NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
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An Organized Compilation of Summaries of Selected Decisions Addressing Civil Procedure Released by the New York State Appellate Courts in February 2020. The Issues Are Described in the Table of Contents. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header to Return There.

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

ADJOURNMENTS, ATTORNEYS, APPEALS.

THE APPEAL OF THE DENIAL OF PETITIONER'S REQUEST FOR AN ADJOURNMENT TO OBTAIN COUNSEL WAS NOT MOOT, DESPITE THE FACT THE TRIAL WAS HELD AND COMPLETED IN PETITIONER'S ABSENCE; THE ADJOURNMENT SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Scheinkman, reversing Surrogate's Court, determined petitioner's motion for an adjournment to obtain new counsel should have been granted and the appeal of the denial of an adjournment was not moot. The matter was before Surrogate's Court for an accounting in the estate of Oleg Cassini, who died in 2006. At the time of the request for an adjournment three attorneys had withdrawn from the case. The trial went ahead without the presence of petitioner, Oleg Cassini's wife Marrianne, and without counsel for petitioner:

An appeal is not moot "[w]here the case presents a live controversy and enduring consequences potentially flow from the order appealed from" … . On the other hand, "[a]n appeal is moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment'" … . Here, enduring consequences flow from the order appealed from since, absent a reversal of the order appealed from, the Surrogate's Court's determination after a trial in which Marianne did not participate will bind the parties. * * *

The Surrogate was rightly concerned about the lengthy history of delay in this case, just as we are. However, there was no evident urgency that required the trial to start on July 25, 2016, as opposed to 60 days later, and any prejudice to the objectants could have been readily addressed by appropriate orders dealing with the administration of the estate and its assets. In the overall context of this long-running litigation, an adjournment of 60 days to allow Marianne's prospective counsel, McKay, to prepare for the trial should have been granted. Indeed, the failure [*6]to grant it has resulted in additional delay and expense in the conclusion of this estate. Given our preference that matters be determined on their merits, and the absence of any indication on this record that Marianne's motion for an adjournment was made solely for the purpose of delay, the Surrogate's Court should not have rejected the request out of hand. Matter of Cassini, 2020 NY Slip Op 01056, Second Dept 2-13-20

AMEND COMPLAINT, STATUTE OF LIMITATIONS.

PLAINTIFF PROPERLY ALLOWED TO AMEND THE MEDICAL MALPRACTICE COMPLAINT AFTER THE STATUTE OF LIMITATIONS HAD RUN TO ADD A TREATING DOCTOR EMPLOYED BY A NAMED DEFENDANT PURSUANT TO THE RELATION-BACK DOCTRINE (SECOND DEPT).

The Second Department determined the relation-back doctrine allowed the amendment of the complaint (CPLR 1003) in this medical malpractice, wrongful death action to add a doctor, Abergel, who treated plaintiff's decedent and was employed by the defendant professional corporation (P.C.):

The causes of action arose out of the same conduct, to wit, the alleged negligence by [defendant] Purow and Abergel in the course of treating the decedent for her ulcerative colitis at the P.C.'s office, which they each did within the scope of their employment with the P.C. …

The vicarious liability of the P.C. allows for a finding of unity of interest with Abergel, "regardless of whether the actual wrongdoer or the person or entity sought to be charged vicariously was served first'" … . …

… [T]he plaintiff satisfied the third prong of the test, which focuses, inter alia, on "whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter has been laid to rest as far as he [or she] is concerned'" … . The decedent's medical records from the P.C. included several notes signed by Abergel, and clearly and repeatedly referenced Abergel as a physician who treated the decedent as part of the care rendered to the decedent by the P.C. * * * In addition, the plaintiff demonstrated that the failure to originally name Abergel as a defendant was the result of a mistake, and there was no need to show that such mistake was excusable … . Petruzzi v Purow, 2020 NY Slip Op 01372, Second Dept 2-26-20

DECLARATORY JUDGMENTS, COURT OF CLAIMS.

ALTHOUGH SOME MONETARY RELIEF WAS SOUGHT, THE ESSENTIAL NATURE OF THE CLAIM WAS A DECLARATION VERIZON HAD WRONGFULLY DISCONTINUED CLAIMANT'S LIFELINE SERVICE; THEREFORE THE ACTION WAS PROPERLY DISMISSED AS OUTSIDE THE JURISDICTION OF THE COURT OF CLAIMS (SECOND DEPT).

The Second Department noted that the jurisdiction of the Court of Claims is generally limited to money damages. Therefore the action, which was seeking a ruling that claimant's Verizon Lifeline Service was wrongfully discontinued, was properly dismissed:

The Court of Claims is a court of limited jurisdiction determined by the Constitution and statute (see NY Const art VI, § 9; Court of Claims Act § 9). Its jurisdiction is generally limited to money damage awards against the State … . "Whether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in a particular case" … .

Here, while the claimant alleges certain monetary losses, the essential nature of his claim is one seeking to compel the PSC [NYS Public Service Commission] to investigate and issue a determination on his complaint that Verizon wrongfully discontinued his Lifeline Service, which he alleges the PSC is required to do. The money damages sought are merely incidental to the primary question of the PSC's investigation and regulation of Verizon with respect to the Lifeline Service program. Aliksanyan v State of New York, 2020 NY Slip Op 01137, Second Dept 2-19-20

DECLARATORY JUDGMENTS.

LOCAL LAW CREATING A SENIOR LIVING DISTRICT (SLD) WAS INVALID BECAUSE APPROVAL BY A SUPERMAJORITY OF THE TOWN BOARD WAS REQUIRED; BECAUSE THE COMPLAINT SOUGHT A DECLARATORY JUDGMENT DISMISSAL OF THE COMPLAINT WAS NOT PROPER, SUPREME COURT SHOULD HAVE RULED ON THE DECLARATORY JUDGMENT (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Garry, in a matter of first impression, determined a local law rezoning agricultural land as a senior living district (SLD) where a senior living community could be constructed was invalid. In order to avoid the requirement that the local law be approved by a supermajority (as opposed to a simple majority) of the town board, the local law called for a 100-foot buffer between the SLD and the surrounding properties. However, in this case, the land in the 100-foot buffer was to be used for access roads and other purposes which exclusively served the SLD. In that situation, the Third Department held, the approval of the local law requires a supermajority and the local law was therefore invalid. The Third Department also noted that, because the complaint sought a declaratory judgment, dismissal of the complaint was not proper. A ruling on the declaratory judgment was required:

… [T]he SLD cannot be used for its intended purpose without improvements in the buffer zone that will serve only uses in the SLD and will provide no public benefit. Under these circumstances, we do not find that the purported buffer zone is sufficient to defeat the supermajority requirements of Town Law § 265. Notably, in holding that the distance of a buffer zone from neighboring properties should be measured from the boundary of the rezoned area rather than that of the buffer zone, the Court of Appeals found that this statutory interpretation "is fair, because it makes the power to require a supermajority vote dependent on the distance of one's property from land that will actually be affected by the change" (Matter of Eadie v Town Bd. of Town of N. Greenbush, 7 NY3d at 315 [emphasis added]). Here, land within the buffer zone will actually be affected by the rezoning in such a way that it would neither be fair nor consistent with the spirit and intent of Town Law § 265 to deprive neighboring landowners of the power to require a supermajority vote. We find that where, as here, a proposed buffer zone will contain improvements that benefit only the rezoned area and are necessary to the intended uses of the rezoned area, Town Law § 265 should be interpreted to require the 100-foot distance to opposing and adjacent properties to be measured from the boundary of the buffer zone rather than that of the rezoned area … . Dodson v Town Bd. of the Town of Rotterdam, 2020 NY Slip Op 01234, Third Dept 2-20-20

DEFAULT, INQUEST.

DEFENDANT DEFAULTED; SUPREME COURT SHOULD NOT HAVE CONSIDERED LIABILITY ISSUES AT THE INQUEST TO DETERMINE DAMAGES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court should not have considered issues of liability because defendant had defaulted and thereby admitted liability:

In this action, inter alia, to recover damages for personal injuries, the defendant failed to appear or answer the complaint. In an order … , the Supreme Court granted the plaintiff's unopposed motion for leave to enter a default judgment against the defendant and directed an inquest on the issue of damages. After conducting the inquest, the court … determined that the plaintiff had failed to establish, prima facie, that the defendant was negligent and that her negligence was a substantial factor in causing the plaintiff's injuries, and thereupon, sua sponte, directed the dismissal of the complaint.

By defaulting, the defendant admitted "all traversable allegations in the complaint, including the basic allegation of liability" … . As such, the sole issue to be determined at the inquest was the extent of the damages sustained by the plaintiff, and the Supreme Court should not have considered issues of liability … . Arluck v Brezinska, 2020 NY Slip Op 00839, Second Dept 2-5-20

DEFAULT, MOTION TO VACATE, FAMILY LAW.

DEFAULT IN THIS NEGLECT/CUSTODY PROCEEDING SHOULD HAVE BEEN ANALYZED UNDER FAMILY COURT ACT 1042, NOT CPLR 5015 AND 5511; BECAUSE RESPONDENT WAS NEVER NOTIFIED THAT A FACT-FINDING HEARING, AS OPPOSED TO A CONFERENCE, WAS GOING TO BE HELD THE DEFAULT ORDER SHOULD HAVE BEEN VACATED (THIRD DEPT).

The Third Department, reversing Family Court, determined: (1) the proper analysis of a default in this neglect/custody proceeding is under Family Court Act 1042, not CPLR 5015 and 5511; (2) respondent was never notified of the fact-finding; and (3) the default order must be vacated:

To begin, although Family Court and the parties assessed whether respondent was entitled to vacatur under "the default mechanism of CPLR 5015 and 5511," the standard set forth by Family Ct Act § 1042 controls in this Family Ct Act article 10 proceeding … .. If a "person legally responsible for the child's care" has been notified of a pending fact-finding hearing and fails to attend … . Family Court is free to conduct the hearing so long as the child is represented by counsel … . Respondent is such a person and, upon her timely motion to vacate the fact-finding order, Family Court was obliged to grant vacatur and reopen the hearing if she showed "a meritorious defense to the petition . . . [unless she] willfully refused to appear at the hearing" … . …

It was an impossibility for respondent to default in attending a hearing that she did not know was going to happen and did not, in fact, happen. Respondent was further unable to challenge details of petitioner's evidence in the absence of a hearing and, the strength of petitioner's proof remaining a mystery, we deem the denials in respondent's affidavit sufficient to set forth a meritorious defense. Matter of Lila JJ. (Danelle KK.), 2020 NY Slip Op 01216, Third Dept 2-20-20

DFEAULT, MOTION TO VACATE, SERVICE OF PROCESS.

DEFENDANT LIMITED LIABILITY COMPANY FAILED TO FILE ITS CURRENT ADDRESS WITH THE SECRETARY OF STATE SINCE 2011; DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT ALLEGING IT WAS NOT SERVED WITH THE SUMMONS AND COMPLAINT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant limited liability company's motion to vacate a default judgment pursuant to CPLR 317 should not have been granted. Defendant had not filed its current address with the Secretary of State since 2011:

Pursuant to CPLR 317, a defaulting defendant who was served with a summons other than by personal delivery may be permitted to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense … . Here, the defendant was not entitled to vacatur of its default pursuant to CPLR 317. The record reflects that, since September 2011, the defendant had not filed, with the Secretary of State, the required biennial form that would have apprised the Secretary of State of its current address (see Limited Liability Company Law § 301[e]), thus raising an inference that the defendant deliberately attempted to avoid notice of actions commenced against it … .

"In contrast to a motion pursuant to CPLR 317, on a motion pursuant to CPLR 5015(a)(1), the movant is required to establish a reasonable excuse for his or her default" … . Under the circumstances of this case, the defendant's failure to keep the Secretary of State apprised of its current address over a significant period of time did not constitute a reasonable excuse … . Bookman v 816 Belmont Realty, LLC, 2020 NY Slip Op 01318, Second Dept 2-26-20

DISCONTINUE, MOTION TO.

MOTION TO DISCONTINUE STATE FORECLOSURE ACTION WHILE FORECLOSURE WAS PURSUED IN FEDERAL COURT SHOULD HAVE BEEN GRANTED WITHOUT PREJUDICE BECAUSE THERE WAS NO SHOWING OF PREJUDICE ON THE PART OF DEFENDANT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to discontinue the foreclosure action should not have been granted with prejudice because there was no showing of prejudice on the part of the defendant (Jach):

… [T]he plaintiff commenced this action … seeking to foreclose the subject mortgage. After interposing an answer, in which he alleged lack of standing as an affirmative defense, Jach moved for summary judgment dismissing the complaint insofar as asserted against him, and the plaintiff cross-moved, inter alia, for summary judgment on the complaint. The Supreme Court referred the action to a referee to hear and report on the issue of standing. After conducting a hearing, the referee issued a report finding, in effect, that the plaintiff had failed to establish its standing for purposes of its cross motion for summary judgment on the complaint.

… [W]ith this action still pending and the referee's report not yet confirmed, the plaintiff commenced an action in federal court seeking to foreclose the subject mortgage. Subsequently, … the plaintiff moved before the Supreme Court, among other things, for leave to discontinue the action without prejudice, which Jach opposed.

In the order appealed from, the Supreme Court, inter alia, in effect, upon granting that branch of the plaintiff's motion which was for leave to discontinue the action, did so with prejudice. The plaintiff appeals.

The Supreme Court, in granting that branch of the plaintiff's motion which was for leave to discontinue the action, should have done so without prejudice. Pursuant to CPLR 3217(b), "an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper." As a general rule, "a plaintiff should be permitted to discontinue an action without prejudice unless the

defendant would be prejudiced thereby" … . Here, there was no evidence that Jach would be prejudiced by a discontinuance … . Onewest Bank, FSB v Jach, 2020 NY Slip Op 01357, Second Dept 2-26-20

DISMISS, MOTION TO.

NEW YORK DOES NOT RECOGNIZE SPOLIATION OF EVIDENCE AS AN INDEPENDENT TORT, THE COMPLAINT SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's complaint should have been dismissed for failure to state a cause of action. Plaintiff was injured falling off a forklift platform. Plaintiff alleged defendants negligently destroyed or failed to preserve the forklift platform, thereby making it impossible to sue the manufacturer. The Second Department held that there is no such tort:

Here, the plaintiff's sole purported cause of action seeks to recover for the negligent impairment of an employee's right to sue, which is, in effect, an allegation of spoliation … , and New York does not recognize spoliation of evidence as an independent tort. Lopez-Lobo v U.S. Nonwovens Corp., 2020 NY Slip Op 01053, Second Dept 2-13-20

DISMISS, MOTION TO.

PLAINTIFF DID NOT SUFFICIENTLY ALLEGE THAT NEW YORK'S PROPERTY TAX SYSTEM DISCRIMINATES AGAINST PROPERTY OWNERS IN "MAJORITY-MINORITY" NEIGHBORHOODS; COMPLAINT SHOULD HAVE BEEN DISMISSED IN ITS ENTIRETY (FIRST DEPT).

The First Department, in a comprehensive opinion by Justice Kern, reversing (modifying) Supreme Court, determined the complaint alleging the New York property tax system is unconstitutional should have been dismissed in its entirety for failure to state a cause of action. The opinion is too detailed to fairly summarize here. With respect to the allegations the property tax system discriminates against property owners in "majority-minority" neighborhoods, the court wrote:

… [P]laintiff does not adequately allege a causal connection between the property tax system and any racial disparities in the availability of housing. Plaintiff has failed to allege sufficient concrete facts or produce statistical evidence showing that the application of the property tax system, as opposed to other factors, causes financial barriers that inhibit the ability of minority residents to own homes. Additionally, plaintiff does not allege sufficient concrete facts or produce statistical evidence showing how the current property tax system contributes to higher rates of foreclosure or discourages the production of rental units in majority-minority communities. …

… [P]laintiff has failed to meet its burden "to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection" between the property tax system and the continued segregation of New York City neighborhoods sufficient to "make out a prima facie case of disparate impact" … . …

… [P]laintiff argues that the terms and conditions of all home, condominium and cooperative sales and apartment rentals include the transfer of an illegal tax burden that make purchasing or renting a dwelling more expensive in affected communities. The portion of the FHA [Fair Housing Act] upon which plaintiff relies makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin" … . However, in the context of taxation, defendants are not involved in the terms and conditions of the sale or rental of property … . Tax Equity Now NY LLC v City of New York, 2020 NY Slip Op 01401, First Dept 2-27-20

FORUM NON CONVENIENS, FAMILY LAW.

NEW YORK SHOULD NOT HAVE BEEN RULED AN INCONVENIENT FORUM FOR THIS VISITATION/CONTACT ENFORCEMENT PROCEEDING, CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court should not have ruled that New York was an inconvenient forum for a visitation/contact enforcement petition where mother is in New York and father is in Arizona with the child:

As Family Court acknowledged, it had exclusive continuing jurisdiction over the matter pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act … . However, "[a] court of this state which has jurisdiction under this article . . . may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum" … .

An inconvenient forum determination "depends on the specific issues to be decided in the pending litigation" … . This is an enforcement petition, and the sole issue concerns the conduct of the parents vis-À-vis the current order. The vast amount of testimony as to whether the father violated the order, which is central to the issue in this proceeding, will come from the mother, who is located in New York, and any witnesses that she may call. Any testimony from the father can be presented by telephone, audiovisual means or other electronic means. Moreover, Family Court has presided over numerous proceedings between the parties related to this child … .That court is far more familiar with the case than the Arizona court and is in a better position to interpret the meaning of its own order … .

Additionally, the mother submitted an affidavit evidencing that she will not be able to travel to or retain counsel in Arizona, yet she has legal representation in New York. Family Court acknowledged her indigency and that it was unable to conclude whether Arizona could provide indigent legal representation to her. Matter of Sadie HH. v Darrin II., 2020 NY Slip Op 01219, Third Dept 2-20-20

FORUM NON CONVENIENS.

DEFENDANTS' MOTION TO DISMISS ON FORUM NON CONVENIENS GROUNDS SHOULD NOT HAVE BEEN GRANTED IN THIS PRODUCTS LIABILITY ACTION, DESPITE THE FACT THAT ONLY TWO OF THE 19 PLAINTIFFS RESIDED IN NEW YORK (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss on forum non conveniens grounds should not have been granted. Nineteen plaintiffs brought this production liability action alleging damage caused by defendants' "Just For Men" dyes and products. Only two plaintiffs resided in New York and defendants' motion to dismiss was granted on that ground, without any further proof:

"The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that in the interest of substantial justice the action should be heard in another forum'" (… CPLR 327[a]). The burden was on the defendants to show that "considerations relevant to private or public interest militate against accepting or retaining the litigation" … . Factors to consider are the residency of the parties, potential inconvenience to proposed witnesses, especially nonparty witnesses, availability of an alternative forum, the situs of the actionable events, the location of the evidence, and the burden that retaining the case would have on New York courts … .

Here, the defendants asserted no facts other than that the nonresident plaintiffs were out-of-state residents. The defendants did not meet their burden of proof on the issue of convenience of the witnesses, since, among other things, there was no statement as to whom the witnesses are and where they reside. Moreover, Just For Men's design, manufacturing, labeling, advertising, and executive decision-making all allegedly occurred in White Plains, where Combe Incorporated has a principal place of business. Further, there is no per se rule stating that out-of-state plaintiffs cannot, on the ground of forum non conveniens, sue in New York based upon products liability … , despite the fact that evidence of damages would most often be found where the plaintiff resides. Albright v Combe Inc., 2020 NY Slip Op 00837, Second Dept 2-5-20

JUDGES, SUA SPONTE.

COURT SHOULD NOT HAVE DISMISSED, SUA SPONTE, FATHER'S MODIFICATION OF CUSTODY PETITION FOR FAILURE TO STATE A CAUSE OF ACTION BECAUSE MOTHER DID NOT REQUEST THAT RELIEF; THE THIRD DEPARTMENT CONSIDERED AND DENIED MOTHER'S MOTION FOR SUMMARY JUDGMENT (THIRD DEPT).

The Third Department, reversing Family Court, determined the judge, sua sponte, should not have dismissed father's modification of custody petition for failure to state a cause of action because mother did not request that relief. The Third Department went on to consider mother's motion for summary judgment and deny it:

"[A] motion for summary judgment may be utilized in a Family Ct Act article 6 proceeding, but such a motion should be granted only when there are no material facts disputed sufficiently to warrant a trial" … . "In a custody modification proceeding, the controlling 'material fact' is whether or not there is a change in circumstances so as to warrant an inquiry into whether the best interests of the children would be served by modifying the existing custody arrangement" … .

Here, the mother failed to meet her initial summary judgment burden. There can be no dispute that only five months had elapsed since entry of the March 2018 order and, as such, the "automatic" change in circumstances provision incorporated in that order had not been triggered. The father, however, sought modification based upon several other alleged changes in circumstance, including that the mother had been disparaging the father in front of the children in violation of the March 2018 order and that she is living in a homeless shelter. The mother, in her motion for summary judgment, makes no mention of these allegations or otherwise attempts to refute them in any way. Matter of Anthony F. v Christy G., 2020 NY Slip Op 01228, Third Dept 2-20-20

JUDGES, SUA SPONTE.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT IN THIS FORECLOSURE ACTION, THEREBY DEPRIVING PLAINTIFF OF AN OPPORTUNITY TO BE HEARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion to vacate the default in this foreclosure action should have been granted. Supreme Court had, sua sponte, dismissed the complaint without affording plaintiff an opportunity to be heard:

Following the plaintiff's failure to move for an order of reference … , the Court Attorney Referee found … that the plaintiff failed to show good cause for its failure to move for the order of reference as directed and recommended that the action be dismissed. … Supreme Court directed dismissal of the action.

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . As no such extraordinary circumstances were present in this case, we disagree with the Supreme Court's determination to sua sponte direct dismissal of the complaint, without affording the plaintiff notice and opportunity to be heard … , which "amounted to a denial of the plaintiff's due process rights" … . Accordingly, the Supreme Court should have granted those branches of the plaintiff's motion which were to vacate the October 4, 2016, order and to restore the action to active status … . Deutsche Bank Natl. Trust Co. v Winslow, 2020 NY Slip Op 01325, Second Dept 2-26-20

JURISDICTION, FORUM NON CONVENIENS.

ALTHOUGH MOVING MONEY THROUGH A NEW YORK BANK IS ENOUGH TO CONFER PERSONAL JURISDICTION ON OUT-OF-STATE PARTIES, SUPREME COURT CORRECTLY HELD IT WAS NOT ENOUGH TO MAKE NEW YORK A CONVENIENT FORUM (FIRST DEPT).

The First Department determined that, although using a New York bank for an allegedly fraudulent transaction is sufficient to acquire personal jurisdiction over out-of-state parties, it does not necessarily follow that New

York is a convenient forum. Supreme Court properly found New York was not a convenient forum in these actions involving individuals and corporations in Saudi Arabia and the United Arab Emirates, as well as a Swiss bank:

… [T]he court properly considered the following matters, among others: (1) none of the parties to either action is a New York citizen or resident or (if an entity) is formed under New York law or has its principal place of business in New York; … (2) the alleged conduct at issue primarily occurred in the UAE, Saudi Arabia and Switzerland, with the sole New York connection being the fleeting presence of the bribery funds at a nonparty New York correspondent bank while en route from the UAE to Switzerland; (3) the bulk of the relevant documentary evidence is located in the UAE, Saudi Arabia, Switzerland and BVI, and most witnesses are located outside New York and beyond New York's subpoena power; (4) there is a likelihood that foreign substantive law will govern; (5) there are alternative fora available (Switzerland and the UAE) with greater connection to the subject matter; and (6) in the Pictet [bank] action, Switzerland has an interest in regulating the conduct of a bank operating within its borders … . …

As Supreme Court correctly recognized … "[o]ur state's interest in the integrity of its banks . . . is not significantly threatened every time one foreign national, effecting what is alleged to be a fraudulent transaction, moves dollars through a bank in New York. . . . New York's interest in its banking system is not a trump to be played whenever a party to such a transaction seeks to use our courts for a lawsuit with little or no apparent contact with New York" (Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co., 23 NY3d 129, 137 [2014] …).

In accordance with Mashreqbank, this Court has declined to disturb the motion court's discretionary determination that New York is not a convenient forum in cases where the sole connection to New York was the passage of wired funds through a correspondent bank in the state … . Al Rushaid Parker Drilling Ltd. v Byrne Modular Bldgs. L.L.C., 2020 NY Slip Op 01277, First Dept 2-25-20

LAW OF THE CASE, APPEALS.

STATEMENT MADE IN PRIOR APPELLATE DECISION IN THE SAME MATTER TO THE EFFECT NO ONE QUESTIONED THE NUMBER OF HOURS PUT IN BY THE ATTORNEY FOR THE CHILD WAS DICTA AND THEREFORE SHOULD NOT HAVE BEEN CONSIDERED THE LAW OF THE CASE ON REMITTAL; THE FOURTH DEPARTMENT REDUCED THE NUMBER OF BILLABLE HOURS (FOURTH DEPT).

The Fourth Department, reducing the amount of attorney's fees awarded by Supreme Court, noted that a statement made by the Fourth Department in a prior appeal in the same matter was dicta and therefore should not have been treated as the law of the case by Supreme Court. In the prior decision the Fourth Department stated that no one had questioned the number of hours the attorney (Reedy) had worked on the case as the attorney for the child. Supreme Court took that statement to mean the number of hours could not be reduced by the court on remittal:

Our prior order unequivocally directed the court to calculate the amount of Reedy's fees. An award of attorney's fees must be "calculated on the basis of the . . . hours actually and reasonably spent on the matter by . . . counsel, multiplied by counsel's reasonable hourly rate" … . In assessing the reasonableness of the hours spent by counsel, the issue "is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in the same time expenditures" … . Thus, upon remittal the court was, inter alia, to determine an award of attorney's fees that adequately reflected both the time spent and whether such time "was reasonably related to the issues litigated" … . Here, especially in light of Reedy's prior concession that the amount sought was excessive, we conclude that the court abused its discretion in fixing the amount of fees without determining the reasonableness of the number of hours included in Reedy's fee request … .

Contrary to respondent's contention, the court's statement in its earlier decision that "[n]o one has questioned the number of hours [Reedy] has claimed" did not become law of the case. The doctrine of law of the case "applies only to legal determinations that were necessarily resolved on the merits in a prior decision" … . Consequently, the doctrine does not apply where, as here, the court makes statements that are "mere dicta" … . Inasmuch as the court's ultimate ruling in its earlier decision was that Reedy was not entitled to compensation as a private pay AFC, the court's statement about the number of hours that he worked was dictum. Stefaniak v Zulkharnain, 2020 NY Slip Op 00961, Fourth Dept 2-7-20

NOTICE, FORECLOSURE.

ALTHOUGH PLAINTIFF BANK DID NOT PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, THE DEFENDANT DID NOT PROVE PLAINTIFF DID NOT COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

The Second Department determined that, although plaintiff bank did not prove compliance with the notice requirements of RPAPL 1304, defendant did not prove plaintiff failed to comply with the notice requirements of RPAPL 1304:

"Even in the face of a plaintiff's failure to establish, prima facie, that a notice was properly mailed on a motion for summary judgment on the complaint, . . . a defendant still has to meet its burden, on a cross motion for summary judgment dismissing the complaint, of establishing that the condition precedent was not fulfilled" … . …

… [W]hile RPAPL 1304 provides that "[t]he notices required by this section shall be sent . . . to the last known address of the borrower, and to the residence that is the subject of the mortgage" (RPAPL 1304[2]), the defendant did not allege, or provide any evidence, that the lender knew her address had changed. Wells Fargo Bank, N.A. v Tricario, 2020 NY Slip Op 01112, Second Dept 2-13-20

NOTICE, FORECLOSURE.

BY NOT SEEKING THE FULL AMOUNT OF THE DEBT IN THE 90-DAY NOTICE PLAINTIFF MAY HAVE DE-ACCELERATED THE DEBT MAKING THE FORECLOSURE ACTION TIMELY (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff, by demonstrating it did not demand the full debt, but rather demanded only the amount needed to cure the default, presented sufficient proof that the debt had not been accelerated, and therefore the action was timely, to warrant restoring the matter to the calendar. The action had been dismissed when plaintiff did not appear at a scheduled conference. Defendant had moved to dismiss alleging the debt had been accelerated and the action was time-barred:

Plaintiff … moved, pursuant to CPLR 5015(a)(1), to vacate the dismissal order and reinstate the claim. * * *

… [P]laintiff provided evidence that it took affirmative action to de-accelerate the mortgage, which would have stopped the running of the statute of limitations on the mortgage debt. The 90-day notice provided to defendant sought an amount lower than the accelerated amount, which may evidence an intent to de-accelerate. While seeking a lower amount in and of itself is not enough to establish, as a matter of law, that the 90-day notice "destroy[ed] the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt" … . it is sufficient to meet the "minimal showing" required on a motion to restore … . Federal Natl. Mtge. Assn. v Rosenberg, 2020 NY Slip Op 00814, First Dept 2-4-20

NOTICE, MUNICIPAL LAW.

TOWN DID NOT DEMONSTRATE IT DID NOT RECEIVE WRITTEN NOTICE OF THE ALLEGED SIDEWALK DEFECT IN THIS SLIP AND FALL CASE; THE TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the town's motion for summary judgment in this sidewalk slip and fall case should not have been granted because the town did not demonstrate it had not received written notice of the defect. The Second Department noted that Supreme Court properly rejected plaintiff's theory that inadequate lighting was a factor because that theory was not in the notice of claim and permission to amend the notice of claim was not sought by the plaintiff:

To prevail on its motion, it was the Town's burden to establish, prima facie, that no prior written notice of the alleged condition was given to either the Town Clerk or Town Commissioner of Highways (see Code of the Town of Hempstead § 6-3; Town Law § 65-a[2]). In support of its motion for summary judgment, the Town submitted, inter alia, the affidavit of a records access officer for the Town's Highway Department, wherein she specifically averred that she searched the Highway Department records, but did not state that she searched the Town Clerk's records. Thus, the Town failed to establish, prima facie, that neither the Town Clerk nor the Commissioner of Highways received prior written notice of the alleged condition … . Weinstein v County of Nassau, 2020 NY Slip Op 00890, Second Dept 2-5-20

PARTIES.

WIFE'S MOTION TO BE SUBSTITUTED FOR HER DECEASED HUSBAND TO ENFORCE THE PAYMENT OF THE SETTLEMENT IN HER HUSBAND'S SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's wife's (Jesenia's) motion pursuant to CPLR 1015 for leave to substitute herself for her deceased husband in this slip and fall case should have been granted. Defendant had settled the case and Jesenia was seeking payment:

Contrary to the Supreme Court's determination, the settlement of the action did not preclude the granting of a motion for substitution (see CPLR 1015[a]; 1021 …). "The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a)" … . Without substitution as a party plaintiff, Jesenia may not seek relief pursuant to CPLR 5003-a. CPLR 5003-a provides that if a settling defendant fails to pay the sum due under a settlement agreement within 21 days of tender of a duly executed release and a stipulation discontinuing the action, the settling plaintiff may, without further notice, pursue the entry of a judgment in the amount of the settlement, plus interest, costs, and disbursements … . Rivera v Skeen, 2020 NY Slip Op 01100, Second Dept 2-13-20

REARGUE, MOTION TO, APPEALS, JUDGES, SUA SPONTE.

PETITION ALLEGED MOTHER FAILED TO GIVE ADHD MEDICATION TO THE CHILDREN; THE NEGLECT PETITION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING; BECAUSE FAMILY COURT ADDRESSED THE MERITS OF THE MOTION TO REARGUE THE MOTION WILL BE DEEMED TO HAVE BEEN GRANTED RENDERING THE ORDER APPEALABLE AS OF RIGHT (THIRD DEPT).

The Third Department, reversing Family Court, determined the neglect proceeding should not have been dismissed without a hearing. The petition alleged mother was not providing ADHD medication to the children and the children were unable to focus in school as a result. The Third Department noted that, although the denial of a motion to reargue is not appealable, here Family Court addressed the merits of the motion to reargue and will be deemed to have granted the motion:

Although, generally, no appeal lies from an order denying a motion to reargue, where "the court actually addresses the merits of the moving party's motion, we will deem the court to have granted reargument and adhered to its prior decision — notwithstanding language in the order indicating that reargument was denied" … . Considering that Family Court scheduled and heard oral argument on the motion to reargue and, thereafter, issued a decision addressing the merits, we deem the court to have granted reargument, such that the December 2018 order adhering to the October 2018 order is appealable as of right … . …

"A parent's unwillingness to follow a recommended course of psychiatric therapy and medication, resulting in the impairment of a child's emotional health[,] may support a finding of neglect. However, what constitutes adequate medical care cannot be judged in a vacuum. The critical factor in this determination is whether the parent[has] provided an acceptable course of medical treatment for [his or her] child in light of all the surrounding circumstances" … . Here, the petition and corresponding affidavit stated, among other things, that respondent failed to properly administer prescribed ADHD medication to the two oldest children and failed to bring them to scheduled doctor appointments, and that those children were struggling in school and were unable to focus because they were not receiving the proper dosage of medication. The petition states that these allegations are supported, in part, by information received from the children and their school. Petitioner further alleged its concern that respondent was either taking the children's medication herself or selling it, along with the reasons for such concern. * * *

Despite the lack of allegations in the petition directly concerning the youngest child, the petition's allegations could support a finding of derivative neglect of that child. Matter of Aydden OO. (Joni PP.), 2020 NY Slip Op 01232, Third Dept 2-20-20

RES JUDICATA, NOTICE , MUNICIPAL LAW.

DISMISSAL OF THE ACTION SEEKING OVERTIME PAY IN FEDERAL COURT ON THE GROUND NO NOTICE OF CLAIM WAS FILED DID NOT PRECLUDE, PURSUANT TO THE DOCTRINE OF RES JUDICATA, AN ACTION IN SUPREME COURT SEEKING PERMISSION TO FILE A LATE NOTICE OF CLAIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the dismissal of the action concerning overtime pay in federal court, on the ground no notice of claim had been filed, did not preclude the action in Supreme Court seeking leave to file a late notice of claim:

… [T]he federal court dismissed the New York Labor Law claims for failure to file a timely notice of claim (see County Law § 52; General Municipal Law § 50-e). …

… [S]o much of the petition as sought leave to deem the late notice of claim timely served nunc pro tunc is not barred by the doctrines of collateral estoppel and res judicata. Although collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue which was raised and decided in a prior action or proceeding … , the issue of whether the petitioners could obtain leave to deem the late notice of claim timely served nunc pro tunc pursuant to General Municipal Law § 50-e(5) was not litigated or decided by the 2017 federal order. As the issue was not litigated, the petitioners are not precluded from raising it … .

Res judicata also is inapplicable to so much of the petition as sought leave to deem the late notice of claim timely served nunc pro tunc. "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" … . Since the federal court was without jurisdiction to determine whether the petitioners could obtain leave to deem the late notice of claim timely served nunc pro tunc (see General Municipal Law § 50-e[7]), the petitioners are not precluded by the doctrine of res judicata from seeking a determination of this issue … . Matter of Chodkowski v County of Nassau, 2020 NY Slip Op 01058, Second Dept 2-13-20

SANCTIONS, FAMILY LAW.

ALTHOUGH FATHER MISSED PLEADING AND DISCLOSURE DEADLINES, THERE WAS NO EVIDENCE THE OMISSIONS WERE WILLFUL; THEREFORE PRECLUDING FATHER FROM PRESENTING EVIDENCE IN THE CUSTODY MODIFICATION PROCEEDING WAS TOO SEVERE A SANCTION (THIRD DEPT).

The Third Department, reversing Family Court, determined father should not have been precluded from offering evidence in the modification of custody proceeding. Although father missed several court-imposed deadlines for responding papers and disclosure, the sanction was too severe:

… [A]lthough the father failed to comply with court-ordered deadlines for responsive pleadings and discovery, the record lacks any evidence of willfulness on the part of the father to warrant a drastic sanction of complete preclusion … . The father was represented by assigned counsel at the May 7, 2018 conference during which the initial discovery schedule was established. Shortly thereafter, the mother served a first demand for interrogatories

and combined discovery demand. … In the meantime, the father was assigned new counsel who appeared for the July 16, 2018 conference, at which time the deadlines were extended. At the fact-finding hearing, the father's counsel stated that delay in responding "is predominantly my fault and I will make that very explicitly clear on the record." In light of the preliminary conference orders, counsel also made the meritless assertion that the mother's discovery demands were ineffective for lacking court authorization. On the other hand, counsel did serve a response to the interrogatories — although that response was unverified. In light of the foregoing, we cannot conclude that the father's conduct was willful. Additionally, "modification of custody determinations requires a full and comprehensive hearing with the parties given the opportunity to present in open court evidence as to the best interest[s] of the child" … . Here, the preclusion of all of the father's testimony renders it difficult to determine the best interests of this child (see id.). Based on the foregoing, we remit the matter for a new hearing. Matter of Tara DD. v Seth CC., 2020 NY Slip Op 01227, Third Dept 2-20-20

SANCTIONS.

ALTHOUGH PLAINTIFF'S REPEATED FAILURE TO APPEAR FOR THE CONTINUATION OF HER DEPOSITION WAS WILLFUL, STRIKING THE COMPLAINT WAS TOO SEVERE A SANCTION (SECOND DEPT).

The Second Department, reversing (modifying Supreme Court) determined striking the complaint was too severe a sanction for plaintiff's repeated failure to appear for the continuation of her deposition:

… [T]he plaintiff's repeated failure to appear for her continued deposition, coupled with her failure to demonstrate a reasonable excuse for that failure, supports an inference that her conduct was willful … . The plaintiff proffered the health condition of her attorney as an excuse for failing to appear for the continued deposition. However, the plaintiff's attorney did not submit medical evidence or sufficient documentary facts to support the claim, or explain why his per diem attorney was unable to attend the deposition … .

Even so, given that the plaintiff had complied with disclosure except for completing the continued deposition relating to newly alleged injuries, we find that the striking of the complaint was too drastic a remedy.

Accordingly, we modify the order appealed from by deleting the provision thereof granting the defendant's motion, in effect, pursuant to CPLR 3126(3) to strike the complaint, and substitute therefor a provision granting the defendant's motion only to the extent of precluding the plaintiff from offering evidence at trial with respect

to any of the new injuries alleged in the plaintiff's supplemental verified bill of particulars … . Turiano v Schwaber, 2020 NY Slip Op 01200, Second Dept 2-19-20

SERVICE OF PROCESS, STATUTE OF LIMITATIONS.

MOTION TO EXTEND THE TIME TO SERVE DEFENDANT SHOULD HAVE BEEN GRANTED, DESPITE THE FACTS THAT THE FORECLOSURE ACTION HAD BEEN DISMISSED AND THE STATUTE OF LIMITATIONS HAD RUN (SECOND DEPT).

The Second Department, in an extensive opinion by Justice Leventhal, over a two-justice dissent, reversing Supreme Court, determined Supreme Court should have granted plaintiff's motion to extend the time to serve defendant pursuant to CPLR 306-b, despite the facts that the action had been dismissed and the statute of limitations had run. The action had been dismissed after a hearing to determine whether defendant had been served in this foreclosure action. At the time of the hearing the process server had died and plaintiff could not, therefore, meet its burden of proof:

… [W]e agree with the plaintiff that an extension of time to serve the defendant with the summons and complaint was warranted in the interest of justice. The action was timely commenced in December 2009, based on the defendant's alleged default that year in paying his indebtedness that was secured by the mortgage. The statute of limitations, however, had expired by the time the plaintiff moved pursuant to CPLR 306-b to extend the time for service … . The defendant had actual notice of the controversy. The Supreme Court, in its order dated December 17, 2013, wrote, among other things, that the defendant "is prepared to say anything and to conceal anything to stave off a foreclosure sale" and that "[i]t is clear that [the defendant] has been well-aware that a foreclosure action was pending. (The day before a previously-scheduled foreclosure sale, [the defendant] filed a Chapter 13 bankruptcy petition)." The plaintiff also demonstrated the existence of a potentially meritorious cause of action, and the lack of identifiable prejudice to the defendant attributable to the delay in service … . Moreover, as the interest of justice standard permits consideration of "any other relevant factor" … , we take into account that the process server's death prior to the hearing on the issue of service hampered the plaintiff's ability to meet its burden of proof at that hearing. State of New York Mtge. Agency v Braun, 2020 NY Slip Op 01107, Second Dept 2-13-20

SERVICE OF PROCESS, NOTICE, FORECLOSURE.

DEFENDANTS RAISED A QUESTION OF FACT ABOUT WHETHER THEY WERE SERVED WITH THE SUMMONS AND COMPLAINT AND PLAINTIFF FAILED TO PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this foreclosure action should not have been granted. Defendants raised a question of fact whether they were served with the summons and complaint and plaintiff failed to prove compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304:

… [T]he defendants submitted the affidavit of Vicki Erani, in which she expressly averred that she was never served. She also averred that, on Thursdays, which was the day of the week of the alleged service, she customarily was away from her residence, assisting her mother with errands. The defendants also submitted the affidavit of Vicki Erani's mother confirming that Vicki Erani spent every Thursday with her. The defendants also submitted evidence that, in 2016, this particular process server's application to renew his license as an individual process server had been denied by the New York City Department of Consumer Affairs on the basis that he had falsified affidavits of service. The defendants' submissions rebutted the presumption of proper service established by the process server's affidavit … . * * *

… [T]he plaintiff failed to establish, prima facie, that it complied with RPAPL 1304 because neither of the affidavits submitted by the plaintiff of two of its vice presidents asserted personal knowledge of the purported mailing and neither vice president made the requisite showing that she was familiar with the plaintiff's mailing practices and procedures to establish "proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" … . The plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened. Since the plaintiff failed to provide evidence of the actual mailing, or evidence of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure, the plaintiff failed to establish its strict compliance with RPAPL 1304 … . Citimortgage, Inc. v Erani, 2020 NY Slip Op 00843, Second Dept 2-5-20

SEVERANCE, MOTION FOR.

MOTIONS FOR SEVERANCE SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motions for severance should have been granted. The lawsuit was brought by healthcare employers against several insurance brokers to recover assessments levied by the Workers' Compensation Board for a $220 million shortfall in a Workers' Compensation trust:

The Supreme Court improvidently exercised its discretion in denying those branches of the appellants' motions which were pursuant to CPLR 603 to sever the action insofar as asserted against them. While all of the plaintiffs are seeking to recover damages pursuant to the same theories of liability, each separate plaintiff is asserting causes of action only against its respective broker with which it had a client-broker relationship. The appellants have persuasively argued that individual issues predominate, concerning particular circumstances applicable to each plaintiff and to each appellant … . In addition, a single trial of all the causes of action would prove unwieldy and confuse the trier of fact … . Accordingly, in the interests of convenience and avoidance of prejudice, the court should have granted … . Belair Care Ctr., Inc. v Cool Insuring Agency, Inc., 2020 NY Slip Op 01040, Second Dept 2-13-20

STANDING, FORECLOSURE.

PROOF OF POSSESSION OF THE NOTE WHEN THE ACTION WAS COMMENCED WAS HEARSAY; PLAINTIFF BANK DID NOT DEMONSTRATE STANDING TO FORECLOSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action. The assertions that the note was in plaintiff's possession when the action was commenced were hearsay and were not supported by business records:

… [T]he plaintiff, to establish its standing to commence this mortgage foreclosure action, submitted an affirmation of Amber A. Jurek, a lawyer with Gross Polowy, LLC (hereinafter Gross Polowy), the plaintiff's counsel. Jurek stated that she was familiar with Gross Polowy's records and record-keeping practices. Jurek stated that on January 28, 2015, Gross Polowy received the plaintiff's file, which included the original endorsed note. Gross Polowy commenced this action on the plaintiff's behalf on February 26, 2015. According to Jurek,

"[o]n that date, Gross Polowy, on behalf of Plaintiff, remained in physical possession of the collateral file, including the original endorsed Note dated March 20, 2012." The plaintiff also submitted the note, which bore an undated endorsement to the plaintiff. However, Jurek did not set forth any facts based on her personal knowledge to support her statement that the note in the plaintiff's file was the original endorsed note. Further, the plaintiff failed to attach the business records upon which Jurek relied in her affirmation, and since Jurek did not state that she personally witnessed Gross Polowy receive the plaintiff's file, her statement is inadmissible hearsay … .

The plaintiff also submitted an affidavit of April H. Hatfield, vice president of loan documentation for the plaintiff. Hatfield stated that she was familiar with the plaintiff's records and record-keeping practices. Although Hatfield attached the records upon which she relied, she did not state that the plaintiff had possession of the endorsed note at the time the action was commenced. Rather, she relied on Jurek's affidavit for that fact. Accordingly, Hatfield's affidavit was also insufficient to establish the plaintiff's standing.

Finally, the plaintiff did not attach a copy of the note to the complaint when commencing this action. Therefore, the plaintiff failed to establish, prima facie, that it had standing to commence this action … . Wells Fargo Bank, N.A. v Bakth, 2020 NY Slip Op 01382, Second Dept 2-26-20

STANDING, MUNICIPAL LAW.

PETITIONERS, SIMPLY BY VIRTUE OF BEING RESIDENTS OF THE VILLAGE, HAD STANDING TO CHALLENGE THE VILLAGE BOARD'S ALLEGED VIOLATION OF THE OPEN MEETINGS LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Rivera, determined petitioners, as members of the public and residents of the Village of Mamaroneck, had standing to challenge an alleged violation of the Open Meetings Law. Petitioners alleged the Village Board did not provide proper notice of the meeting, improperly entered a closed executive session and failed to accurately record the minutes of the meeting:

The purpose of the Open Meetings Law and the intent of the Legislature in enacting that law dictate that the harm or injury is the alleged unlawful exclusion of the public from a municipal meeting. The Open Meetings Law plainly confers upon the public the right to attend certain meetings of public bodies (see Public Officers Law § 100). Consistent therewith, the harm or injury of being excluded from municipal meetings that should be

open to the public is sufficient to establish standing in cases based upon alleged violations of the Open Meetings Law … . If the analysis and determination of the Supreme Court were allowed to stand, a petitioner/plaintiff would have to demonstrate an additional personal damage or injury to his or her civil, personal, or property rights in order to assert a violation of the Open Meetings Law. This would, in effect, interject a counterintuitive restriction upon the general citizenry's access and participatory freedoms to attend certain meetings of a public body. Such a requirement or condition would undermine, erode, and emasculate the stated objective of this statute, which was designed to benefit the citizens of this state and the general commonweal, assure the public's right to be informed, and prevent secrecy by governmental bodies. Matter of McCrory v Village of Mamaroneck Bd. of Trustees, 2020 NY Slip Op 00864, Second Dept 2-5-20

STATUTE OF LIMITATIONS, CONTINUOUS TREATMENT DOCTRINE.

CONTINUOUS TREATMENT DOCTRINE NOT AFFECTED BY A YEAR AND THREE MONTH GAP IN TREATMENT, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED IN THIS MEDICAL MALPRACTICE ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this medical malpractice action should not have been granted. Although the alleged malpractice (the failure to follow up on a detection of a mass) occurred in 2006, the continuous treatment doctrine tolled the statute of limitations. A year and three month gap in treatment did not preclude application of the continuous treatment doctrine:

Plaintiff raised an issue of fact as to whether Dr. Woo continuously treated the decedent for conditions related to renal cell carcinoma. Plaintiff's expert, Dr. Feit, opined that Dr. Woo treated the decedent for symptoms of back pain, hypertension, and insomnia, all of which were symptoms of and related to renal cell carcinoma, a diagnosis that should have been considered given the findings in the 2006 MRI of a renal mass.

Plaintiff sufficiently established that such treatment continued through the decedent's hospitalization in July 2012. * * *

The one-year-and-three month gap between the April 2011 visit and the July 2012 note does not preclude application of the continuous treatment doctrine … . Dookhie v Woo, 2020 NY Slip Op 00975, First Dept 2-11-20

STATUTE OF LIMITATIONS, DEBTOR-CREDITOR.

THE MORTGAGE-PAYMENT MODIFICATION AGREEMENT DID NOT CONSTITUTE AN ACKNOWLEDGMENT OF THE MORTGAGE DEBT WITHIN THE MEANING OF GENERAL OBLIGATIONS LAW 17-101; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START ANEW; THE FORECLOSURE ACTION IS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's trial payments as a condition for entering a mortgage-payment modification agreement (the Plan) did not amount to an acknowledgment of the debt such that the statute of limitations would start running anew:

" General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt'" … . "The writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it" … . "In order to demonstrate that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder'" … . * * *

… [T]he Plan did not constitute an "unconditional and unqualified acknowledgment of [the] debt" sufficient to reset the statute of limitations … . While the writing arguably acknowledged the existence of indebtedness, the defendant merely agreed to make three trial payments so as to receive a permanent modification offer. Any intention to repay the debt was conditioned on the parties reaching a permanent modification agreement, which condition did not occur. Under these circumstances, it cannot be said that the writing contained "nothing inconsistent with an intention on the part of the debtor to pay" the debt … . Indeed, the defendant represented in the Plan that he was unable to afford the mortgage payments. Nationstar Mtge., LLC v Dorsin, 2020 NY Slip Op 01354, Second Dept 2-26-20

STATUTE OF LIMITATIONS, FORECLOSURE.

ACCELERATION OF A DEBT DOES NOT AFFECT THOSE INSTALLMENT PAYMENTS DUE MORE THAN SIX YEARS BEFORE THE ACTION ON THE NOTES WAS COMMENCED, ACTION ON THOSE PAYMENTS IS TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that installment payments due prior to six years before the action on the notes could not be recovered despite the allegation that the debt had been accelerated:

Acceleration causes those future installment payments that are not yet due and payable to become immediately due and payable. It enables a lender to advance the due date for the future installment payments and thus, the statute of limitations runs on the balance of the debt … . It does not change the due date of those past due installment payments to that of the date of acceleration … .

Accordingly, plaintiffs demonstrated, prima facie, that defendant breached each of the notes by submitting evidence of the duly executed notes and defendant's failure to make payments in accordance with their payment terms … . Defendant, however, demonstrated prima facie, that the unpaid installment payments due prior to June 1, 2012 were time-barred. Cannell v Grail Partners, LLC, 2020 NY Slip Op 00973, First Dept 2-11-20

STAYS, JUDGES.

ORDERS ISSUED WHEN THE STAY PURSUANT TO CPLR 321(c) WAS IN EFFECT, DUE TO THE INABILITY OF PETITIONER'S COUNSEL TO CONTINUE FOR MEDICAL REASONS, SHOULD HAVE BEEN VACATED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Scheinkman, reversing Surrogate's Court, determined that orders issued when a stay was in effect pursuant to CPLR 321(c), due to the inability of petitioner's counsel to continue for medical reasons, should have been vacated. The petitioner is Oleg Cassini's (the fashion designer's) wife and the underlying matter is the heavily litigated (to say the least) administration of his estate. The opinion is overwhelming in its detail and cannot be fairly summarized here:

On these appeals, we consider the interplay between CPLR 321(b)(2), which permits the attorney of record for a party to withdraw by order of the court, with the court having the ability to stay proceedings pending substitution of new counsel, and CPLR 321(c), which automatically and effectively suspends all proceedings against a party whose attorney becomes incapacitated until 30 days after notice to appoint another attorney has been served upon that party. In this contentious, complex estate litigation, the Surrogate's Court determined, in the context of a motion by the attorneys for the petitioner to withdraw from representing her, that the attorney primarily responsible for the matter had become unable to continue to represent the petitioner due to health reasons. While the Surrogate's Court relieved counsel and provided for a 30-day stay of proceedings, it failed to require that the adverse parties serve the orders relieving counsel upon the litigant whose counsel was permitted to withdraw. The adverse parties themselves failed to serve the orders and also to serve the petitioner with a notice to appoint new counsel. However, several months later, the petitioner appeared with prospective new counsel at a court conference and was advised by the court that a trial would be conducted some six weeks later, regardless of whether the petitioner was present and regardless of whether the petitioner had representation. This was, under the circumstances, the practical equivalent of more than 30 days' notice to the litigant to appoint new counsel. In conformity with the controlling statutory and decisional authorities, and to protect the litigant's right to legal representation, we conclude that the judicial determinations rendered in between the Surrogate's Court determination of incapacity and its subsequent practical notification of a deadline to appoint counsel should be vacated. Matter of Cassini, 2020 NY Slip Op 01057, Second Dept 2-13-2o

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VERDICTS, DIRECTED VERDICT.

QUESTIONS OF FACT WHETHER WALKING ON THE REBAR GRID WAS AN INHERENT RISK OF THE JOB AND WHETHER THE GRID WAS A DANGEROUS CONDITION PRECLUDED A DIRECTED VERDICT IN THIS LABOR LAW 200 ACTION; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined questions of fact for the jury precluded the directed verdict (CPLR 4401) for the defendants in this Labor Law 200 action. Plaintiff was working as a surveyor at a construction site. He was walking across a rebar grid when one of his legs fell through. There were questions of fact whether walking on the rebar grid was an inherent risk of his job and whether the grid was a dangerous condition. Plaintiff's motion to set aside the directed verdict (CPLR 4404) should have been granted:

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work … . The duty, however, is subject to recognized

exceptions … . It does not extend to hazards which are part of or inherent in the very work which the contractor is to perform, or where the contractor is engaged for the specific purpose of repairing the defect … .

Here, in directing a verdict in favor of the defendants on the issue of liability, the Supreme Court improperly decided the factual questions of whether traversing an uncovered rebar grid was an inherent risk in the injured plaintiff's work as a surveyor, and whether the uncovered rebar grid was a dangerous condition under the circumstances presented. The record demonstrates that the plaintiffs' evidence made out a prima facie case, and that disputed factual issues existed which should have been resolved by the jury. Since the court failed to draw "every favorable inference" in favor of the plaintiffs and because the court resolved disputed issues of fact … , the matter must be remitted to the Supreme Court, Queens County, for a new trial on the issue of liability. Vitale v Astoria Energy II, LLC, 2020 NY Slip Op 01381, Second Dept 2-26-20

VERDICTS, MOTION TO SET ASIDE VERDICT.

JUDGE PROPERLY SET ASIDE THE VERDICT AWARDING $0 FOR FUTURE PAIN AND SUFFERING IN THIS LABOR LAW 240 (1) ACTION DESPITE PLAINTIFF'S FAILURE TO OBJECT TO THE VERDICT AS INCONSISTENT (FIRST DEPT).

The First Department determined Supreme Court properly set aside the verdict awarding $0 for pain and suffering in this Labor Law 240 (1) action, despite plaintiff's failure to object to the verdict as inconsistent:

… [P]laintiff's failure to object to the jury's award of $0 for both past and future pain and suffering as inconsistent with the jury's awards for past and future lost earnings and future medical expenses did not preclude the court from deciding whether " the jury's failure to award damages for pain and suffering [wa]s contrary to a fair interpretation of the evidence and constitute[d] a material deviation from what would be reasonable compensation'" … . Natoli v City of New York, 2020 NY Slip Op 00988, First Dept 2-11-20

VERDICTS, MOTION TO SET ASIDE VERDICT.

THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE IMPLIED ASSUMPTION OF RISK DOCTRINE IN THIS SKIING ACCIDENT CASE, DEFENDANTS' MOTION TO SET ASIDE THE $3,000,000/$15,000,000 VERDICT SHOULD HAVE BEEN GRANTED; THE DAMAGES AMOUNT IS NOT SUPPORTED BY THE RECORD (SECOND DEPT).

The Second Department, ordering a new trial, determined defendants' motion to set aside the verdict should have been granted. The jury should have been instructed on implied assumption of risk in this skiing accident case involving a nine-year-old novice skier. Plaintiff struck a pole and fractured her femur. The jury awarded $3,000,000 in past damages and $15,000,000 in future damages. If defendants are found liable in the second trial, there will be a trial on damages unless the plaintiff stipulates to $950,000 past damages and $1,250,000 future damages:

… [O]n their motion for summary judgment dismissing the complaint, the movants failed to establish their entitlement to judgment as a matter of law on the ground that the action was barred by the doctrine of assumption of the risk … . The evidence submitted in support of the motion demonstrated that the injured plaintiff was a nine-year-old novice skier on a bunny slope, which is a part of the ski area specifically designed for beginners who are learning how to ski. The evidence submitted also included the injured plaintiff's deposition testimony that she believed it was safer to continue beyond the devices than to be struck by a passing skier if she fell. The devices warned skiers to slow down but did not warn them to stop. These facts presented a triable issue of fact as to whether the injured plaintiff was aware of and fully appreciated the risk involved in downhill skiing and the terrain of the bunny slope such that she assumed the risk of injury … .

At the close of the trial on the issue of liability, the Supreme Court denied the defendants' request to instruct the jury on express assumption of the risk and implied assumption of the risk. While there was no evidence elicited at trial that the injured plaintiff expressly assumed the risk of injury, the evidence did support an instruction on implied assumption of risk. Specifically, a factual issue was presented regarding whether the injured plaintiff assumed the risk of skiing in the area where the PVC pipe was located. Although the injured plaintiff testified that the PVC pipe "blended with the snow," the pipe had a brightly colored guide-rope attached to it on the day of the accident and was behind warning devices past which the injured plaintiff skiied … . Therefore, the court should have granted the defendants' request to instruct the jury on implied assumption of the risk. Under the

facts of this case, the failure to instruct the jury on implied assumption of the risk is an error warranting a new trial … . Zhou v Tuxedo Ridge, LLC, 2020 NY Slip Op 01206, Second Dept 2-19-20

VERDICTS, MOTION TO SET ASIDE VERDICT. VERDICT AWARDING $0 DAMAGES FOR FUTURE AND PAIN SUFFERING SHOULD HAVE BEEN SET ASIDE, $100,000 WOULD BE REASONABLE COMPENSATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the damages verdict awarding $0 for future pain and suffering should have been set aside:

The jury's award of damages for past pain and suffering deviates materially from what would be reasonable compensation (see CPLR 5501[c]). Plaintiff sustained a bimalleolar ankle fracture and underwent two surgeries, the first involving implantation of hardware in the ankle and the second involving arthroscopy and removal of the hardware and some scar tissue. Comparing this matter to similar cases … , we find that $275,000 is reasonable compensation … .

The award for future damages also deviates materially from what would be reasonable compensation (CPLR 5501[c]). Defendant's expert agreed that plaintiff's injury is permanent and that he has developed arthritis in his left ankle, which may require treatment in the future, including the possibility of an ankle replacement. In light of the foregoing, we find that $100,000 for future pain and suffering is reasonable compensation … . Thomas v New York City Hous. Auth., 2020 NY Slip Op 01001, First Dept 2-13-20

VISITATION PETITIONS, FAMILY LAW.

FATHER'S INCARCERATION CONSTITUTED A CHANGE IN CIRCUMSTANCES RE FATHER'S VISITATION/CONTACT PETITIONS; HEARING REQUIRED TO DETERMINE BEST INTERESTS OF THE CHILD; VISITATION PETITIONS NEED NOT BE VERIFIED (THIRD DEPT).

The Third Department, reversing Family Court, determined: (1) father's incarceration constituted a change in circumstances; (2) father's petition for visitation and contact triggered the need for a hearing to determine the

best interests of the child; and (3) verification of a visitation petition is not required by CPLR 3020 or Family Ct Act article 6:

… [W]e find that the father demonstrated a change in circumstances arising from his incarceration … .

We note that "[v]isitation with a noncustodial parent, even one who is incarcerated, is presumed to be in the best interests of the child[]" . Further, "as a general matter, custody determinations … be rendered only after a full and plenary hearing" … . This guideline applies to requests for visitation and contact, as presented here … . Accordingly, in the absence of sufficient information allowing a comprehensive review of the child's best interests, Family Court erred in dismissing the petitions without a hearing … . Finally, it was not necessary for Family Court to dismiss the petitions because they were unsworn, given that verification of a visitation petition is not required by either CPLR 3020 or Family Ct Act article 6 … . Matter of Shawn MM. v Jasmine LL., 2020 NY Slip Op 01223, Third Dept 2-20-20