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An Organized Compilation of Summaries of Selected Decisions Addressing Civil Procedure Released in March 2020 and Posted on the New York Appellate Digest Website. 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.

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The Fourth Department determined Supreme Court properly ruled that Georgia law controlled the action which alleged Bank of America's employees or agents notarized documents with false signatures. The torts were alleged to have occurred in Georgia. Plaintiff was a domiciliary of New York and Bank of America was a domiciliary of North Carolina:

If the conflicting laws regulate conduct, the law of the place of the tort applies because of the "locus jurisdiction's interests in protecting the reasonable expectations of the parties" and "the admonitory effect that applying its law will have on similar conduct in the future" … . Where [, as here], however, the conflicting laws relate to the allocation of losses, then "considerations of the State's admonitory interest and party reliance are less important" … . Nevertheless, pursuant to the third rule set forth in Neumeier v Kuehner (31 NY2d 121, 128 [1972]), i.e., where the parties are domiciled in different states with conflicting laws, the law of the place of the tort normally applies, unless displacing it "will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants" … . We conclude that plaintiff "failed to establish that the exception applies to warrant a departure from the locus jurisdiction rule" … , and thus the third Neumeier rule warrants the application of the law of Georgia in this action … . Durham Commercial Capital Corp. v Arunachalam, 2020 NY Slip Op 02024, Fourth Dept 3-20-20

DECISIONS, ORDERS.

WHERE THERE IS A DISCREPANCY THE ORDER MUST BE CONFORMED WITH THE DECISION (FOURTH DEPT).

The Fourth Department noted a discrepancy between the decision and the order. Therefore the order was conformed to the decision:

… [W]e note that, in its bench decision, Family Court determined that the child ,,, was derivatively neglected. Inasmuch as there is a conflict between the decision and the order in appeal No. 1, that order must be conformed to the decision (… see generally CPLR 5019 [a]). We therefore modify the order … by vacating that part of the order determining that the child was derivatively abused and substituting therefor a determination that the child was derivatively neglected. Matter of Aaren F. (Amber S.), 2020 NY Slip Op 01739, Fourth Dept 3-13-20

DEFAULT, APPEALS, ATTORNEYS.

BECAUSE FATHER'S ATTORNEY APPEARED IN THE CUSTODY PROCEEDING FATHER WAS NOT IN DEFAULT AND THE ORDER WAS THEREFORE APPEALABLE (FOURTH DEPT).

The Fourth Department determined father was not in default because his attorney appeared. Therefore the custody order was appealable:

Petitioner father commenced this proceeding seeking to modify a prior order of custody that, inter alia, awarded sole legal and physical custody of the subject child to respondent mother. The father now appeals from an order that, inter alia, continued sole legal and physical custody of the subject child with the mother.

We agree with the father that Family Court erred in entering the order upon his default based on his failure to appear in court. The record establishes that the father "was represented by counsel, and we have previously determined that, [w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" … . Matter of Williams v Richardson, 2020 NY Slip Op 01975, Fourth Dept 3-20-20

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The Second Department, reversing Supreme Court, determined Supreme Court should not have ordered the return of the down payment to the buyer (Berman) pursuant to the purchase contract in the context of granting a preliminary injunction. First, by granting the ultimate relief requested Supreme Court had effectively granted summary judgment before issue was joined. Second the criteria for a preliminary injunction were not met. The purchase contract allowed the termination of the agreement and the return of the down payment if three conditions were met. Berman alleged two of the conditions were met and the third was impossible:

Berman failed to demonstrate his entitlement to temporary injunctive relief pursuant to CPLR 6301, as he failed to establish any of the three required elements for such relief: (1) likelihood of ultimate success on the merits,

(2) irreparable injury absent granting of a preliminary injunction, (3) and a balancing of equities in his favor … . …

Berman failed to demonstrate irreparable injury, as the loss of a down payment is not an irreparable harm since the injured party could be made whole by a money judgment … . …

While Berman contends that it was impossible to obtain a Phase II Assessment within the required time, he failed to demonstrate a likelihood of success in establishing that it was impossible to obtain the report. …

Finally, Berman failed to show that the balancing of equities was in his favor. Berman v TRG Waterfront Lender, LLC, 2020 NY Slip Op 01902, Second Dept 3-18-20

JUDGES, SUA SPONTE.

THE JUDGE SHOULD NOT HAVE DISMISSED CAUSES OF ACTION ON A GROUND (STANDING) NOT RAISED BY A PARTY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed causes of action for lack of standing when that issue was not raised by the parties:

We thus conclude that the court erred in sua sponte reaching the issue of standing with respect to the second and third causes of action … . Standing "is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation" … . Inasmuch as the … respondents' cross motion with respect to the second and third causes of action was not based on petitioners' alleged lack of standing, there was no basis for the court to reach that issue. Matter of Barbeau v Village of LeRoy, 2020 NY Slip Op 01732, Fourth Dept 3-13-20

JUDGES, SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, APPOINTED A RECEIVER BECAUSE THAT RELIEF WAS NOT REQUESTED BY A PARTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, appointed a receiver and should not have referred an issue to a court attorney referee in this dispute between plaintiff condominium boards and homeowners association and their management company and attorney. The complaint alleged breach of contract and negligence:

The Supreme Court improvidently exercised its discretion in, sua sponte, appointing a receiver to manage the plaintiff entities, since the complaint did not seek the appointment of a receiver, no "person having an apparent interest" in the plaintiff entities sought such relief, and there is no evidence that such a drastic remedy was warranted (CPLR 6401[a] …).

The Supreme Court should not have referred the issue of which Board of Managers and/or which management company shall be implemented to manage the affairs of the plaintiffs to a court attorney referee to hear and report, since the defendants lack standing to challenge the alleged violations of the plaintiffs' bylaws in the elections of new board members (see N-PCL 618 …). Further, the reference of the issue of attorney's fees was premature … . Board of Mgrs. of Golfview Condominium I v Island Condo Mgt. Corp., 2020 NY Slip Op 02070, Second Dept 3-25-20

MUNICIPAL LAW, ADMINISTRATIVE LAW, JURISDICTION, JUDGES.

CORRESPONDENCE BETWEEN THE TOWN AND THE PROPERTY OWNER AMOUNTED TO AN AGREEMENT TO AGREE, NOT AN ENFORCEABLE SETTLEMENT AGREEMENT ALLOWING CONSTRUCTION; SUPREME COURT'S DIRECTIVES TO THE TOWN ENCROACHED UPON THE TOWN'S ADMINISTRATIVE AUTHORITY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined: (1) the correspondence between the property owner (PCP) and the town concerning proposed construction created an agreement to agree, not an enforceable settlement agreement allowing construction; and (2), Supreme Court's directing what the town could and could not consider with respect to the construction project encroached upon the town's administrative authority:

… [T]he letters that the court found to have memorialized the settlement agreement did not contain all the material terms of the settlement and constituted no more than an agreement to agree … . [The town] stated therein only that it was "now in a position to agree to a settlement of the mass and scale issues," but that first it would "need to receive, review and approve all of the items that it normally reviews in connection with any application it receives." Any agreement was further conditioned on [the town's] receipt of additional documentation from PCP, including "an accurate, to-scale site plan" and further roof specifications … .

We further conclude that, in the absence of an enforceable settlement agreement, the court's hearing on the issues of mass and scale, subsequent decision rendering findings of fact related to PCP's new application for a certificate of approval, and remittal to [the town] for consideration of that application with specific directives regarding what [the town] could and could not consider were impermissible intrusions into respondents' administrative domain … . Matter of Pittsford Canalside Props., LLC v Village of Pittsford Zoning Bd. of Appeals, 2020 NY Slip Op 01812, Fourth Dept 3-13-20

MUNICIPAL LAW, ARTICLE 78.

VILLAGE BOARD WAS NOT REQUIRED TO CONSIDER AN APPLICATION FOR THE AMENDMENT OF A ZONING ORDINANCE WHICH IS A LEGISLATIVE FUNCTION NOT SUBJECT TO AN ARTICLE 78 REVIEW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the village board properly declined to consider an application to rezone the subject property, which was an exercise of a legislative function:

"[T]he amendment of a zoning ordinance is a purely legislative function" … . The Village Board is vested with discretion to amend its zoning ordinance, and it is not required to consider and vote upon every application for a zoning change (see Village Law § 7-708 …). Thus, in the present case, the Village Board's determinations not to consider the plaintiffs/petitioners' applications were a legislative function not subject to review under CPLR article 78 … . Matter of Hampshire Recreation, LLC v Village of Mamaroneck, 2020 NY Slip Op 02062, Second Dept 3-25-20

NECESSARY PARTIES, MOTIONS TO DISMISS.

INSTEAD OF DISMISSING THE COMPLAINT FOR FAILURE TO NAME A NECESSARY PARTY SUPREME COURT SHOULD HAVE ORDERED THE PARTY SUMMONED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the motion to dismiss for failure to name a necessary party should not have been granted. Rather the court should have ordered the party summoned:

… [T]he Supreme Court should have denied that branch of [defendant's] motion which was pursuant to CPLR 3211(a)(10) to dismiss the complaint insofar as asserted against her for failure to join the estate … as a defendant. "When a [necesssary party] has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned" (CPLR 1001[b]). Accordingly, we remit the matter … for the joinder of the administrator of the estate … and for further proceedings consistent herewith … . U.S. Bank Trust, N.A. v Gedeon, 2020 NY Slip Op 01660, Second Dept 3-11-20

NOTE OF ISSUE.

VACATING THE NOTE OF ISSUE RETURNS THE CASE TO THE PRE-NOTE OF ISSUE DISCOVERY STAGE, NO NEED TO MAKE A MOTION TO RESTORE THE ACTION TO THE TRIAL CALENDAR; THE MOTION TO EXTEND THE TIME TO FILE A NOTICE OF ISSUE, CITING LAW OFFICE FAILURE, SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that vacating the note of issue automatically removes the case from the trial calendar and restores the action to the pre-note of issue discovery stage. The Second Department also determined the motion to extend the time to file a note of issue, citing law office failure, should have been granted:

The Supreme Court should have denied, as unnecessary, that branch of the plaintiff's motion which was to restore the action to the active calendar … . Since the note of issue … was vacated, thereafter, the action was restored to the pre-note of issue discovery stage … . Because no note of issue had been filed, the action was not on the trial calendar. Therefore, the court's action of marking the action "disposed" … , after the plaintiff failed to file and serve a note of issue by the court-ordered deadline, did not dismiss the action … . For the same reason, contrary to the defendant's contention, CPLR 3404 was inapplicable … . As "this action was never properly dismissed, there was no need for a motion to restore" … .

The Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was to extend his time to file a note of issue. CPLR 2004 allows a court to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown." Here, the plaintiff established good cause for his delay in completing discovery and filing a note of issue based on law office failure, among other things … . Ryskin v Corniel, 2020 NY Slip Op 01658, Second Dept 3-11-20

PLEADINGS, FRAUD, CIVIL CONSPIRACY.

PLAINTIFFS STATED A CAUSE OF ACTION FOR FRAUD AND PROPERLY ALLEGED A CIVIL CONSPIRACY (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiffs had, inter alia, stated a cause of action for fraud and properly alleged a related civil conspiracy. Plaintiffs are owners of commercial buildings and

defendants included an employee of one of the plaintiffs and several contractors who did work for the plaintiffs. Plaintiffs alleged invoices for work were inflated and the excess payments were split among defendants. With respect to the fraud and civil conspiracy causes of action, the First Department wrote:

To state a cause of action for fraud, a plaintiff must allege "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" … . Such a claim must be pleaded with particularity (CPLR 3016[b] …). "[A]ctual knowledge[, however,] need only be pleaded generally, [given], particularly at the prediscovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind" … . …

Here, we find that plaintiffs sufficiently pleaded fraud causes of action with the information available to them in a pre-discovery posture … . They alleged the creation and presentation for payment to plaintiffs of false, forged or inflated purchase orders; that defendants "knew that the work described on the bogus purchase orders or invoices and other contract forms was either falsely stated, overcharged or not provided, and knew that Plaintiffs would rely on these falsified or doctored purchase orders to make unwarranted payments"; that plaintiffs "relied on these purchase orders, invoices and other contract forms in making unnecessary payments to . . . defendants" to their detriment; that such reliance was "justifiable" and "reasonable"; and that plaintiffs were damaged as a result of defendants' fraud. After discovery, plaintiffs can amplify their pleadings and defendants can renew their motions. But at this stage, plaintiffs should be allowed to probe defendants' knowledge of the alleged fraudulent scheme. …

Although New York does not recognize an independent cause of action for civil conspiracy, allegations of civil conspiracy are permitted "to connect the actions of separate defendants with an otherwise actionable tort" … . To establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury … . Plaintiffs pleaded the underlying fraud against defendants …, as well as an agreement that "[d]efendants acted in concert and conspired to defraud [p]laintiffs' business." As a result, plaintiffs were damaged because they paid monies to the defendants "for non-existent, unnecessary, and/or overpriced construction and maintenance services." Cohen Bros. Realty Corp. v Mapes, 2020 NY Slip Op 01440, First Dept 3-3-20

REFEREES, FORECLOSURE.

THE REFEREE'S FAILURE TO PROVIDE NOTICE AND A HEARING TO THE DEFENDANT DID NOT REQUIRE REVERSAL OF THE JUDGMENT OF FORECLOSURE (SECOND DEPT).

The Second Department determined the referee's failure to provide notice and a hearing to the defendant in this foreclosure action did not require reversal of the judgment of foreclosure:

It is undisputed that the referee failed to provide notice to the defendant pursuant to CPLR 4313, or to hold a hearing on the issues addressed in the referee's report. However, as long as a defendant is not prejudiced by the inability to submit evidence directly to the referee, a referee's failure to notify a defendant and hold a hearing is not, by itself, a basis to reverse a judgment of foreclosure and sale and remit the matter for a hearing and a new determination of amounts owed … . Where, as here, a defendant had an opportunity to raise questions and submit evidence directly to the Supreme Court, which evidence could be considered by the court in determining whether to confirm the referee's report, the defendant is not prejudiced by any error in failing to hold a hearing … . Bank of N.Y. Mellon v Viola, 2020 NY Slip Op 01895, Second Dept 3-18-20

RESTORE, MOTION TO, FORECLOSURE.

THE BANK'S MOTION TO RESTORE THE 2009 FORECLOSURE ACTION WHICH HAD BEEN ADMINISTRATIVELY, BUT NOT FORMALLY, DISMISSED SHOULD HAVE BEEN GRANTED; THE BANK HAD PREVIOUSLY STATED ITS INTENTION TO DISCONTINUE THE 2009 FORECLOSURE BUT THE MOTION TO RESTORE WAS NOT PRECLUDED BY THE JUDICIAL ESTOPPEL DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank should have been allowed to restore a 2009 foreclosure action which had been administratively, but not formally, dismissed. The court noted that the bank's prior statement of its intention to discontinue the 2009 action did not trigger the judicial estoppel doctrine:

While, in an effort to successfully prosecute the 2015 foreclosure action, the Bank represented that it would seek to discontinue the 2009 action, it is not judicially estopped from changing its position. " [A] party who assumes

a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed'" … . The Bank did not obtain a favorable judgment in the 2015 foreclosure action.

The Supreme Court should have granted that branch of the Bank's motion which was to restore the 2009 action to the active calendar. The 2009 action was never formally dismissed, as the marking-off procedures of CPLR 3404 do not apply to pre-note of issue actions such as this one … . Since the 2009 action could not properly be marked off pursuant to CPLR 3404, the Bank was not required to move to restore within any specified time frame and was not obligated to demonstrate a reasonable excuse and a potentially meritorious claim … . Further, there was neither a 90-day notice pursuant to CPLR 3216 … , nor an order dismissing the complaint pursuant to 22 NYCRR 202.27 … . Finally, [defendant] does not contend that the 2009 action was dismissed pursuant to CPLR 3215(c). Deutsche Bank Natl. Trust Co. v Gambino, 2020 NY Slip Op 01476, Second Dept 3-4-20

SERVICE OF PROCESS.

A HEARING IS NECESSARY TO DETERMINE WHETHER SERVICE OF THE SUMMONS AND COMPLAINT ON THE DOORMAN OF DEFENDANT'S APARTMENT BUILDING WAS VALID (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a hearing should have been held about the validity of the service of the summons and complaint; i.e., whether service on the doorman of the defendant's (Freeman's) apartment building was valid service:

The plaintiff asserted that service of process was properly made pursuant to CPLR 308(2), relying on an affidavit of service indicating that service upon Freeman was effected by delivering the summons and complaint to a "doorman" in the apartment building where Freeman resided and by subsequently mailing the summons and complaint to Freeman … . While the affidavit of service constituted prima facie evidence of service of the summons and complaint pursuant to CPLR 308(2) … , the evidence submitted by Freeman in support of her motion, inter alia, to dismiss the complaint sufficiently rebutted the presumption of proper service to warrant a hearing. Freeman's submissions included specific and detailed averments, as well as the affidavit of a security guard who worked in Freeman's apartment building. The security guard averred that the summons and complaint were delivered to him at his desk on … , but that he was not authorized to receive packages or deliveries, that he did not deny the process server access to Freeman's apartment, and that he did not inform Freeman of the delivery. Under these circumstances, the court should have conducted a hearing to determine whether the

security guard was a person of suitable age and discretion within the meaning of CPLR 308(2), and whether the outer bounds of Freeman's dwelling place extended to the security guard's desk in her apartment building … . Edwards-Blackburn v City of New York, 2020 NY Slip Op 01907, Second Dept 3-18-20

SERVICE OF PROCESS.

SELF-SERVING AFFIDAVIT FROM DEFENDANT DID NOT REBUT THE PRESUMPTION OF THE VALIDITY OF THE SERVICE OF PROCESS (FOURTH DEPT).

The Fourth Department determined defendant did not rebut the presumption of valid service of process:

… [P]laintiff submitted, in addition to evidence establishing the default of defendant and "proof of the facts constituting the claim" (CPLR 3215 [f] …), the affidavit of a process server, who averred that he served defendant by delivering a copy of the summons and complaint to the office of the Secretary of State pursuant to Business Corporation Law § 306 (b) (1), and an affidavit of additional mailing establishing that a copy of the summons and complaint was also sent to defendant's mailing address pursuant to CPLR 3215 (g) (4). In opposition, defendant asserted that it was entitled under CPLR 317 to be relieved from its default in pleading, and defendant submitted an affidavit in which its president averred, insofar as relevant to the issue of service, that defendant had not received the summons and complaint prior to receipt of plaintiff's initial notice of motion for a default judgment.

… [I]n order to be relieved of a default in pleading under CPLR 317, defendant was required to show, among other things, that it did not receive actual notice of the process in time to defend the action … . It is well settled that a "process server's affidavit constitute[s] prima facie evidence of proper service on the Secretary of State" … , and thus defendant was required to rebut the presumption of proper service … . Here, the "self-serving affidavit [of defendant's president], which merely denied receipt, is insufficient to rebut [that] presumption" … . Lechase Constr. Servs., LLC v JM Bus. Assoc. Corp., 2020 NY Slip Op 01977, Fourth Dept 3-20-20

SPOLIATION.

CITY DEFENDANTS SHOULD HAVE BEEN SANCTIONED FOR FAILURE TO PRESERVE PRE-ACCIDENT POLICE COMMUNICATIONS IN THIS POLICE-VEHICLE TRAFFIC ACCIDENT CASE BECAUSE THE CITY DEFENDANTS WERE AWARE THEY WOULD PROBABLY ASSERT AN EMERGENCY DEFENSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the City defendants should have been sanctioned for spoliation of evidence. The action stemmed from a traffic accident involving a police vehicle and the city defendants were put on notice they would assert an emergency defense by the notice of claim. But the pre-accident police communications were not preserved:

Defendants had an obligation to preserve the pre-accident audio recordings at the time they were destroyed because the Police Department (NYPD) internal report and plaintiff's notice of claim, which attached the public police accident report, put defendants on notice that they would likely assert an emergency operation defense. Therefore, pre-accident audio communication between the dispatcher and the NYPD vehicle or officers involved in the accident should have been preserved in case it was needed for future litigation … . Under the circumstances presented, the imposition of an adverse inference charge would be an appropriate sanction … . Sanchez v City of New York, 2020 NY Slip Op 01970, First Dept 3-19-20

STANDING, LAND USE, ZONING.

PLAINTIFF DID NOT HAVE STANDING TO CONTEST PERMITS GRANTING THE CONVERSION OF DEFENDANT'S PROPERTY FROM MANUFACTURING TO RETAIL; PROXIMITY TO DEFENDANT'S PROPERTY WAS NOT ENOUGH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not have standing to contest the defendant City's issuing permits allowing defendant CAB to convert property from manufacturing to retail. Plaintiff operated a grocery store 450 feet from CAB's property. The Second Department held proximity was not enough to confer standing on plaintiff:

"In land use matters, . . . [the plaintiff] must show that it would suffer direct harm, injury that is in some way different from that of the public at large'" … . "An allegation of close proximity may give rise to an inference of damage or injury that enables a nearby property owner to challenge a land use decision without proof of actual injury" … . "However, this does not entitle the property owner to judicial review in every instance" … . "Rather, in addition to establishing that the effect of the proposed change is different from that suffered by the public generally, the [property owner] must establish that the interest asserted is arguably within the zone of interests the statute protects" … . Thus, "even where [the property owner's] premises are physically close to the subject property, an ad hoc determination may be required as to whether a particular [property owner] itself has a legally protectable interest so as to confer standing" … .

Here, the plaintiff alleged standing on the basis of proximity, issues and interests within the zone of interests, and adverse impacts. We disagree with the Supreme Court's finding that the plaintiff had standing to commence this action. The plaintiff failed to allege any harm distinct from that of the community at large … . 159-MP Corp. v CAB Bedford, LLC, 2020 NY Slip Op 01892, Second Dept 3-18-20

STANDING, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), FORECLOSURE.

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND DID NOT PRESENT NON-HEARSAY EVIDENCE OF STANDING IN THIS FORECLOSURE ACTION, CRITERIA EXPLAINED IN SOME DETAIL (SECOND DEPT).

The Second Department, in an extensive decision explaining the relevant issues and analysis in some depth, determined plaintiff bank did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 did not demonstrate standing to bring the foreclosure action:

… [T]he plaintiff failed to submit an affidavit of mailing or proof of mailing by the United States Postal Service evidencing that it properly mailed notice to the defendant pursuant to RPAPL 1304. Instead, the plaintiff relied on an affidavit of Rashad Blanchard, who was employed as a loan analyst by the parent company of the plaintiff's loan servicer, and copies of the purported notices. The plaintiff submitted only one letter that purported to constitute the statutorily required 90-day notice of default … . Although the letter contained the statement "sent via certified mail," with a 20-digit number below it, no receipt or corresponding document issued by the United States Postal Service was submitted proving that the letter was actually sent by certified mail more than 90 days

prior to commencement of the action. The plaintiff also failed to submit any documentary evidence that notice was sent by first-class mail. Further, Blanchard did not aver that the notice was sent in the manner required pursuant to RPAPL 1304, i.e., by certified mail and first-class mail. Moreover, since he did not aver that he personally mailed the notice, or that he was familiar with the mailing practices and procedures of American Home Mortgage Servicing, Inc., the entity that purportedly sent the notices, he did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . * * *

[Vice President] Reyes's affidavit failed to establish a sufficient foundation for the admission of a business record pursuant to CPLR 4518(a) because, although he recited that the records upon which he relied were "regularly maintained by [the plaintiff] in the ordinary course of its business," he "did not indicate that they were made by their author (or authors, whoever they might be) pursuant to an established procedure for the routine, habitual, systematic making of records that would qualify them as trustworthy accounts," or that they "were the records regularly relied on in the business" … . Reyes also failed to indicate "that the record [was] made at or about the time of the event being recorded—essentially, that recollection [was] fairly accurate and the habit or routine of making the entries assured" … . …

… .[T]o the extent that Reyes's purported knowledge of the date the plaintiff received the original note was based upon his review of unidentified business records maintained by the plaintiff, "[his] affidavit constituted inadmissible hearsay and lacked probative value" … . Deutsche Bank Natl. Trust Co. v Dennis, 2020 NY Slip Op 02039, Second Dept 3-25-20

STATUTE OF FRAUDS, SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED BECAUSE REFERENCE TO EXTRINSIC EVIDENCE WAS REQUIRED; STATUTE OF FRAUDS DID NOT REQUIRE DISMISSAL BECAUSE IT WAS ALLEGED THERE WAS NEW CONSIDERATION FOR THE PROMISE TO PAY THE DEBT OF ANOTHER (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the invoices submitted by plaintiff do not qualify for CPLR 3213 relief on the account stated cause of action because reference to extrinsic evidence

was required, and defendants were not were not entitled to dismissal based upon the statute of frauds because there was an allegation of new consideration flowing from plaintiff to defendants:

Plaintiff's motion for summary judgment in lieu of complaint should have been denied. The invoices do not qualify for CPLR 3213 relief because it is necessary to consult extrinsic evidence aside from the invoices and proof of nonpayment in order for plaintiff to establish its entitlement to summary judgment on its account stated claim … . Plaintiff has failed to establish, based on the invoices themselves, that defendants, as opposed to nonparty Impact Sports, are liable based on an account stated claim.

Defendants are not entitled to dismissal of the action based on the statute of frauds (GOL § 5-701[a][2]) as plaintiff has sufficiently alleged that there was new consideration flowing from plaintiff to defendants, which is an exception to the requirement that a promise to pay the debt for another be in writing … . Peter R. Ginsberg Law, LLC v J&J Sports Agency, LLC, 2020 NY Slip Op 01468, First Dept 3-3-20

STATUTE OF LIMITATIONS, INTENTIONAL TORTS.

TEACHER'S LAWSUIT AGAINST STUDENTS ALLEGED INTENTIONAL, NOT NEGLIGENT, CONDUCT AND WAS THEREFORE TIME-BARRED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff-teacher's suit against two students alleged intentional conduct (battery), not negligent conduct, and was therefore time-barred. Plaintiff was pushed into a locker by the students who were fighting each other. Although the students did not intend to touch the teacher, the doctrine of transferred intent applied:

Defendant met her initial burden by establishing that plaintiff was injured as a result of intentional conduct that constituted a battery and not negligent conduct … . "A valid claim for battery exists where a person intentionally touches another without that person's consent" … . " The intent required for battery is intent to cause a bodily contact that a reasonable person would find offensive'; there is no requirement that the contact be intended to cause harm' " … . The deposition testimony of plaintiff and defendants submitted in support of the motion established that defendants intentionally caused offensive bodily contact with each other by engaging in a physical fight … . Although defendants did not intend to make physical contact with or to injure plaintiff, the contact that resulted in plaintiff's injuries was nevertheless intentional under the doctrine of "transferred intent" … . …

Defendant thus established that this action is barred by the one-year statute of limitations applicable to intentional torts … . Kessel v Adams, 2020 NY Slip Op 01758, Fourth Dept 3-13-20

VERDICT, MOTION FOR DIRECTED.

PLAINTIFF'S MOTION FOR A DIRECTED VERDICT SHOULD NOT HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for a directed verdict should not have been granted and explained the criteria:

" A motion for judgment as a matter of law pursuant to CPLR 4401 may be granted where the trial court determines that, upon the evidence presented, there is no rational process by which the [trier of fact] could base a finding in favor of the nonmoving party'" … . "In considering such a motion, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in light most favorable to the nonmovant'" … .

Here, the Supreme Court, in announcing its decision, stated that it expressly considered and relied on the defendants' evidence. This was error, as it was improper for the court to consider, on a motion for a directed verdict made before the moving party had rested and the opposing party had an opportunity to present rebuttal evidence, the evidence introduced by the moving party … .

Thus, in the context of a motion for a directed verdict, the Supreme Court should not have accorded the defendants' expert's testimony more weight than that of the plaintiff's expert. In determining a motion for a directed verdict, the trial court "must not engage in a weighing of the evidence, nor may it direct a verdict where the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question" … . Boriello v Loconte, 2020 NY Slip Op 02035, Second Dept 3-25-20

WAIVER, FORECLOSURE.

DEFENDANT'S PARTICIPATION IN A SETTLEMENT CONFERENCE DID NOT WAIVE HIS RIGHT TO SEEK DISMISSAL OF THE FORECLOSURE ACTION AS ABANDONED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant in this foreclosure action did not waive his right to seek dismissal of the complaint by participating in a settlement conference. The plaintiff bank had abandoned the action:

CPLR 3215(c) states that "if [a] plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned…upon its own initiative or on motion." The language of CPLR 3215(c) is not discretionary, and a claim for which a default judgment is not sought within the requisite one-year period will be deemed abandoned … . Notwithstanding, a claim will not be deemed abandoned if the party seeking a default judgment provides sufficient cause as to why the complaint should not be dismissed (CPLR 3215[c]). Here, plaintiff waited almost three years to seek a default judgment, and it failed to provide sufficient cause as to why the complaint should not be dismissed. As such, plaintiff's complaint is dismissed as abandoned.

Plaintiff's argument that defendant waived his right to seek dismissal pursuant to 3215(c) because he participated in the settlement conferences is equally unavailing. Although a party may waive it rights under CPLR 3215(c) "by serving an answer or taking any other steps which may be viewed as a formal or informal appearance"…, defendant's participation in settlement conferences did not constitute either a formal or an informal appearance "since [he] did not actively litigate the action before the Supreme Court or participate in the action on the merits" … . Wells Fargo Bank, N.A. v Martinez, 2020 NY Slip Op 01693, First Dept 3-12-20