERIT, DID NOT PRESENT ANY NEW THEORIES AND SOUGHT TO NARROW THE ISSUES FOR TRIAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' motion to amend the bill of particulars should have been granted, even though the motion was made after the note of issue was filed and there was no good excuse for the delay:

… "[L]eave to amend a bill of particulars may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant" … . Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine … .

Here, despite their unreasonable and unexplained delay in seeking leave to amend their bill of particulars and interrogatory responses, the plaintiffs did not seek to assert any new theory of liability, but rather, sought to narrow a theory previously asserted. Specifically, whereas the plaintiffs had previously alleged violation of "all provisions of the [Federal Motor Carrier Safety Regulations] Parts 300 to 399," their proposed amendment sought to narrow this allegation to specify a violation of 49 CFR 392.2 as a result of a violation of Tuckahoe Village Code § 21-33.1. Since the proposed amendment was meritorious and sought to narrow the issues before the Supreme Court, the court should have granted the plaintiffs' cross motion for leave to amend their bill of particulars and interrogatory responses as requested … . Cioffi v S.M. Foods, Inc., 2019 NY Slip Op 09252, Second Dept 12-24-19

DEFAULT JUDGMENT, INSURANCE LAW.

THE INSURER IN THIS PERSONAL INJURY CASE DID NOT MEET ITS HEAVY BURDEN TO DEMONSTRATE ITS INSURED'S NON-COOPERATION SUCH THAT THE INSURER WAS NOT OBLIGATED TO INDEMNIFY THE INSURED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department determined the defendant insurer, Utica. did not meet its heavy burden to demonstrate its insured's (J & R's) non-cooperation such that the insurer was entitled to a default judgment declaring that it is not obligated to indemnify J & R in the underlying personal injury action in which the injured plaintiff was awarded nearly $700,000. Despite numerous scheduled depositions, J & R's principal, Singh, never appeared to be deposed and his answer was ultimately stricken:

"To effectively deny coverage based upon lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insured were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction" … . " [M]ere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation'" … .

Here, Utica failed to meet its "heavy" burden of demonstrating J & R's non-cooperation … . In support of its motion, Utica established that between January 2009 and April 2009, more than one year before J & R's answer was stricken, it made diligent efforts, through written correspondence, numerous telephone calls, and visits to Singh's home, that were reasonably calculated to bring about J & R's cooperation. Utica's submissions, however, failed to demonstrate that the conduct of J & R constituted "willful and avowed obstruction" … . Foddrell v Utica First Ins. Co., 2019 NY Slip Op 08991, Second Dept 12-18-19

DISCOVERY, PRIVILEGE.

PLAINTIFF WAS ASSAULTED BY ANOTHER PATIENT IN DEFENDANT LONG-TERM CARE FACILITY; THE MEDICAL RECORDS OF THE ASSAILANT, WHO WAS NOT A PARTY, WERE PRIVILEGED AND NOT DISCOVERABLE; THE INCIDENT REPORTS PERTAINING TO THE ASSAULT WERE NOT SHOWN BY THE DEFENDANT TO BE PRIVILEGED PURSUANT TO THE PUBLIC HEALTH LAW AND WERE THEREFORE DISCOVERABLE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the assailant's medical records were privileged, but any incident reports pertaining to the assault were not. Plaintiff alleged she was attacked while a long-term resident of defendant long-term health care facility. The assailant in this third-party assault action was not made a party:

We agree with the Supreme Court's determination denying that branch of the plaintiffs' motion which sought disclosure of the assailant's admission chart. The assailant is not a party to the action, his medical records were subject to the physician-patient privilege, and he has not waived that privilege … .

However, the Supreme Court should have granted that branch of the plaintiffs' motion which sought disclosure of all incident reports related to the assault. Pursuant to Education Law § 6527(3), certain documents generated in connection with the "performance of a medical or a quality assurance review function," or which are "required by the Department of Health pursuant to Public Health Law § 2805-l," are generally not discoverable … . The defendant, as the party seeking to invoke the privilege, has the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes … . Here, the defendant merely asserted that a privilege applied to the requested documents without making any showing as to why the privilege attached. Accordingly, the incident reports related to the assault were subject to disclosure. DeLeon v Nassau Health Care Corp., 2019 NY Slip Op 08989, Second Dept 12-18-19

DISCOVERY.

IT WAS AN ABUSE OF DISCRETION TO STRIKE PLAINTIFF'S COMPLAINT BASED UPON AN ALLEGED FAILURE TO COMPLY WITH COURT-ORDERED DISCOVERY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined it was an abuse of discretion to grant defendants' motion to strike the complaint for plaintiff's alleged failure to comply with discovery orders. Discovery had been ongoing for years with several conferences with the judge and several orders to comply with new discovery demands:

… [I]t is undisputed that defendants' motion to strike the complaint failed to include an affirmation of good faith as required by 22 NYCRR 202.7 … . Moreover, this error is compounded by the lack of other record evidence demonstrating that defendants engaged in good faith efforts to resolve the ongoing discovery issues without the need for judicial intervention. Despite plaintiff having at least partially complied with defendants' discovery demands, the record is devoid of any correspondence or other documentation indicating that defendants ever specifically informed plaintiff's counsel, other than in a generalized conclusory manner, in what manner the subject discovery responses were deficient or inadequate. Further, following the filing of defendants' April 2018 motion to strike, defendants' counsel failed to respond to four separate letters sent by plaintiff's counsel in May 2018 wherein he provided certain additional discovery and otherwise attempted to ascertain from defendants what, if any, paper discovery remained outstanding. Notably, defendants have provided no explanation as to why they failed to provide any such response prior to the filing of defendants' second motion to strike plaintiff's complaint … .

Although we appreciate Supreme Court's concern regarding the length of time that this action has been pending and the fact that the various discovery responses that plaintiff's counsel did provide were unquestionably untimely, we do not find that defendants have established a "deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay [by plaintiff] that would be deserving of the most vehement condemnation" … . Mesiti v Weiss. 2019 NY Slip Op 09343. Third Dept 12-26-19

DISMISS COMPLAINT, MOTION TO.

SUPREME COURT SHOULD NOT HAVE DETERMINED THE MERITS OF THIS ACTION FOR A DECLARATORY JUDGMENT ON A MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to dismiss a declaratory judgment action should have been denied. Supreme Court had issued a declaratory judgment in favor of the moving party (the county). This is a class action contending that the imposition of a driver responsibility fee on red-light camera violations is illegal:

The plaintiff commenced this putative class action against Nassau County and the Nassau County Traffic and Parking Violations Agency (hereinafter together the County) seeking, inter alia, a judgment declaring that the imposition of a driver responsibility fee on a red-light camera violation is “inconsistent with New York’s general law, or is otherwise ultra vires, preempted, unconstitutional, or void as a matter of law.” Prior to interposing an answer, the County moved, inter alia, pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action. The Supreme Court, treating that branch of the County’s motion as one for a declaration in the County’s favor with respect to the first cause of action, granted that branch of the motion to the extent of declaring that the imposition of a driver responsibility fee on a red-light camera violation was a proper exercise of the County’s power to charge and collect administrative fees and, based on that declaration, directed dismissal of the remainder of the complaint for failure to state a cause of action. We reverse. …

“… [I]f the record before the motion court is insufficient to resolve all factual issues such as the rights of the parties cannot be determined as a matter of law, a declaration upon a motion to dismiss is not permissible” … . Guthart v Nassau County, 2019 NY Slip Op 08825, Second Dept 12-11-19

DISMISS COMPLAINT, MOTION TO.

THE CRITERIA FOR PRE-ANSWER DISMISSAL OF THE COMPLAINT BASED UPON DOCUMENTARY EVIDENCE AND IN THE INTEREST OF JUDICIAL ECONOMY WERE NOT MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's pre-answer motion to dismiss the complaint alleging the breach of a letter of intent (LOI) should not have been granted. The evidence submitted by the defendant was not "documentary" evidence within the meaning of CPLR 3211 and the defendant did not demonstrate the complaint should be dismissed in the interest of judicial economy:

… [T]he emails and the unsigned documents relied on by the Supreme Court to conclude that the LOI was an unenforceable agreement to agree were not essentially undeniable, and did not constitute documentary evidence … . Furthermore, the LOI itself contained all the essential elements of a lease, including the area to be leased, the duration of the lease, and the price to be paid … . Moreover, nothing in the LOI stated that it was not binding, and its language did not conclusively establish that the parties did not intend to be bound by it … . Accordingly, the court should have denied that branch of the defendant's motion which was pursuant to CPLR 3211(a)(1) to dismiss the complaint.

… A court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7), and then the question becomes whether the plaintiff has a cause of action, not simply whether a cause of action is stated … . Unless the defendant can demonstrate that there is no factual issue as claimed by the plaintiff, the motion to dismiss should be denied … . Here, the defendant failed to demonstrate that there was no factual issue regarding whether the LOI can be construed as a binding contract. Accordingly, that branch of the defendant's motion which was to dismiss the complaint pursuant to CPLR 3211(a)(7) should have been denied. S & J Serv. Ctr., Inc. v Commerce Commercial Group, Inc., 2019 NY Slip Op 09049, Second Dept 12-18-19

JUDGMENTS.

SUPREME COURT SHOULD NOT HAVE MODIFIED THE PARENTAL ACCESS PROVISIONS OF THE JUDGMENT OF DIVORCE WITHOUT HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the parental access provisions of the judgment of divorce should not have been modified without holding a hearing:

"A party seeking a change in [parental access] or custody is not automatically entitled to a hearing, but must make an evidentiary showing sufficient to warrant a hearing" … . As a general matter, custody and parental access determinations should only be rendered after a full hearing … .However, this general right is not absolute … , and a hearing "is not necessary where the undisputed facts before the court are sufficient, in and of themselves, to support a modification of custody … .

The plaintiff made the necessary showing entitling him to a hearing regarding that branch of his motion which was to modify the parental access provisions of the judgment of divorce with respect to the child … . The record shows that there were disputed factual issues regarding the child's best interests such that a hearing on modification of parental access was required … . Further, "[a] decision regarding child custody and parental access should be based on admissible evidence" … . Here, in making its determination, the Supreme Court relied solely on information provided at court conferences, and the hearsay statements and conclusions of the family specialist, whose opinions and credibility were untested by either party … . Katsoris v Katsoris, 2019 NY Slip Op 08833, Second Dept 12-11-19

JUDGMENTS.

THE CALIFORNIA JUDGMENT SHOULD HAVE BEEN GIVEN FULL FAITH AND CREDIT; THE COURT SHOULD NOT HAVE CONSIDERED THE UNDERLYING MERITS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a California judgment should have been given full faith and credit and the underlying merits should not have been considered:

The plaintiff established its prima facie entitlement to judgment as a matter of law by submitting the judgment and the order, which obligated the defendants to pay the plaintiff certain amounts, and evidence that the

defendants had not paid the amounts awarded therein (see CPLR 3213 …). In opposition, the defendants failed to raise a triable issue of fact as to a bona fide defense.

The full faith and credit clause of the United States Constitution (US Const, art IV, § 1) requires that the public acts, records, and judicial proceedings of each state be given full faith and credit in every other state. The purpose of the clause is to avoid conflicts between states in adjudicating the same matters … . "The doctrine establishes a rule of evidence . . . which requires recognition of the foreign judgment as proof of the prior-out-of-State litigation and gives it res judicata effect, thus avoiding relitigation of issues in one State which have already been decided in another" … . "Absent a challenge to the jurisdiction of the issuing court, New York is required to give the same preclusive effect to a judgment from another state as it would have in the issuing state" … , and it is precluded from inquiring into the merits of the judgment … .

Here, the defendants did not challenge the jurisdiction of the California court, but instead, sought to relitigate the merits underlying that court's determination. The Supreme Court should not have considered the defendants' attack on the merits of the California determination. Balboa Capital Corp. v Plaza Auto Care, Inc., 2019 NY Slip Op 08645, Second Dept 12-4-19

JURISDICTION.

DEFENDANT ASKED PLAINTIFF TO WIRE THE LOAN PROCEEDS TO A BANK IN NEW YORK; NEW YORK THEREFORE HAD JURISDICTION, PURSUANT TO CPLR 302, OVER THIS BREACH OF CONTRACT ACTION STEMMING FROM DEFENDANT'S ALLEGED FAILURE TO REPAY THE LOAN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant's motion to dismiss for lack of personal jurisdiction should not have been granted. Plaintiff demonstrated defendant had a bank account in a New York bank to which the funds defendant borrowed from plaintiff were wired. Plaintiff alleged defendant breached a contract requiring the repayment of the loan:

CPLR 302(a)(1) provides that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state." "The CPLR 302(a)(1) jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions" … . The sufficient activities requirement is satisfied "so long as the defendant's activities here were purposeful" …

. “Purposeful activities are those with which a defendant, through volitional acts, avails [himself or herself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws” … .

“To satisfy the second prong of CPLR 302(a)(1) that the cause of action arise from the contacts with New York, there must be an articulable nexus . . . or substantial relationship . . . between the business transaction and the claim asserted” … . “This inquiry is relatively permissive, and does not require causation, but merely a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim” … . “CPLR 302(a)(1) is a single act statute and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted” … . Skutnik v Messina, 2019 NY Slip Op 08725, Second Dept 12-4-19

JURISDICTION.

NEW YORK COURTS DO NOT HAVE THE AUTHORITY TO ENJOIN A TENNESSEE MORTGAGE FORECLOSURE ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined New York did not have the authority to decide issues affecting title to real property in another state, here Tennessee:

Plaintiff financed its purchase of the property in 2007 with a note secured by a deed of trust. In 2015, plaintiff and defendant trustee entered into a loan modification agreement (LMA) that, inter alia, bifurcated the original loan and allowed Note B to be forgiven if a subsequent sale or refinancing was insufficient to pay the principal and interest thereon. The LMA is governed by Tennessee law but requires plaintiff to submit to the jurisdiction of the courts of this State. It does not similarly require defendant-appellants to submit to the jurisdiction of this State.

Defendant trustee advertised a nonjudicial foreclosure sale (Tenn Code Ann 35-5-101) based on plaintiff’s apparent failure to pay the entire amount due upon maturity, and its failure to cause all rents to be deposited into a lockbox. Plaintiff sued, alleging, among other things, breach of the LMA provision prohibiting the trustee from unreasonably withholding consent to refinancing.

"[T]he courts of one State may not decide issues directly affecting title to real property located in another State" … . Although a court with personal jurisdiction over the parties may adjudicate their rights with respect to foreign realty … , plaintiffs cite no authority allowing an out-of-state foreclosure sale to be enjoined … . Contrary to plaintiff's argument, its one-sided agreement to submit to personal jurisdiction in New York does not confer upon the New York courts a contractual right to enjoin an out-of-state foreclosure sale. Clark Tower, LLC v Wells Fargo Bank, N.A., 2019 NY Slip Op 08975, First Dept 12-17-19

JURISDICTION.

THE INSURANCE LAW REQUIRED SUBMITTING THE DISPUTE BETWEEN TWO CARRIERS TO ARBITRATION; THEREFORE SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THE MATTER; THE LACK OF SUBJECT MATTER JURISDICTION CAN BE RAISED AT ANYTIME (SECOND DEPT).

The Second Department, reversing Supreme Court in this traffic accident case, determined the Insurance Law required that the matter involving a coverage dispute between two insurance carriers (Repwest and Hereford) be submitted to arbitration. Therefore Supreme Court did not have subject matter jurisdiction:

The defendants … were passengers in the livery vehicle and no-fault benefits were paid on their behalf by Hereford. Repwest alleged that there is no coverage for the subject incident because it was not an accident, but rather the result of an intentional act/fraudulent scheme. Thereafter, Hereford interposed an answer to the complaint and asserted a counterclaim against Repwest, among others, for loss transfer pursuant to Insurance Law § 5105(a) … .

Pursuant to Insurance Law § 5105(b), "[t]he sole remedy of any insurer or compensation provider to recover on a claim arising pursuant to subsection (a) hereof, shall be the submission of the controversy to mandatory arbitration pursuant to procedures promulgated or approved by the superintendent" … . Contrary to Hereford's contention, since its counterclaim is for loss transfer pursuant to section 5105(a), the counterclaim is subject to mandatory arbitration and the Supreme Court had no subject matter jurisdiction over the counterclaim … .

Although Repwest did not seek dismissal of the counterclaim in the Supreme Court, "a court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, ex mero

motu [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action" … . Repwest Ins. Co. v Hanif, 2019 NY Slip Op 09047, Second Dept 12-18-19

LAW OF THE CASE, SUA SPONTE.

THE DOCTRINE OF THE LAW OF THE CASE PRECLUDED CONSIDERATION OF WHETHER THE BANK COMPLIED WITH THE NOTICE PROVISIONS OF RPAPL 1304; THE ISSUE HAD BEEN DETERMINED IN THE BANK'S FAVOR AT THE SUMMARY JUDGMENT STAGE AND SHOULD NOT HAVE BEEN RECONSIDERED, SUA SPONTE, WHEN THE BANK MOVED FOR A JUDGMENT OF FORECLOSURE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the doctrine of the law of the case precluded the court from sua sponte, considering whether the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 were met by the bank in this foreclosure action. The issue was determined in the bank's favor in the initial summary judgment proceeding and should not have been considered again when the bank moved to confirm the referee's report and for a judgment of foreclosure:

… [T]he defendants raised the issue of noncompliance with RPAPL 1304 in their answer, the plaintiff presented evidence of its compliance with the statute on its motion, inter alia, for summary judgment on the complaint, and, in granting that motion, the Supreme Court decided the issue in the plaintiff's favor. Therefore, pursuant to the doctrine of law of the case … , the court was precluded from reconsidering the issue on the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale … . Moreover, since the defendants did not oppose the plaintiff's motion to confirm the referee's report and, therefore, did not raise the issue of the plaintiff's noncompliance with RPAPL 1304 in opposition to the motion, the court should not have raised the issue sua sponte … . Wells Fargo Bank, N.A. v Morales, 2019 NY Slip Op 08891, Second Dept 12-11-19

LIENS, JUDGMENTS.

ALTHOUGH THE JUDGMENTS WERE DOCKETED, THE DEBTOR'S NAME WAS MISSPELLED RENDERING THE LIEN INVALID; ALTHOUGH THE ISSUE WAS NOT RAISED BELOW, THE APPELLATE COURT CAN CONSIDER AN ISSUE OF LAW WHICH COULD NOT BE AVOIDED IF IT HAD BEEN RAISED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judgment creditor, Fischer, was not entitled to priority over the respondent wife, Mayrav, who had been awarded real property owned with her husband, Julius, in divorce proceedings. Although Fisher's judgments were docketed, Julius's surname was spelled incorrectly, rendering the lien invalid. Although this issue had not been raised below, the appellate court can address it because it is a question of law which could not have been avoided if it had been raised:

"CPLR 5203(a) gives priority to a judgment creditor over subsequent transferees with regard to the debtor's real property in a county where the judgment has been docketed with the clerk of that county" (… see CPLR 5203[a]). Pursuant to CPLR 5018(c), a judgment is docketed when the clerk makes an entry "under the surname of the judgment debtor . . . consist[ing] of . . . the name and last known address of [the] judgment debtor" … . "A judgment is not docketed against any particular property, but solely against a name" … . " Once docketed, a judgment becomes a lien on the real property of the debtor in that county'" … .

… [I]t is undisputed that when the judgments were docketed, Julius's surname was spelled incorrectly. Because the judgments were not docketed under the correct surname, no valid lien against Julius's interest in the subject property was created … . Therefore, Fischer was not entitled to a determination that his interest in the subject property was superior to that of Mayrav, whose interest "vest[ed] upon the judgment of divorce" … . Although Mayrav failed to argue in the Supreme Court that Fischer did not have a valid lien on the subject property in light of the undisputed fact that Julius's surname was misspelled, that issue can be raised for the first time on appeal because it is one of law which appears on the face of the record and could not have been avoided if it had been raised at the proper juncture … . Accordingly, that branch of the petition which sought a determination that Fischer's interest in the subject property was superior to that of Mayrav should have been denied. Matter of Fischer v Chabbott, 2019 NY Slip Op 09002, Second Dept 12-18-19

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MEDICAL MALPRACTICE, CERTIFICATE OF MERIT.

THE ALLEGED NEGLIGENCE IN THE PROCEDURE USED WHEN PLAINTIFF DONATED BLOOD SOUNDED IN MEDICAL MALPRACTICE, DESPITE THE FACT THAT NO DOCTOR WAS INVOLVED IN THE PROCEDURE; PLAINTIFF'S FAILURE TO PROVIDE A CERTIFICATE OF MERIT AS REQUIRED BY CPLR 3012-a WAS DUE TO THE GOOD FAITH BELIEF THE ACTION SOUNDED IN COMMON LAW NEGLIGENCE; THE ACTION SHOULD NOT HAVE BEEN DISMISSED WITHOUT AFFORDING PLAINTIFF THE OPPORTUNITY TO PROVIDE A CERTIFICATE OF MERIT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court, determined: (1) the action stemming from alleged negligence in drawing blood donated by plaintiff sounded in medical malpractice, not common law negligence; (2) therefore a certificate of merit was required (CPLR 3012-a); and (3) the failure to provide a certificate of merit does not warrant dismissal of the action, rather the plaintiff should be allowed 60 days to provide the certificate:

… [M]any of the plaintiff's allegations bear a substantial relationship to the rendition of medical treatment to a particular patient …. The complaint alleges, inter alia, that the defendant failed to properly screen the plaintiff for health problems, obtain her medical history, monitor her physical condition, measure her hemoglobin levels, and keep her at the donation site for a specific period of time to observe any signs of an adverse reaction. The issues of whether the plaintiff needed additional screening, monitoring, or supervision, and whether she was at risk of falling due to a medical condition, involve the exercise of medical judgments beyond the common knowledge of ordinary persons. Only a medical professional would know what factors make a person ineligible to donate blood, how much blood should be drawn, what constitutes the signs and symptoms of an adverse reaction, and how to immediately treat an adverse reaction. Thus, the interaction between the plaintiff and the defendant implicates issues of medical judgment that sound in medical malpractice. * * *

… [A]lthough the complaint was not accompanied by a certificate of merit as required by CPLR 3012-a, dismissal of the complaint is not warranted as the plaintiff's attorney should be provided with an opportunity to comply with the statute now that it is determined that the statute applies to this particular action … . There is no reason to believe from this record that the plaintiff's attorney's failure to file a certificate of merit was motivated by anything other than a good faith assessment that CPLR 3012-a did not apply to the action. The proper remedy

at this stage, since the defendant had also sought in its underlying motion “such other and further relief as this court may deem just, proper and reasonable” … , is for this Court to extend the plaintiff’s time to serve a certificate of merit upon the defendant until 60 days after service of this opinion and order. Only if the plaintiff is recalcitrant in complying with both the statute and this Court’s order may the Supreme Court, in its discretion, then dismiss the complaint … . Rabinovich v Maimonides Med. Ctr., 2019 NY Slip Op 08724, Second Dept 12-4-19

PLEADINGS.

MOTION FOR A DECLARATORY JUDGMENT SHOULD NOT HAVE BEEN GRANTED BECAUSE THERE WAS NO DEMAND FOR DECLARATORY RELIEF IN THE PLEADINGS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for a declaratory judgment should not have been granted because declaratory relief was not in the pleadings:

… Supreme Court should have denied the … motion for a declaration that the contract and its amendments are null and void, because that declaratory relief was not demanded in the pleadings filed in this proceeding (see CPLR 3017[b] …). Matter of Mount Olive Baptist Church of Manhasset, 2019 NY Slip Op 09270, Second Dept 12-24-19

SERVICE OF PROCESS, MUNICIPAL LAW.

ARTICLE 78 PETITION WAS NOT SERVED UPON A PERSON AUTHORIZED TO RECEIVE SERVICE ON BEHALF OF THE NYC DEPARTMENT OF ENVIRONMENTAL PROTECTION (DEP); ALTHOUGH THE PROCESS SERVER ALLEGED THE PETITION WAS DELIVERED TO AN ATTORNEY AT THE DEP WHO SAID SHE WAS AUTHORIZED TO RECEIVE SERVICE, THE DOCTRINE OF EQUITABLE ESTOPPEL DID NOT APPLY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the NYC Department of Environmental Protection (DEP) was not properly served with an Article 78 petition and therefore the court did not have

jurisdiction over this Freedom of Information Law (FOIL) action. The process server alleged the petition was delivered to an attorney at the DEP who said she was authorized to receive service. The Second Department found that the doctrine of equitable estoppel, based upon the DEP attorney's assertion she was authorized to receive service, did not apply:

It is undisputed that the petitioner's process server did not deliver the notice of petition and petition to the Corporation Counsel, or any other "person designated to receive process in a writing filed in the office of the clerk of New York county" (CPLR 311[a][2]). Because the petitioner did not effectuate service in strict compliance with CPLR 311(a)(2), it is irrelevant that the petitioner's process server allegedly relied upon the representations of an attorney employed by the DEP … .

Contrary to the petitioner's contention, the DEP should not be equitably estopped from asserting the petitioner's failure to properly serve the DEP with the notice of petition. The doctrine of equitable estoppel should be invoked against governmental entities sparingly and only under exceptional circumstances … . Estoppel against a governmental entity will lie when the governmental entity acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes its position to its detriment or prejudice … . The fact that the DEP's attorney may have identified herself as an agent who was "authorized by appointment to receive service at that address" is far removed from any clear expression of her status as a person designated to receive process on behalf of the City in a writing filed in the New York County Clerk's office … . There is no evidence in the record demonstrating that the petitioner justifiably relied on any misleading conduct by the DEP which would support a finding of equitable estoppel … . Matter of Exxon Mobil Corp. v New York City Dept. of Envtl. Protection, 2019 NY Slip Op 08670, Second Dept 12-4-19

SERVICE OF PROCESS.

PLAINTIFF WAS ENTITLED TO A SECOND EXTENSION OF TIME TO SERVE THE SUMMONS AND COMPLAINT IN THE INTEREST OF JUSTICE; DEFENDANT WAS ESTOPPED FROM CLAIMING HE RESIDED AT AN ADDRESS DIFFERENT FROM THE ADDRESS ON FILE WITH THE DEPARTMENT OF MOTOR VEHICLES (SECOND DEPT).

The Second Department determined plaintiff was properly granted a second extension of time, in the interest of justice, to serve the summons and complaint. The court noted that defendant Ewing was estopped from

contending his address was different from the address indicated in the Department of Motor Vehicles; (DMV's) records:

Ewing maintains that he should have been served at an address which differed from the Strauss Street address listed on the police report, as well as the Atlantic Avenue address and the Georgia address. However, a search of the DMV records conducted on June 23, 2017, more than six weeks after the traverse hearing, reflected that the Atlantic Avenue address, where the plaintiff had attempted to effectuate service, was the current documented address for Ewing. Since the record demonstrates that Ewing failed to notify the DMV of his change of residence, as required by Vehicle and Traffic Law § 505(5), he was estopped from raising a claim of defective service … .

Furthermore, we note that "the more flexible interest of justice' standard accommodates late service that might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant" … Here, the plaintiff demonstrated that there was no demonstrable prejudice to Ewing, particularly in light of evidence that he had actual notice of the action … . Indeed, the record indicates that Ewing served an answer to the complaint in April 2015, shortly after the expiration of the 120-day period for service … . Mighty v Deshommes, 2019 NY Slip Op 08996, Second Dept 12-18-19

SERVICE OF PROCESS.

TIME TO SERVE DEFENDANT, WHO LIVED IN INDIA, IN THIS FORECLOSURE ACTION WAS PROPERLY EXTENDED IN THE INTEREST OF JUSTICE BUT SUPREME COURT SHOULD NOT HAVE DIRECTED AN ALTERNATIVE METHOD OF SERVICE, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the time for serving defendant (Kothary), who lived in India, in this foreclosure action was properly extended in the interest of justice pursuant to CPLR 306-b. But Supreme Court should not have directed an alternative method of service (service upon the defendant's attorney) pursuant to CPLR 308 (5):

… [W]e agree with the Supreme Court's determination granting, in the interest of justice, that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon Kothary. The plaintiff established, among other things, that the action was timely commenced, and that service was timely attempted and was perceived by the plaintiff to have been within the 120-day period but was subsequently found to have been defective … . Additionally, the plaintiff demonstrated that it has a potentially

meritorious cause of action, and that there was no identifiable prejudice to Kothary as a consequence of the delay in service … . …

However, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was pursuant to CPLR 308(5) to direct an alternative method for service of process by permitting service upon Kothary's attorney. "CPLR 308(5) vests a court with discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308(1), (2), and (4) are impracticable" … . "[A] plaintiff seeking to effect expedient service must make some showing that the other prescribed methods of service could not be made" … . Here, at the hearing, Kothary provided the address where he resides in New Delhi … , and the plaintiff failed to submit any evidence that effectuating service in India by any of the authorized methods would have been unduly burdensome … . "That [Kothary] resided in a foreign country did not, by itself, relieve the plaintiff of [its] obligation to make a reasonable effort to effectuate service in a customary manner before seeking relief pursuant to CPLR 308(5)" … . JPMorgan Chase Bank, N.A. v Kothary, 2019 NY Slip Op 08832, Second Dept 12-11-19

SEVERANCE.

MALPRACTICE ACTION AGAINST A DOCTOR PROPERLY SEVERED FROM A NEGLIGENT HIRING AND RETENTION ACTION AGAINST THE DOCTOR'S EMPLOYER (SECOND DEPT).

The Second Department determined the action against a doctor (Wishner) for medical malpractice was properly severed from an action against the doctor's employer (HMG) for negligent training, supervision, hiring and retention. Evidence the doctor had negligently treated another patient would not be admissible in the malpractice action but would be admissible in the action against the employer:

"In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603). Here, the Supreme Court providently exercised its discretion in granting that branch of Wishner's motion which was to sever the causes of action asserted against HMG alleging negligent training, supervision, hiring, and retention from the causes of action premised on medical malpractice. In general, "it is improper to prove that a person did an act on a particular occasion by showing that he or she did a similar act on a different, unrelated occasion" … . Thus, generally, evidence of prior unrelated bad acts of negligent treatment of other patients, even if relevant, constitutes impermissible propensity evidence that lacks probative value and "has the potential to induce the jury to decide the case based on evidence of [a] defendant's character" … . Mullen v Wishner, 2019 NY Slip Op 08850, Second Dept 12-11-19

STANDING.

UNION REPRESENTING CITY EMPLOYEES HAS STANDING TO CONTEST THE CREATION OF A NEW CITY DEPARTMENT AFFECTING THOSE EMPLOYEES (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the labor union representing employees of the city's Office of the Building Inspector and Bureau of Code Enforcement had standing to contest an executive order issued by the mayor and related regulations which created a new Building Department:

"[S]tanding is a threshold determination and a litigant must establish standing in order to seek judicial review, with the burden of establishing standing being on the party seeking review" … . A petitioner challenging governmental action must "show 'injury in fact,' meaning that [the petitioner] will actually be harmed by the challenged [governmental] action[,]" and, further, that the injury "fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [governmental entity] has acted" … . For an organization to have standing, it must establish "'that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members'" … .

Petitioners allege that the Mayor unlawfully engaged in a legislative act by creating the Buildings Department and that this unlawful legislative act brought the union's members under the auspices/jurisdiction of the Commissioner, who used that unlawful grant of authority to enact a regulation that respondents have relied on to supplant the members' negotiated rights regarding disciplinary proceedings, as set forth in the applicable collective bargaining agreement. In our view, these allegations would, if proven, demonstrate the requisite harm flowing from the executive order, which would fall within the zone of interests … . Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v City of Schenectady, 2019 NY Slip Op 09342, Thrid Dept 12-26-19

STATUTE OF LIMITATIONS, CONTINUOUS REPRESENTATION DOCTRINE.

CONTINUOUS REPRESENTATION DOCTRINE APPLIED TO AN ENGINEERING FIRM HIRED TO OVERSEE AN HVAC INSTALLATION PROJECT; THE THREE-YEAR NEGLIGENCE STATUTE OF LIMITATIONS WAS TOLLED BY THE CONTINUOUS REPRESENTATION DOCTRINE AND THE ACTION WAS TIMELY (FIRST DEPT).

The First Department determined the negligence action against Skyline, an engineering firm hired to inspect an on-going HVAC (heating, ventilation, air conditioning) installation, was not time-barred because the continuous representation doctrine applied to toll the accrual of the limitations period:

Plaintiff commenced this action in 2016 alleging that it retained Skyline, an engineering firm, to perform "special inspection" services for "Phase I" of an HVAC installation project, and that Skyline negligently performed those services and breached the contract. In support of its motion for summary judgment, Skyline demonstrated prima facie that it completed Phase I work under the contract in 2012 and that it was serving in a professional capacity as an engineering firm when it performed those services, so that the three-year limitations period applied (CPLR 214[6] …). …

… [P]plaintiff demonstrated that the action is not time-barred because the continuous representation doctrine is applicable and tolled the accrual of the limitations period until 2014 … . Plaintiff submitted evidence showing Skyline provided special and progress inspection and testing services for "Remediation of Phase I" of the project, pursuant to a 2014 agreement. Although this work was completed under a separate agreement, Skyline rendered these services to correct the engineering and construction defects that it failed to identify during its Phase 1 inspection in 2012. Since Skyline continued to provide services in connection with Phase I in 2014, the action commenced in 2016 is timely under CPLR 214(6) … . Mutual Redevelopment Houses, Inc. v Skyline Eng'g, L.L.C, 2019 NY Slip Op 09112, First Dept 12-19-19

STATUTE OF LIMITATIONS, CONTINUOUS TREATMENT DOCTRINE.

ALTHOUGH DEFENDANT PSYCHIATRIST ALLEGED HE CALLED PLAINTIFF'S DECEDENT TO TELL HER SHE SHOULD SEE ANOTHER PSYCHIATRIST, THE NEXT SCHEDULED APPOINTMENT WITH DEFENDANT WAS NOT CANCELLED; THERE IS A QUESTION OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE APPLIED AND RENDERED THE ACTION TIMELY; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, over a dissent, determined that the medical malpractice causes of action should not have been dismissed as time-barred. Plaintiff's decedent had seen the defendant psychiatrist for the first time on November 20, 2014 and the next appointment was set up for December 11, 2014. Defendant alleged he called decedent on November 21, 2014 to tell her she should be treated by someone else, but the December 11, 2014 appointment was not cancelled. Decedent committed suicide on November 24, 2014. The action was commenced on May 24, 2017:

Under the continuous treatment doctrine, the period of limitations does not begin to run until the end of the course of treatment if three conditions are met: (1) the patient "continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period"; (2) the course of treatment was "for the same conditions or complaints underlying the plaintiff's medical malpractice claim"; and (3) the treatment is "continuous" … . To satisfy the requirement that treatment is continuous, further treatment must be explicitly anticipated by both the physician and the patient, as demonstrated by a regularly scheduled appointment for the near future … . * * *

The question here is whether the statute of limitations began to run on November 20, 2014, when the decedent met with the defendant for a medical appointment, or November 24, 2014, when she died. The Supreme Court concluded that the limited interactions between the defendant and the decedent failed to give rise to a continuing trust and confidence between them upon which the court could conclude that the decedent anticipated further treatment. However, since a further appointment was scheduled and was not cancelled—further treatment of some sort was anticipated, or there is at least a triable issue of fact on that issue … . Hillary v Gerstein, 2019 NY Slip Op 08658, Second Dept 12-4-19

STATUTE OF LIMITATIONS.

ALTHOUGH THE INITIAL COMPLAINT WAS FILED BUT NEVER SERVED, THE CAUSES OF ACTION IN THE COMPLAINT WERE TIMELY INTERPOSED AND THERE WAS NO NEED TO APPLY THE RELATION-BACK DOCTRINE TO THE AMENDED COMPLAINT (CT APP).

The Court of Appeals, over an extensive dissenting opinion, held, in a brief memorandum, that the claims were timely asserted in a complaint which was filed but never served. The amended complaint included the same claims. Therefore the relation-back doctrine did not apply. The claims should not have been dismissed under CPLR 306-b because the defendants waived that objection:

… [W]e … conclude that plaintiff's first and second causes of action should be reinstated. Those claims, asserted in identical form in both the original and amended complaints, were timely interposed when plaintiff filed the original summons and complaint, i.e., "when the action [was] commenced" (see CPLR 203 [c]; 304 [a]). The relation-back doctrine is therefore inapplicable (see CPLR 203 [f]). Although plaintiff failed to serve the original complaint, on this record, the claims should not have been dismissed under CPLR 306-b because defendants did not properly raise such an objection and thus waived it (see CPLR 320 [b]; 3211 [e]).

From the dissent:

Defendants each moved to dismiss the complaint—referring to the amended complaint—under CPLR 3211 (a) (5) and (7), claiming, amongst other things, that the first and second causes of action are untimely … . Plaintiff opposed the motion, asserting that these causes of action were timely interposed based on the filing of the unserved complaint. In its reply, the [defendant] requested dismissal of the unserved complaint pursuant to CPLR 306-b for lack of service within the statutory time period.

… [P]laintiff responded by filing a motion under CPLR 306-b to extend the time to file the unserved complaint and deem it timely served nunc pro tunc. * * *

Supreme Court, … denied plaintiff's CPLR 306-b motion, and … granted defendants' motions to dismiss and dismissed "the complaint" with prejudice. The Appellate Division affirmed … .. The dispositive point of contention … was whether the first two causes of action were timely … . Vanyo v Buffalo Police Benevolent Assn., Inc., 2019 NY Slip Op 08980, CtApp 12-17-19

STIPULATIONS.

PLAINTIFF SUBMITTED EVIDENCE OF DEFENDANTS' BREACH OF A STIPULATION OF SETTLEMENT; PLAINTIFF'S MOTION TO VACATE (RESCIND) THE STIPULATION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate a stipulation of settlement should not have been granted without a hearing. Plaintiff presented evidence defendants breached the stipulation raising a question whether the stipulation should be rescinded:

… [T]he plaintiff argued that the stipulation should be vacated because the defendants had "openly and willfully violated" the terms of the stipulation. In support of his position, the plaintiff submitted, inter alia, his own affidavit, in which he stated that the defendants had, among other things, assaulted his wife, refused to provide him with an accounting, and had made it impossible for him to operate his plumbing business as agreed to in the stipulation by, among other things, removing and destroying equipment from his office, disconnecting his phone line, and changing locks on the property.

"As a general rule, rescission of a contract is permitted for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but . . . only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract'" … .

Under the circumstances, the factual assertions set forth in the plaintiff's affidavit were sufficient to warrant a hearing on the issue of whether the stipulation should be rescinded due to the defendants' alleged breaches … . Young v Young, 2019 NY Slip Op 09321, Second Dept 12-24-19

SUBPOENAS.

CPLR 3122 DOES NOT REQUIRE THE STATE COMPTROLLER TO ACQUIRE PATIENT AUTHORIZATIONS BEFORE SUBMITTING SUBPOENAS FOR MEDICAL RECORDS IN CONNECTION WITH AUDITS OF PRIVATE HEALTHCARE PROVIDERS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined that the Comptroller of the State of New York, in auditing private health care providers, has the power to subpoena medical records without patient authorizations:

The Comptroller of the State of New York has a constitutional and statutory duty to audit payments of state money, including payments to private companies that provide health care to beneficiaries of a state insurance program. Here, the Comptroller carried out that obligation by means of investigatory subpoenas duces tecum directed to a medical provider, seeking patients' records. We hold that CPLR 3122 (a) (2) does not require that the Comptroller's subpoenas be accompanied by written patient authorizations, as the requirements set out in that paragraph apply only to subpoenas duces tecum served after commencement of an action. Matter of Plastic Surgery Group, P.C. v Comptroller of the State of N.Y., 2019 NY Slip Op 08979, CtApp 12-17-19

SUBPOENAS.

SUBPOENA ISSUED BY THE ATTORNEY GENERAL OF THE US VIRGIN ISLANDS SHOULD HAVE BEEN QUASHED BECAUSE IT WAS ISSUED WITHOUT ANY INVOLVEMENT BY A STATE COURT (FIRST DEPT).

The First Department, reversing Supreme Court, determined a subpoena issued by the Attorney General of the United State Virgin Islands (USVI) should have been quashed for failure to comply with CPLR 3119:

The subpoena … failed to meet the procedural requirements for out-of-state subpoenas because it was not issued "under authority of a court of record" (see generally CPLR 3119[a][1], [4] …). Although the subpoena need not have been issued in connection with a pending litigation, there must have been some court involvement, such as the issuance of a commission by a state court clerk or signature of the subpoena by a state court judge … . We reject respondents' argument that administrative subpoenas are outside the scope of CPLR 3119 and not subject

to any restrictions on issuance. Matter of American Express Co. v United States Virgin Is. Dept. of Justice, 2019 NY Slip Op 08618, First Dept 12-3-19

SURVEY MAPS.

THE JURY WAS WRONGLY INSTRUCTED ON THE INFERENCE WHICH CAN BE DRAWN ABOUT THE LOCATION OF A BOUNDARY LINE FROM A SURVEY MAP FILED FOR MORE THAN 10 YEARS; VERDICT FINDING PLAINTIFF HAD WRONGLY SET THE PROPERTY BOUNDARY REVERSED (THIRD DEPT).

The Third Department, reversing the jury verdict finding that plaintiff had incorrectly set the western boundary of his property, held that the jury was wrongly instructed:

The jury received defective instructions as to the application of CPLR 4522. In that regard, Supreme Court charged the jury that "[a] 2002 survey map prepared by Surveyor Dickinson is in evidence. The survey was filed in 2002 with the Rensselaer County Clerk. The law provides that a map which has been on file with the County [Clerk] for more than [10] years is presumed to be accurate unless rebutted by other credible survey or expert opinion. In deciding whether the presumption of accuracy of the 2002 survey has been rebutted by other evidence you will apply the rules that I have already given you and will continue to give you about the evaluation of evidence."

CPLR 4522 states that "[a]ll maps, surveys and official records affecting real property, which have been on file in the state in the office of . . . any county clerk . . . for more than [10] years, are prima facie evidence of their contents." In analyzing similar statutory language from another hearsay exception contained in the same article of the CPLR, the Court of Appeals held that "[p]resumptive evidence[] is, . . . like the prima facie evidence to which CPLR 4518 (c) refers, evidence which permits but does not require the trier of fact to find in accordance with the presumed fact, even though no contradictory evidence has been presented. It is, in short, not a presumption which must be rebutted but rather an inference, like the inference of negligence denominated res ipsa loquitor" … .

Supreme Court's charge required the jury to locate the western boundary of plaintiff's property as depicted in the 2002 survey unless plaintiff offered evidence that rebutted the survey's presumed accuracy. The jury should have been instructed that, in the absence of contradictory evidence, it was permitted but not required to adopt the western boundary as depicted in the 2002 survey. Hence, Supreme Court committed reversible error because

the effect of the charge was to improperly require plaintiff to disprove the alleged accuracy of the 2002 survey map … . Kennedy v Nimons, 2019 NY Slip Op 09332, Third Dept 12-26-19

VENUE.

VENUE FOR THIS HYBRID ARTICLE 78/DECLARATORY JUDGMENT ACTION SEEKING TO ANNUL A TOWN LOCAL LAW WHICH CREATED A WILDLIFE OVERLAY DISTRICT IS THE COUNTY IN WHICH THE TOWN IS LOCATED PURSUANT TO TOWN LAW SECTION 66 (1) (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice DeJoseph, determined Supreme Court properly found that Orleans County, not Niagara County, was the correct venue for this hybrid Article 78/declaratory judgment action seeking to invalidate a Town of Shelby Local Law creating a wildlife refuge overlay district, and further seeking to annul the Town Board's negative declaration under the State Environmental Quality Review Act (SEQRA). The legal analysis is too detailed to be fully summarized here:

The primary issue raised on this appeal involves the interplay between three statutory provisions concerning venue, i.e., CPLR 504 (2), CPLR 506 (b), and Town Law § 66 (1) and, ultimately, whether Supreme Court properly granted the motion of respondents-defendants (respondents) to transfer venue of this hybrid CPLR article 78 proceeding and declaratory judgment action from Niagara County to Orleans County. We conclude that the court properly transferred venue pursuant to Town Law § 66 (1). …

Town Law § 66 (1) provides that "[t]he place of trial of all actions and proceedings against a town or any of its officers or boards shall be the county in which the town is situated."

We conclude that Town Law § 66 applies and, as such, the proper venue in the instant action is Orleans County rather than Niagara County. Matter of Zelazny Family Enters., LLC v Town of Shelby, 2019 NY Slip Op 09124, Fourth Dept 12-20-19

WITNESSES, DISCOVERY.

TESTIMONY OF A DEFENSE WITNESS WHO IDENTIFIED PLAINTIFF AS THE PERSON FLEEING THE SCENE OF A CRIME SHOULD NOT HAVE BEEN PRECLUDED IN THIS FALSE ARREST AND MALICIOUS PROSECUTION ACTION; THE JURY WAS NOT INSTRUCTED ON THE CRITERIA FOR A TERRY STOP; PLAINTIFF'S JUDGMENT VACATED AND NEW TRIAL ORDERED (FIRST DEPT).

The First Department, vacating the plaintiff's judgment and ordering a new trial in this false arrest and malicious prosecution action, determined that the testimony of the defense witness who identified plaintiff as fleeing the scene of a crime should not have been precluded. The name and address of the witness had been provided to plaintiff four years before the trial and the fact that she had since moved and did not want to disclose her new address to any party was not something the defense could control. In addition, the jury was given no guidance on the criteria for an alleged wrongful stop of the plaintiff by police (reasonable suspicion, not probable cause), despite the questions concerning the stop on the special verdict sheet:

The trial court improvidently exercised its discretion in precluding testimony from the witness who identified plaintiff to the police as an individual she had seen fleeing the scene of a crime. Defendants satisfied their discovery obligation by providing the witness's last known address and telephone number during discovery, more than four years before trial. Thus, there could have been no surprise or prejudice warranting the preclusion … . While the witness subsequently moved, she declined to disclose her new address to any parties to the suit, a factor defendants could not control … . As defendants did not know her new address, they had no obligation under CPLR 3101(h). Nor should defendants have been sanctioned for the fact that the witness did not wish to discuss the case with plaintiff's counsel when counsel called her. Notably, plaintiff's counsel did not attempt to contact the witness until two months before trial and did not attempt to obtain a nonparty deposition of the witness during discovery. Defendant offered to have the witness further confirm these facts, under oath and outside the presence of the jury. Under these circumstances, the trial court improvidently exercised its discretion in ordering a hearing at which defendants' trial attorney would be subject to questioning by plaintiff's trial attorney, and precluding the witness's testimony when defense counsel declined to participate in such a hearing. Given that the witness would have offered highly relevant and non-cumulative trial testimony, the error was not harmless … .

It was error to include on the special verdict sheet a questions as to a wrongful stop (Terry v Ohio, 392 US 1 [1968]), because there was no charge given instructing the jury on the legal standard that must be applied in

resolving those claims. The jury was never told that a stop is improper if the detaining officer does not have "reasonable suspicion" that the detainee committed a crime, which is less demanding than the "probable cause" standard applicable to the malicious prosecution claims … . That the jury sent a note requesting clarification on the question indicated its awareness of the lack of guidance …. . Onilude v City of New York, 2019 NY Slip Op 08925, First Dept 12-12-19

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