NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
June 2020

An Organized Compilation of the Summaries of Selected New York State Appellate Decisions Addressing Civil Procedure Released in June 2020 and Posted Weekly on the New York Appellate Digest Website. The Table of Contents Entries Link to the Summaries which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header of Any Page to Return There.

Contents

Table of Contents

Table of Contents

APPEALS, APPEALABLE ORDERS.

ALTHOUGH THE ORDER ADDRESSING A MOTION TO SET ASIDE THE VERDICT WAS ISSUED AFTER JUDGMENT AND THEREFORE CANNOT BE SUBSUMED IN THE JUDGMENT, THE ORDER IS APPEALABLE; PRECEDENT TO THE CONTRARY OVERRULED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Troutman, overruling precedent, determined that an order issued after judgment, here an order on a motion to set aside the verdict, can be appealed:

… [W]e must consider whether a party may appeal directly from an order denying a CPLR 4404 motion when that order was entered after entry of a final judgment. In some of our previous cases, we have concluded that such an order is "subsumed in the judgment and the right to appeal directly therefrom terminated" (Paul Revere Life Ins. Co. v Campagna, 233 AD2d 954, 955 [4th Dept 1996] …). We now conclude that the rule set forth in Paul Revere Life Ins. Co. is inconsistent with the statutory framework and with Court of Appeals precedent, and should no longer be followed. Accordingly, we hold that an order otherwise appealable as of right (see CPLR 5701 [a]) entered after the entry of a final judgment is not subsumed in the judgment, but is independently appealable.

An appeal may be taken as of right from an order that, inter alia, "involves some part of the merits," "affects a substantial right," or "refuses a new trial" (CPLR 5701 [a] [2] [iii]-[v]). If, however, a court enters an "intermediate order" and subsequently enters a final judgment, the Court of Appeals has held that the entry of the judgment terminates the right to appeal from the order … . Although the right of appeal terminates, the order is not beyond review. There is a statutory remedy. An appeal from the final judgment "brings up for review," inter alia, "any non-final judgment or order which necessarily affects the final judgment" or "any order denying a new trial" (CPLR 5501 [a] [1], [2]). Thus, CPLR 5501 (a) salvages the ability of aggrieved parties to seek review of the intermediate order on appeal.

On the other hand, orders entered after the entry of a final judgment cannot conceptually merge into the judgment. The rule in Aho [39 NY2d 241] applies only to an "intermediate order" … , which the Court of Appeals has defined as an order "made after the commencement of the action and before the entry of judgment" … . Consequently, inasmuch as the right of appeal from a post-judgment order remains in effect, we conclude that the appeal from the order here is properly before us. Knapp v Finger Lakes NY, Inc., 2020 NY Slip Op 03353, Fourth Dept 6-12-20

APPEALS.

NO APPEAL LIES FROM DECLINING TO SIGN AN ORDER TO SHOW CAUSE (FIRST DEPT).

The First Department noted that no appeal lies from declining to sign an order to show cause:

No appeal lies from an order declining to sign an order to show cause, since it is an ex parte order that does not decide a motion made on notice (CPLR 5701[a][2] …). To the extent defendant seeks review of the ex parte order pursuant to CPLR 5704, such relief is denied. Review under CPLR 5704 would not, in any event, address the merits of the motion defendant sought to make by order to show cause … .

To the extent defendant contends that we should review the order or grant leave to appeal in the interest of justice, we decline to do so. Chi Young Lee v Osorio, 2020 NY Slip Op 03186, First Dept 6-4-20

ARBITRATION.

PETITION TO STAY ARBITRATION IN THIS UNDERINSURED MOTORIST PROCEEDING WAS SERVED AFTER THE 20-DAY STATUTORY PERIOD FOR SERVICE AND WAS NOT SERVED IN THE MANNER REQUIRED BY THE STATUTE (CPLR 7503(c)); THEREFORE THE APPLICATION TO STAY ARBITRATION WAS JURISDICTIONALLY DEFECTIVE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the insurer's (State Farm's) notice and petition to stay arbitration was not served within the required 20 days and was not properly served. The petition therefore should have been dismissed:

… [T]he insured, Joyce Reid, sent State Farm Insurance Company (hereinafter State Farm) a demand for supplemental underinsured motorist (hereinafter SUM) arbitration, which was received by State Farm on February 14, 2019. On March 22, 2019, State Farm filed a notice of petition and petition seeking to temporarily stay the arbitration pending the completion of pre-arbitration discovery. That notice and petition were served upon counsel for Reid by first-class mail on March 22, 2019. …

CPLR 7503(c) requires that an application to stay arbitration be made within 20 days after service of a demand to arbitrate. "This limitation is strictly enforced and a court has no jurisdiction to entertain an untimely application" … . CPLR 7503(c) also directs that notice of an application to stay arbitration "shall be served in the same manner as a summons or by registered or certified mail, return receipt requested."

… State Farm did not file its notice of petition and petition until March 22, 2019, which was beyond the 20-day statute of limitations. Consequently, the proceeding is time-barred … .

Moreover, State Farm's notice of petition and petition to stay arbitration were served by regular first-class mail, rather than by registered or certified mail, return receipt requested. Since there was a lack of compliance with CPLR 7503(c), the present proceeding was jurisdictionally defective … . Matter of State Farm Ins. Co. v Reid, 2020 NY Slip Op 03517, Second Dept 6-24-20

CLASS ACTIONS.

COMPLAINT IN PUTATIVE CLASS ACTION ALLEGING DISCRIMINATION AGAINST PERSONS WHO CANNOT USE STAIRS PROPERLY SURVIVED MOTIONS TO DISMISS; 360 OF 427 NYC SUBWAY STATIONS ARE ACCESSIBLE ONLY BY STAIRS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, determined that the transit authority's and the city's motions to dismsiss the complaint in this putative class action were properly denied. The complaint, brought pursuant to the NYC Human Rights Law (NYCHRL), alleged discrimination against persons with disabilities which prevent them from using stairs. 360 of the 427 subway stations in NYC are accessible only by stairs. The First Department held: (1) the action was not time-barred because the continuous violation doctrine applied; (2) the action was not preempted by either Transportation Law 15-b or Public Authorities Law 1266 (8); (3) the controversy is justiciable; and (4) the city, which owns the stations, was not entitled to pre-discovery dismissal. With respect to the continuous violation doctrine, the court wrote:

… [T]he reach of the continuous violation doctrine under NYCHRL is broader than under either federal or state law. A broad interpretation is consistent with a "rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble, nor rewards covered entities that discriminate by insulating them[selves] from challenges to their unlawful conduct that continues into the limitation period" … . Thus, defendants' claimed failure to provide an accessible subway system is a continuous

wrong for purposes of tolling the statute of limitations under the NYCHRL Center for Independence of the Disabled v Metropolitan Transp. Auth., 2020 NY Slip Op 03203, First Dept 6-4-20

CLASS ACTIONS.

MOTION FOR CLASS CERTIFICATION BASED UPON ALLEGEDLY ADULTERATED FUEL OIL SHOULD NOT HAVE BEEN GRANTED BECAUSE THE NUMEROSITY REQUIREMENT WAS NOT SUPPORTED BY ADMISSIBLE EVIDENCE; DISMISSAL WAS WITHOUT PREJUDICE AND LEAVE TO RENEW WAS GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the motion for class certification should have been denied because the proof of the numerosity prerequisite was not in admissible form. The dismissal was without prejudice because it appeared the evidence could be properly presented:

The gravamen of plaintiffs' claim, and that for which they seek class certification, is that defendant provided them and others similarly situated "with inferior, adulterated heating oil, i.e. that the fuel oil that was delivered to them contained oils of lesser value mixed into the ordered grade of fuel oil, so that the delivered product did not meet the standards of the parties' contracts" … . Contrary to defendant's contention, this is the predominant question of law and fact in this case, and it is common among the class. In any event, "the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action" … . Moreover, "CPLR article 9 affords the trial court considerable flexibility in overseeing a class action," and the court could even "decertify the class at any time before a decision on the merits if it becomes apparent that class treatment is inappropriate" … . Supreme Court is more than able to recognize if its class certification becomes unduly cumbersome, and, if so, how best to fashion a remedy.

Nevertheless, "[t]he proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901(a) and must do so by tender of evidence in admissible form" … . Here, plaintiffs failed to submit admissible evidence demonstrating that the numerosity prerequisite to class certification was satisfied. However, the record suggests that such evidence is in plaintiffs' possession but simply was not submitted in connection with their motion. Accordingly, plaintiffs are given leave to renew their motion for class certification, upon admissible evidence providing a sufficient basis for determining the size of the potential class. Mid Is. LP v Hess Corp., 2020 NY Slip Op 03270, First Dept 6-11-20

DISCLOSURE, TAX RETURNS.

ALTHOUGH DISFAVORED, DISCLOSURE OF REDACTED TAX RETURNS WAS WARRANTED IN THIS CASE (FIRST DEPT).

The First Department noted that the disclosure of tax returns is disfavored, but agreed with Supreme Court that disclosure of the redacted returns in this Labor-Law/employment-law dispute was warranted:

Plaintiffs claim that between 2010 and 2016 defendant employed them as a caretaker for her ailing aunt and that defendant violated, inter alia, several sections of the Department of Labor Regulations (12 NYCRR) requiring overtime pay, a minimum wage, and additional pay for split shifts. Defendant denies that she was plaintiffs' employer for purposes of the regulations and provisions of the Labor Law, but admits that she paid plaintiffs by check from 2014 to 2016, albeit on her aunt's behalf. Plaintiffs claim they were paid in cash by defendant between 2010 and 2013. Defendant, who denies that she was the source of the cash payments, seeks plaintiffs' federal and state tax returns for 2010 to 2013, claiming she needs the returns to verify the cash amounts, as well as plaintiffs' assertion that they were employees, and not independent contractors.

… [D]efendant demonstrated both that the specific information ordered disclosed was necessary to defend the action, and unavailable from other sources … . Since plaintiffs were paid in cash between 2010 and 2013 and there is no other evidence in the record establishing who paid their wages and how much they were paid during those years, defendant showed a specific need for the production of the three years of tax returns, which might show the amounts claimed by plaintiffs as income from the caretaker work, as well as whether they claimed the income as wages or as money earned through self-employment. Defendant demonstrated that investigating plaintiffs' bank accounts would be inconclusive, since pay deposited in the accounts could have been commingled with other amounts, and because one of the plaintiffs claimed that she used several banking institutions and did not make deposits on a predictable basis. We note that the court already inspected the tax returns in camera and deemed them relevant. Currid v Valea, 2020 NY Slip Op 03590, First Dept 6-25-20

DISCLOSURE, TAX RETURNS.

DEFENDANT'S MOTION TO COMPEL THE PRODUCTION OF TAX RETURNS AFTER THE PARTIES' FAILURE TO RESPOND TO THE DEMAND FOR PRODUCTION SHOULD HAVE BEEN DENIED; THE FAILURE TO RESPOND TO A PALPABLY IMPROPER DEMAND FOR PRODUCTION, I.E. A DEMAND FOR TAX RETURNS, DOES NOT WAIVE THE ABILITY TO OBJECT TO THE DEMAND ON APPEAL; DEFENDANT MAY RENEW THE MOTION TO COMPEL PRODUCTION OF THE TAX RETURNS IF THE REQUIRED SHOWINGS ARE MADE (FIRST DEPT).

The First Department noted that the failure to respond to defendant-Mazal's demands for production waived any objections to the demands. Mazal's motion to compel discovery therefore was properly granted. However objections to demands which are palpably improper are not waived by a failure to respond and Mazal's demand for tax returns may be in the palpably-improper category. Mazal's motion to compel the production of tax returns should therefore have been denied. But the First Department denied that portion of the motion to compel without prejudice and granted leave to renew if Mazal can make the required showing of need:

The motion court providently deemed the appealing parties' objections waived under CPLR 3122 as a result of their failure to respond timely to Mazal's demands for production … . We modify, however, with respect to Mazal's demands for the appealing parties' tax returns, as objections to "palpably improper" demands are not waived … .

A demand for the production of tax returns is disfavored and requires "a strong showing of necessity," and the inability to obtain the information from other sources … . Here, the failure "to identify the particular information the tax returns . . . will contain and its relevance to the claims made" … should have been sufficient to deny Mazal's motion to compel. Indeed, the tax returns were not necessary to determine whether plaintiffs acquired an interest in the properties in 1994 or retained it thereafter — the reason the motion court gave for granting the motion. However, Mazal argues that the tax returns could be relevant to its affirmative defenses of laches, estoppel, waiver, ratification, and consent, and the motion court did not pass on this issue. As a result, although Mazal did not sufficiently show the inability to obtain the information sought from other sources or, indeed, what specific information the appealing parties' tax returns will show, we grant leave to renew upon a proper showing … . Demurjian v Demurjian, 2020 NY Slip Op 03479, First Dept 6-18-20

DISCONTINUANCE, STIPULATION OF.

ALTHOUGH AN INCOMPLETE CHANGE-OF-ATTORNEY STIPULATION WAS FILED BEFORE THE STIPULATION OF DISCONTINUANCE WAS FILED, THE STIPULATION OF DISCONTINUANCE REMAINED VALID AND ENFORCEABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a stipulation of discontinuance executed by the plaintiff's then attorney, and filed after plaintiff's change-of-attorney stipulation was filed, was valid and enforceable. Plaintiff's change-of-attorney stipulation was not signed by an agent or representative of the plaintiff:

" [A]n attorney of record in an action may only withdraw or be changed or discharged in the manner prescribed by statute'" … . Pursuant to CPLR 321(b), an attorney of record may be changed either by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party, with notice of the change given to the attorneys for all parties in the action, or by order of court upon notice to all parties. " Until an attorney of record withdraws or is changed or discharged in the manner prescribed by CPLR 321, his [or her] authority as attorney of record for his [or her] client continues, as to adverse parties, unabated'" … .

Here, the stipulation of discontinuance was executed by an attorney with the plaintiff's then attorney of record … (hereinafter outgoing counsel). Though the plaintiff's stipulation to change its attorney was filed prior to the date on which the stipulation of discontinuance was filed, and was signed by outgoing counsel and incoming counsel, no agent or representative of the plaintiff signed the change-of-attorney stipulation. Nor does the record establish that notification of the plaintiff's change in attorney was provided to any other party, or to the appellant, prior to the date on which the stipulation of discontinuance was filed. Accordingly, the plaintiff neither filed a properly signed consent to change attorney form nor sought a court order permitting outgoing counsel to withdraw as the plaintiff's attorney of record in accordance with CPLR 321(b) prior to the filing of the stipulation of discontinuance. GMAC Mtge., LLC v Galvin, 2020 NY Slip Op 03405, Second Dept 6-17-20

DISCONTINUNCE, STIPULATION OF, JURISDICTION.

ONCE A STIPULATION OF DISCONTINUANCE WAS FILED SUPREME COURT LACKED ANY SUPERVISORY CONTROL OVER THE PROCEEDING AND THE MOTION PRACTICE SEEKING TO SET ASIDE THE SETTLEMENT SHOULD HAVE BEEN DENIED ON THAT GROUND; A PLENARY ACTION WAS REQUIRED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined once the stipulation of discontinuance was filed Supreme Court lacked any supervisory control over the proceedings. So the subsequent motions dealing with the allocation of settlement proceeds to the plaintiffs and their attorney should have been denied. After the stipulation of discontinuance a plenary action was required to enforce or set aside the settlement:

As contemplated by the stipulation and order, counsel for the parties executed a stipulation of discontinuance that was filed with the Albany County Clerk (see CPLR 3217 [a] [2]). The filing occurred before any of the motion practice at issue and, as a result, a plenary action was required "to enforce [or set aside] the settlement since the court does not retain the power to exercise supervisory control over previously terminated actions and proceedings" … . Indeed, "[w]hen an action is discontinued, it is as if it had never been," and Supreme Court lacked authority to grant any of the requested relief … . It follows that both motions should have been denied in their entirety. DeLap v Serseloudi, 2020 NY Slip Op 03443, Third Dept 6-18-20

DISMISS, MOTION TO, DOCUMENTARY EVIDENCE.

THE TITLE INSURANCE POLICY GAVE THE INSURER THE RIGHT TO PROSECUTE A TITLE CLAIM BUT NOT THE OBLIGATION TO PROSECUTE A TITLE CLAIM; THEREFORE PLAINTIFF'S COMPLAINT ALLEGING DEFENDANT BREACHED THE POLICY BY NOT PROSECUTING THE CLAIM SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's action against a title insurance company should have been dismissed based upon the language of the policy. Plaintiff had requested that defendant take action against a party plaintiff believed was using plaintiff's land. Defendant refused. The title insurance policy gave defendant the right but not the obligation to bring such an action:

A dismissal of a complaint pursuant to CPLR 3211 (a) (1) is warranted if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" … . Plaintiffs alleged that defendant breached section 5 (b) of the policy, which provides, in relevant part, that defendant "shall have the right . . . to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured." Defendant's "right" to prosecute an action is not equivalent to an "obligation" … . Inasmuch as the policy submitted by defendant on the motion did not require defendant to prosecute the action against the property owner, defendant is entitled to dismissal of the complaint insofar as it sought attorneys' fees and costs that plaintiffs had already incurred for the prosecution of that action … . We further conclude that defendant is entitled to a declaration that it is not obligated to pay for the attorneys' fees and costs necessary to prosecute that action in the future … . Irma Straus Realty Corp. v Old Republic Natl. Tit. Ins. Co., 2020 NY Slip Op 03307, Fourth Dept 6-12-20

DISMISS, MOTION TO, FAILURE TO STATE A CAUSE OF ACTION.

COMPLAINT AGAINST THE DIOCESE OF BUFFALO ALLEGING SEXUAL ABUSE BY A PRIEST DID NOT STATE A CAUSE OF ACTION FOR PUBLIC NUISANCE (FOURTH DEPT).

The Fourth Department determined the complaint seeking damages and injunctive relief against the Diocese of Buffalo NY stemming from alleged sexual abuse by a priest did not state a cause of action for public nuisance based on common law and Penal Law 240.45 (criminal nuisance). The court noted that a nuisance suit in this context would conflict or compete with the classification system under the Sex Offender Registration Act and, to the extent plaintiff seeks damages, a suit pursuant to the Child Victims Act is available:

"Conduct does not become a public nuisance merely because it interferes with . . . a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured" … . Here, the complaint alleges the infringement of, at most, a common right of a particular subset of the community, i.e., a group of Roman Catholic parishioners in the area of the Diocese who attended or were active in the priest's parishes. The complaint does not allege that the general public was exposed to the priest's conduct, nor does it otherwise allege interference with a collective right belonging to all members of the public … . …

Penal Law § 240.45 does not imply a private right of action under the circumstances presented here. "Where a penal statute does not expressly confer a private right of action on individuals pursuing civil relief, recovery

under such a statute may be had only if a private right of action may fairly be implied' " … . Three essential factors are considered in determining whether a private right of action may fairly be implied: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" … . Golden v The Diocese of Buffalo, NY, 2020 NY Slip Op 03354, Fourth Dept, 6-12-20

DISMISS, MOTION TO, FAILURE TO STATE A CAUSE OF ACTION.

PLAINTIFF WAS WORKING ON A ROOF WHEN HE ALLEGEDLY CONTACTED AN ELECTRIC WIRE LEADING TO THE HOME AND WAS KILLED; THE UTILITIES' (CON EDISON'S) MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION ON THE GROUND IT OWED NO DUTY TO PLAINTIFF'S DECEDENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint against the Con Edison defendants in this electrocution case should not have been dismissed for failure to state a cause of action. Plaintiff was working on a roof when he alleged came into contact with an electric wire attached to the home and was killed. Con Edison argued it did not owe a duty to plaintiff's decedent:

"[T]he existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations" …. Contrary to Con Edison's contention, it failed to establish that it owed no duty to the decedent … . Viewing the allegations in the light most favorable to the plaintiff, since the plaintiff alleged that Con Edison authorized the installation of an improper and non code-compliant connection between its electrical lines and the homeowner's electrical system, such actions gave rise to Con Edison's duty to the decedent who reasonably could be expected to come into contact with the property's electrical wires … . Thus, Con Edison did not establish that the plaintiff failed to state a cause of action to recover damages for negligence. Sucre v Consolidated Edison Co. of N.Y., Inc., 2020 NY Slip Op 03377, Second Dept 6-17-20

\

FORUM NONCONVENIENS.

NEW YORK DETERMINED TO BE AN INCONVENIENT FORUM IN THIS CUSTODY MATTER (FOURTH DEPT).

The Fourth Department noted the record was sufficient to allow the appellate court to determine whether New York was an inconvenient forum in this custody matter. Mother had moved to California with the child after father abused mother in New York. Father filed the custody petitions in New York. After considering the statutory factors the Fourth Department found New York to be an inconvenient forum. With respect to one of the factors–the location of the relevant evidence–the court wrote:

The location of relevant evidence and, to some extent, the ability of the court in each state to decide matters expeditiously also favor California as the appropriate forum. The majority of the evidence pertaining to the best interests analysis in this custody matter is located in California. Although evidence relating to certain domestic violence incidents is, as noted above, more readily available in New York, most other relevant information regarding the child's best interests, such as her school performance, response to therapy, the indigenous tribe she belongs to, and her relationship with her extended family, is in California … . It does not appear that the child has any connection with New York other than the father and a paternal grandmother. Further, the Attorney for the Child in New York was having trouble providing effective representation to the child inasmuch as it was difficult to communicate with the child by telephone … . Matter of Coia v Saavedra, 2020 NY Slip Op 03325, Fourth Dept 6-12-20

INDEMNIFICATION.

ALTHOUGH THE RELEASE EXECUTED BY PLAINTIFF WITH RESPECT TO TWO DEFENDANTS PRECLUDED AN ACTION FOR CONTRIBUTION BY A THIRD DEFENDANT WHICH WAS NOT A PARTY TO THE RELEASE, IT DID NOT PRECLUDE AN ACTION FOR COMMON-LAW INDEMNIFICATION (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the release executed by plaintiff in this workplace injury case precluded a contribution action by a defendant which was not a party to the release, but did not preclude an action for common-law indemnification:

In 2016, plaintiff was allegedly injured while working at a commercial construction site. Plaintiff accepted $2,000 in settlement of his claims against third-party defendants, Village Air and Electric, Inc. and Jimerico Construction, Inc. — his employer and the contractor that retained it to do work at the construction site, respectively — and executed a release agreeing to hold them harmless. He then commenced this action against defendant, another contractor whose employees had allegedly caused the condition that led to his injuries. Defendant answered and impleaded Village Air and Jimerico, claiming that it was entitled to contribution and/or indemnification.

Jimerico moved … to dismiss the third-party complaint on the ground that the release executed by plaintiff defeated the contribution and indemnification claims (see CPLR 3211 [a] [5]; General Obligations Law § 15-108) … .

… [T]he release executed by plaintiff "relieve[d] [Jimerico] from liability to any other person for contribution" pursuant to CPLR article 14 and, as a result, Supreme Court should have dismissed defendant's contribution claim against Jimerico (General Obligations Law § 15-108 [b] …). In contrast, Jimerico's "settlement with . . . plaintiff did not preclude [defendant] from seeking common-law indemnification from" it … . Koretnicki v Northwoods Concrete, Inc., 2020 NY Slip Op 03445, Third Dept 6-18-20

JUDGES, SUA SPONTE.

LABOR LAW 200 CAUSE OF ACTION BASED UPON A DANGEROUS CONDITION PROPERLY SURVIVED SUMMARY JUDGMENT, APPELLANTS DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION; JUDGE SHOULD NOT HAVE, SUA SPONTE, DENIED A MOTION ON A GROUND NOT RAISED BY A PARTY (SECOND DEPT).

The Second Department determined the Labor Law 200 and common-law negligence causes of action properly survived summary judgment. The Second Department noted the court should not have, sua sponte, denied appellants' motion on the ground the deposition transcripts were inadmissible because that issue was not raised. Plaintiff was working in the bottom of a hole which was muddy from heavy rain and littered with boulders and rocks. Plaintiff was injured when he allegedly slipped and fell because of the mud. The Second Department held that the causes of action were based upon a dangerous condition, not the method and manner of work, and the appellants did not demonstrate they lacked actual or constructive notice of the condition:

Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work … . There are "two broad categories of actions that implicate the provisions of Labor Law § 200" … . The first category involves worker injuries arising out of alleged dangerous or defective conditions on the premises where the work is performed … . In those circumstances, "[f]or liability to be imposed on the property owner, there must be evidence showing that the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time" … . The second category of actions under Labor Law § 200 involves injuries arising from the method and manner of the work … . A property owner will be held liable under this category only if it possessed the authority to supervise or control the means and methods of the work … .

Contrary to the appellants' contention, the plaintiff's accident arose from a dangerous premises condition, not from the method and manner of the work. Where a plaintiff alleges that he or she was injured at a work site as a result of a dangerous premises condition, a property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition … . Modugno v Bovis Lend Lease Interiors, Inc., 2020 NY Slip Op 03508, Second Dept 6-24-20

JUDGES, SUA SPONTE.

PLAINTIFF SOUGHT ONLY CANCELLATION OF A MORTGAGE; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, CANCELLED THE NOTE AS WELL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, granted relief that was not asked for by the plaintiff. Plaintiff sought cancellation and discharge of a mortgage pursuant to Real Property Actions and Proceedings Law (RPAPL) 1501(4). The judge cancelled the mortgage and the note:

"The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" … . Here, the plaintiff only sought cancellation and discharge of the subject mortgage, not cancellation of the note. The Supreme Court should not have granted additional relief sua sponte … . We note that the plaintiff lacked standing to seek cancellation of the note, as it was not a party to it. Trenton Capital, LLC v Bank of N.Y. Mellon, 2020 NY Slip Op 03416, Second Dept 6-17-20

JURISDICTION, FAMILY OFFENSE.

PETITIONER DID NOT HAVE THE STATUTORILY REQUIRED CLOSE RELATIONSHIP WITH THE RESPONDENT IN THIS FAMILY OFFENSE PROCEEDING; FAMILY COURT DID NOT HAVE SUBJECT MATTER JURISDICTION (FIRST DEPT).

The First Department, reversing Family Court, determined Family Court did not have subject matter jurisdiction over this family offense proceeding because the petitioner and the respondent were not members of the same family or household and had not been in an intimate relationship:

The court lacks subject matter jurisdiction over this family offense proceeding brought by the foster mother of respondent's biological children. Petitioner failed to establish that she and respondent, who are not members of the same family or household, are or have been in an intimate relationship (see Family Court Act § 812[1][e] …). Petitioner testified that she did not even know respondent's first name. It appears from the record that petitioner's contact with respondent has been limited to scheduling visitation with the children at the agency and, perhaps, interacting with respondent when she went to petitioner's home to pick up the children for visits. Matter of Veronica C. v Ariann D., 2020 NY Slip Op 03612, First Dept 6-25-20

RENEW, MOTION TO.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ASBESTOS-INJURY CASE SHOULD NOT HAVE BEEN GRANTED, PROPER BURDEN OF PROOF EXPLAINED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant's motion for summary judgment in this asbestos -injury case should not have been granted and, alternatively, even if the motion were properly granted, leave to renew should have been granted based on additional evidence:

In connection with a motion for summary judgment in an action based on exposure to asbestos, defendant has the initial burden of showing "unequivocally" that its product could not have contributed to the causation of decedent's asbestos-related injury … .

Defendant Burnham failed to sustain its initial burden of demonstrating that its products could not have contributed to decedent's mesothelioma. Decedent's testimony identified defendant as the manufacturer of greenhouses in which he worked and cited three possible sources of asbestos: transite benches in the greenhouses, window glazing and the greenhouse boiler. Burnham provided no evidence demonstrating that its products could not have been the source of the asbestos that caused decedent's illness. It only pointed to gaps in plaintiffs' proof, which was insufficient to meet its burden … . Even if the burden had shifted, plaintiffs' evidence in opposition raised an issue of fact as to whether Burnham had sold, distributed, and recommended asbestos-containing products such as those used in plaintiffs' family's gardening business. While hearsay, that evidence could be considered by the court since it was not the sole basis of the opposition … .

Alternatively, even if the summary judgment motion had been properly granted, the court should have granted leave to renew in the interests of fairness and justice since plaintiffs presented an affidavit of decedent's estranged brother, which supplied crucial evidence linking decedent's illness to Burnham's products. Fischer v American Biltrite, Inc., 2020 NY Slip Op 03277, First Dept 6-11-20

REPLY, EVIDENCE SUBMITTED FOR THE FIRST TIME.

THE MEDICAL RECORDS SUBMITTED FOR THE FIRST TIME IN REPLY CAN BE CONSIDERED BECAUSE RESPONDENTS ADDRESSED THE RELEVANT ISSUES AT ORAL ARGUMENT; THE MEDICAL RECORDS DEMONSTRATED RESPONDENTS HAD TIMELY NOTICE OF THE NATURE OF THE CLAIM; ALTHOUGH THE EXCUSE FOR DELAY WAS NOT ADEQUATE, THE DEFECT DID NOT REQUIRE DENIAL OF THE APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM; THE APPLICATION SHOULD NOT HAVE BEEN DENIED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined claimant's application for leave to file a late notice of claim in this medical malpractice action should have been granted. The court noted that the medical records submitted for the first time in a reply were properly considered because the respondents addressed the relevant issues at oral argument. Both the majority and the dissent noted that the excuse for failure to timely file the notice of claim was inadequate but that defect did not require denial of the application. The majority found claimant demonstrated respondents were not prejudiced by the delay. The dissent disagreed with the majority's finding that the medical records demonstrated respondents had timely notice of the nature of the claim:

… [W]e reject the contention of respondents and the dissent that it is inappropriate under the circumstances of this case to consider the medical records submitted by claimant for the first time in his reply papers. In general, " [t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion [or application]' " … . "This rule, however, is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence" … . …

… "[T]he medical records . . . evince that [respondents'] medical staff, by its acts or omissions, inflicted an[ ] injury on [claimant]' " … . The medical records indicate that, following the surgical skin graft procedure, claimant developed swelling beneath the dressings that became constrictive of blood flow to the leg and ultimately caused necrosis, and that respondents' medical staff, for various reasons, had failed to recognize the ischemic nature of the leg and claimant's development of compartment syndrome, thereby eventually necessitating partial amputation of the leg … . We thus conclude that respondents timely acquired actual knowledge of the essential facts constituting the claim … . Matter of Dusch v Erie County Med. Ctr., 2020 NY Slip Op 03351, Fourth Dept 7-12-20

SANCTIONS, DISCOVERY SCHEDULING ORDER.

DISMISSAL OF COMPLAINT TOO SEVERE A SANCTION FOR FAILING TO COMPLY WITH DISCOVERY SCHEDULING ORDER (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the dismissal of the complaint was too severe a sanction for plaintiff's failure to comply with the court's scheduling order:

Defendants merely alleged that plaintiff's failure to comply with the discovery deadlines set forth in the scheduling order was due to the representations of plaintiff's attorney that he was engaged in settlement negotiations with a claims adjuster. Plaintiff's attorney apparently believed that settlement of the case was imminent and, thus, that depositions would not be necessary. There is also nothing in the record to indicate that plaintiff ignored any warnings from the court that continued noncompliance with discovery orders could lead to the court striking the complaint … , or that defendants were prejudiced by the delay in conducting discovery … .

Although plaintiff's dilatory conduct may have reasonably prompted defendants to seek the court's guidance, the drastic sanction of dismissing the complaint with prejudice provided more relief than was necessary to protect defendants' interests … . In short, plaintiff's conduct was not the type of "deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay" that would justify the penalty of dismissal of the complaint … . Windnagle v Tarnacki, 2020 NY Slip Op 03355, Fourth Dept 6-12-20

STANDING, ZONING, LAND USE.

THE IMMEDIATE NEIGHBORS HAD STANDING TO CONTEST THE APPROVAL OF THE CONSTRUCTION OF A DOLLAR STORE; THE PLANNING BOARD DID NOT NEED TO SEND THE MATTER TO THE ZONING BOARD OF APPEALS TO INTERPRET A ZONING ORDINANCE WHICH WAS ONLY A GUIDELINE CONCERNING THE ALLOWED LENGTH OF A BUILDING FACADE; THE PLANNING BOARD TOOK THE REQUISITE HARD LOOK PURSUANT TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (THIRD DEPT).

The Third Department, reversing Supreme Court, noting that the abutting neighbors (Cady and Crawley) had standing to contest the town planning board's approval of the construction of a Dollar Store, determined Supreme Court should not have found that the matter must be sent to the Zoning Board of Appeals (ZBA) for a variance proceeding. Because the zoning ordinance in question, concerning the length of a building facade, was only a guideline, it was not necessary to involve the ZBA to interpret it:

Cady and Cawley's residence is directly adjacent to the proposed construction site, and the proposed retail store would be directly across the woods from their property. The store's main parking lot, which is located behind the store, is in the line of sight of Cady and Cawley's property. As a result, the store is likely to obstruct or interfere with the scenic views within the scenic viewshed overlay district from Cady and Cawley's property. Cady and Cawley have standing because they have demonstrated that they would suffer an "injury in fact – i.e., actual harm by the action challenged that differs from that suffered by the public at large — and that such injury falls within the zone of interests, or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" … . * * *

… [T]he Town zoning code states that "the length of any faÇade should generally not exceed 50 feet maximum [horizontal dimension]". Insofar as the subject provision lacks any compulsory language, … this provision is

deliberately phrased … as a guideline, rather than as a prohibition; in other words, there was no requirement for a referral to the ZBA to determine the plain language of the statute. …

… [O]ur review of the record reveals that the Planning Board underwent a nearly four-year process that involved in-depth environmental impact reports, multiple draft EISes [environmental impact statements] and public hearings, which formed the basis of the FEIS [final environments impact statement] and SEQRA [State Environmental Quality Review Act] findings statement. Accordingly, we find that the Planning Board complied with its procedural and substantive requirements under SEQRA … . Matter of Arthur M. v Town of Germantown Planning Bd., 2020 NY Slip Op 03440, Third Dept 6-18-20

STARE DECISIS.

SUPREME COURT WAS BOUND TO FOLLOW A FIRST DEPARTMENT DECISION BECAUSE THERE WERE NO ON-POINT DECISIONS FROM THE THIRD DEPARTMENT OR THE COURT OF APPEALS; HOWEVER THE THIRD DEPARTMENT IS NOT SO BOUND; SUPREME COURT REVERSED (THIRD DEPT).

The Third Department, reversing Supreme Court, dealt with the issue of stare decisis in this dispute between defendant employer and plaintiff employee over the "demutualization" proceeds of an insurance policy. Plaintiff was employed as a certified nurse midwife by defendant. As part of the employment agreement defendant was required to maintain and pay the premiums for a malpractice insurance policy. When the insurance company converted from a mutual insurance company to a stock insurance company (demutualization) the policyholder was entitled to nearly $50,000. Plaintiff-employee claimed the money was hers and brought an action for a declaratory judgment. Supreme Court agreed with plaintiff but, because there was no on-point appellate decision by the Court of Appeals or the Third Department, Supreme Court was required to follow a First Department decision and, based on that decision, found in favor of defendant-employer. The Third Department noted that it, unlike Supreme Court, was not bound by stare decisis and reversed:

Initially, Supreme Court was "bound by the doctrine of stare decisis to apply precedent established in another Department," as no relevant precedent was available from this Court or the Court of Appeals … . However, this Court is not so bound … . We agree with Supreme Court's inclinations — although that court was constrained by stare decisis not to follow them — and disagree with the First Department's holding in Matter of Schaffer, Schonholz & Drossman, LLP v Title (171 AD3d at 465 …). Therefore, for the reasons stated in our decision

in Schoch v Lake Champlain OB-GYN, P.C. (___ AD3d ___ [decided herewith]), we reverse. Shoback v Broome Obstetrics & Gynecology, P.C., 2020 NY Slip Op 03447, Third Dept 6-18-20

STARE DECISIS.

UNDER THE TERMS OF THE EMPLOYMENT AGREEMENT AND THE APPLICABLE INSURANCE LAW PROVISIONS, AND UNDER THE PRINCIPLES OF UNJUST ENRICHMENT, PLAINTIFF EMPLOYEE, NOT DEFENDANT EMPLOYER, WAS ENTITLED TO THE DEMUTUALIZATION PROCEEDS WHEN THE MEDICAL MALPRACTICE INSURANCE CARRIER CONVERTED FROM A MUTUAL TO A STOCK INSURANCE COMPANY, DESPITE THE FACT THAT THE DEFENDANT EMPLOYER PAID THE POLICY PREMIUMS (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Mulvey, dealt with insurance law, employment law, contract law, unjust enrichment and stare decisis in this dispute between defendant employer and plaintiff employee over the "demutualization" proceeds of an insurance policy. Plaintiff was employed as a certified nurse midwife by defendant. As part of the employment agreement defendant was required to maintain and pay the premiums for a malpractice insurance policy. When the insurance company (MLMIC) converted from a mutual insurance company to a stock insurance company (demutualization) the policyholder was entitled to nearly $75,000. Plaintiff-employee claimed the money was hers and brought an action for a declaratory judgment. Supreme Court agreed with plaintiff but, because there was no on-point appellate decision by the Court of Appeals or the Third Department, Supreme Court was required to follow a First Department decision and, based on that decision, found in favor of defendant-employer. The Third Department noted that it, unlike Supreme Court, was not bound by stare decisis and reversed:

… [P]er the relevant statute [(Insurance Law § 7307 [e] [3])] and the conversion plan's definitions, plaintiff was entitled to the cash consideration … . * * *

… [T]he parties' employment agreement provided that plaintiff would perform professional services for defendant. In exchange, defendant would pay her a stated salary and provide specified benefits including, as relevant here, obtaining and paying the premiums for professional liability insurance covering plaintiff. The record indicates that defendant purchased, controlled and maintained such a policy from MLMIC in plaintiff's favor. Defendant was the policy administrator, selected the coverage and terms, and was responsible for all

financial aspects of the policy. Notably, defendant paid annual premiums of approximately $25,710; plaintiff paid nothing toward the premiums and those amounts were not counted as income to plaintiff. Defendant received from MLMIC dividends, premium reductions and the return of premiums when the policy was canceled upon plaintiff leaving defendant's employ, all without any objection by plaintiff. * * *

The reality is that neither party here bargained for the demutualization proceeds. Moreover, neither party actually paid for them, because membership interests in a mutual insurance company are not paid for by policy premiums; such rights are "acquired . . . at no cost, but rather as an incident of the structure of mutual insurance policies," through operation of law and the company's charter and bylaws … . * * *

Neither party changed its position based on demutualization and plaintiff's conduct was neither tortious nor fraudulent. … [W]e conclude that defendant failed to meet its burden to establish its affirmative defense and counterclaim alleging unjust enrichment. Schoch v Lake Champlain OB-GYN, P.C., 2020 NY Slip Op 03444, Third Dept 6-18-20

STATUTE OF LIMITATIONS, POSTNUPTIAL AGREEMENT.

THE ACTION TO ENFORCE THE POSTNUPTIAL AGREEMENT WAS GOVERNED BY THE THREE-YEAR STATUTE OF LIMITATIONS IN THE DOMESTIC RELATIONS LAW, NOT THE SIX-YEAR CONTRACT STATUTE OF LIMITATIONS IN CPLR 213; THEREFORE THE ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the statute of limitations with respect to the enforcement of a postnuptial agreement is that provided for in Domestic Relations Law 250, not the six-year statute of limitations for contract actions generally:

… [T]he six-year statute of limitations that pertains to breach of contract causes of action (see CPLR 213[2]) is not applicable. Rather, the applicable statute of limitations is provided for in Domestic Relations Law § 250. Pursuant to Domestic Relations Law § 250, the statute of limitations for claims arising from prenuptial and postnuptial agreements is three years and that period is tolled, as relevant here, until process has been served in a matrimonial action. The language of the statute makes it broadly applicable to claims arising from prenuptial and postnuptial agreements, such that it applies equally where a party seeks to invalidate the agreement and where a party seeks to enforce it … .

Here, the defendant did not assert his claim to enforce the postnuptial agreement until more than 4½ years after he was served with process in the matrimonial action. Accordingly, the defendant's claim is untimely, and should have been rejected. Washiradusit v Athonvarangkul, 2020 NY Slip Op 03562, Second Dept 6-24-20

STATUTE OF LIMITATIONS, CONTINUOUS REPRESENTATION.

THE COMPLAINT ADEQUATELY ALLEGED THE TOLLING OF THE STATUTE OF LIMITATIONS PURSUANT TO THE CONTINUOUS REPRESENTATION DOCTRINE AND THE EXISTENCE OF THE FUNCTIONAL EQUIVALENT OF PRIVITY BETWEEN PLAINTIFF AND THE DEFENDANT ARCHITECT; SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint alleging architectural malpractice should not have been dismissed pursuant to CPLR 3211. Plaintiff leased the first floor of a building to operate a pizza restaurant. Plaintiff hired a contractor which in turn hired an architect for the heating, ventilation and air conditioning (HVAC) design. The gas line hookup was completed in 2014. Subsequently, in 2016, National Grid shut off the gas, alleging plaintiff was stealing gas. In 2017 the defendant architect allegedly attempted to remedy the problem with the gas line. The complaint adequately pled the statute of limitations was tolled by the continuous representation doctrine and a privity-like relationship between the plaintiff and the architect:

"The law recognizes that the supposed completion of the contemplated work does not preclude application of the continuous representation toll if inadequacies or other problems with the contemplated work timely manifest themselves after that date and the parties continue the professional relationship to remedy those problems" … . In support of its motion, the architect submitted documentary evidence which included a final invoice issued by it dated August 14, 2014, and a letter of completion issued by the New York City Department of Buildings to the architect stating that its work was completed on December 20, 2014. In opposition, the plaintiffs' submissions, which included evidence of continuing communications between [plaintiff] and the architect, and evidence of the architect's efforts to remedy the alleged error uncovered by National Grid regarding the gas line connection for the premises, raised a question of fact as to the application of the continuous representation doctrine and supported the denial of those branches of the architect's motion which were pursuant to CPLR 3211(a)(1) and (5) to dismiss the amended complaint insofar as asserted against it … . Contrary to the architect's contention, the fact that two years had elapsed between the completion of its services and its subsequent efforts to remedy the problem does not render the continuous representation doctrine inapplicable as a matter of law … .

We also reject the architect's contention, as an alternative ground for affirmance, that dismissal of the amended complaint insofar as asserted against it was warranted pursuant to CPLR 3211(a)(1) and (7), on the ground that it was not in privity with the plaintiffs. The evidence submitted by the architect, which included a copy of the contract entered into between it and the contractor, failed to utterly refute the factual allegations supporting the plaintiffs' contention that a relationship existed between them and the architect that was the "functional equivalent of privity" … . Creative Rest., Inc. v Dyckman Plumbing & Heating, Inc., 2020 NY Slip Op 03499, Second Dept 6-24-20

STATUTE OF LIMITATIONS, FORECLOSURE.

NOTICE OF DEFAULT DID NOT ACCELERATE THE MORTGAGE DEBT; THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the mortgage debt was never accelerated and therefore the six-year statute of limitations did not begin to run in this foreclosure action:

An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213[4]). "[E]ven if a mortgage is payable in installments …, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" … .

… [T]he May 3, 2007, notice of default, which advised that the loan would be accelerated if the default was not cured by June 7, 2007, was "nothing more than a letter discussing acceleration as a possible future event, which [did] not constitute an exercise of the mortgage's optional acceleration clause" … . U.S. Bank N.A. v Mongru, 2020 NY Slip Op 03137, Second Dept 6-3-20

STATUTE OF LIMITATIONS, FORECLOSURE.

UNDER THE TERMS OF THE MORTGAGE, THE DEATH OF THE BORROWER DID NOT ACCELERATE THE DEBT; BECAUSE THE DEBT WAS NOT ACCELERATED THE INSTALLMENT PAYMENTS FOR THE SIX YEARS PRIOR TO THE COMMENCEMENT OF THE FORECLOSURE ACTION WERE STILL OWING AND THE ACTION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed as time-barred, noting that the death of the borrower did not accelerate the debt. Therefore the installment payments due during the six year prior to commencing the action were still owing:

An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213 [4]). Here, the note provided that decedent agreed to repay the loan in monthly installments from September 2007 to August 2032. "[W]ith respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the [s]tatute of [l]imitations [begins] to run, on the date each installment [becomes] due" … . Plaintiff commenced this foreclosure action on September 15, 2017. Therefore, recovery for the installments due within the six years prior to that date, i.e., September 15, 2011, is not barred by the statute of limitations. To the extent that plaintiff seeks recovery for installments due before that date, recovery is barred by the statute of limitations … . * * *

We reject defendants' contention that the debt accelerated automatically upon decedent's death. The mortgage provides that there is a default upon decedent's death, but it does not provide that the death of decedent would automatically accelerate the debt. Rather, the mortgage provides that the lender may accelerate the debt upon a default and, here, defendants did not establish that plaintiff chose to accelerate the debt at any time before the complaint was filed … . Wilmington Sav. Fund Socy. FSB v Deliberto, 2020 NY Slip Op 03297, Fourth Dept 6-12-20

STATUTE OF LIMITATIONS.

PLAINTIFF WAS NOT BARRED FROM SEEKING RENT OVERCHARGES BASED UPON A 1986 RENT REDUCTION ORDER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff could seek rent overcharges based upon a 1986 rent reduction order:

… [T]he plaintif's first cause of action to recover damages for rent overcharges based upon the May 1, 1986, rent reduction order was not barred by the then-applicable four-year statute of limitations and the "look-back rule," precluding examination of the rental history prior to the four-year period preceding commencement of the action (see former Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516[a][2]; former CPLR 213-a; Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, _____ NY3d _____, 2020 NY Slip Op 02127). Since rent reduction orders impose a continuing obligation on landlords, tenants are entitled to recover for any rent overcharges occurring during the applicable limitations period by reference to rent reduction orders that remain in effect during that period, even if the rent reduction order was initially issued outside the limitations period … . Santana v Fernandez, 2020 NY Slip Op 03383, Second Dept 6-17-20

SUMMARY JUDGMENT, NEGLIGENCE.

RARE CASE WHERE PLAINTIFF'S SUMMARY JUDGMENT MOTION ON LABOR LAW 200 AND COMMON-LAW NEGLIGENCE CAUSES OF ACTION WAS APPROPRIATELY GRANTED (FIRST DEPT).

The First Department determined this was a rare case where summary judgment was appropriate on a Labor Law 200, common-law negligence cause of action:

Here, PSJV, the entities responsible for site cleanliness and trade coordination, at a time when the project was open to the elements, covered a recessed area of the third floor, where rainwater regularly collected, with non-waterproof planking, and never inspected it for water accumulation. Further, PSJV did not warn plaintiff or his employer that he was working under the recessed area, and when he drilled into the second floor ceiling to affix electrical equipment, the sludgy, oily water poured down onto him, causing him to lose his balance and

injure himself. Thus, plaintiffs made a prima showing that the accident occurred due to a defective condition on the premises of which PSJV had actual notice, having caused and created it … . In response, PSJV failed to adduce credible evidence that anyone else, including plaintiff electrician, negligently caused the accident … . Langer v MTA Capital Constr. Co., 2020 NY Slip Op 03171, First Dept 6-3-20

VACATE, MOTION TO, VS APPEAL.

ACCOUNTING CAUSE OF ACTION IN THIS SHAREHOLDERS' DERIVATIVE SUIT SHOULD NOT HAVE BEEN DISMISSED; ALTHOUGH SUA SPONTE ORDERS ARE NOT APPEALABLE, THE APPEAL WAS HEARD IN THE INTEREST OF JUSTICE; PROPER WAY TO HANDLE A SUA SPONTE ORDER IS TO MOVE TO VACATE AND THEN APPEAL (FIRST DEPT).

The First Department, reversing Supreme Court in this shareholders' derivative action against a low-income Housing Development Fund Corporation (HDFC), determined: (1) although a sua sponte order is not appealable, the appeal of the dismissal of the cause of action for an accounting is heard in the interest of justice; (2) the proper way to handle a sua sponte order is to move to vacate it and then appeal; (3) there was no need to amend the complaint because the accounting cause of action included the right to damages for wrongdoing (here the alleged failure to account for the sale of an apartment for $90,000):

An order issued sua sponte is not appealable as of right (see CPLR 5701[a][2] …). Plaintiffs' remedy is to move to vacate the court's order, and, if the motion is denied, appeal from that order (CPLR 5701[a][3] …). …

… [W]e find that Supreme Court erred in dismissing the complaint because the cause of action for an equitable accounting was not moot. Supreme Court conflated the first cause of action for the inspection of the HDFC's books and records with the second cause of action for an equitable accounting … . Defendants failed to demonstrate what happened to the $90,000 from the sale of Apartment 6A, and the funds do not appear in the HDFC's financials. Defendants' affidavits did not address this glaring deficiency.

… An equitable accounting involves a remedy "designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession" … . Available relief includes a personal judgment against the wrongdoer … . Hall v Louis, 2020 NY Slip Op 03268, First Dept 6-11-20

VACATE, MOTION TO, VS APPEAL.

SELF-EXECUTING CONDITIONAL DISCOVERY ORDER BECAME ABSOLUTE UPON NON-COMPLIANCE; A MOTION TO VACATE, NOT AN APPEAL, IS THE PROPER PROCEDURE TO CONTEST THE ORDER ON THE GROUND OF EXCUSABLE DEFAULT; DEFENDANTS TOOK NO ACTION TO AVOID THE DEFAULT (FIRST DEPT).

The First Department noted that defendants' failure to comply with a self-executing, conditional order striking the answer became absolute. The proper way to contest such an order is to move to vacate, not appeal:

When defendants failed to comply with the self-executing, conditional order striking their answer if they did not produce a witness for deposition by a date certain, the order became absolute (… CPLR 3126[3]). Defendants' proper recourse was to move to vacate the conditional order on the ground of excusable default (… CPLR 5015[a]). They did not seek that relief. In any event, the excuses for failing to comply with the court's order that defendants asserted in opposition to plaintiff's motion were not reasonable, and defendants failed to seek an adjournment from the court or take any other action to avoid their knowing default. Humble Monkey, LLC v Rice Sec., LLC, 2020 NY Slip Op 03470, First Dept 6-18-20

VENUE, CHANGE OF.

VENUE WAS IMPROPER; DEFENDANTS FOLLOWED THE STATUTORY PROCEDURE AND MOVED FOR A CHANGE OF VENUE; NO OTHER PARTY MOVED FOR A CHANGE OF VENUE; THE MOTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendants' (Transit Authorities') motion to change venue should have been granted. Venue was improper, the Transit Authorities followed the correct procedure, and no other party made a motion to change venue:

After plaintiffs commenced this action in Bronx County, the Transit Authorities timely served a demand for a change of venue as of right to New York County, where one of them has its principal office (see CPLR 505[a]; 511). Plaintiffs did not respond to the demand, and the Transit Authorities timely moved to change venue (see CPLR 510[1]; 511[b]). In opposition to the motion, plaintiffs did not dispute that their choice of venue was

improper, but requested that venue be placed in Kings County, where the accident occurred. No other defendant timely appeared in opposition to the motion, although the City defendants submitted a belated affirmation asserting that venue should be placed in Kings County under CPLR 504(3).

By failing to respond to the Transit Authorities' demand to change venue to a proper forum, plaintiffs forfeited their right to select venue … . Further, no party moved to transfer venue to an alternate county … . Thus, once the Transit Authorities had followed the procedure set forth in CPLR 511 and established that the county chosen by plaintiffs was improper, their motion to change venue to New York County as of right should have been granted … . Richardson v City of New York, 2020 NY Slip Op 03281, First Dept 6-11-20

WORKERS' COMPENSATION, EXCLUSIVE REMEDY.

PERSONAL INJURY ACTION BY MOTHER OF A 14-YEAR-OLD KILLED WHEN WORKING ILLEGALLY ON DEFENDANT FARM PROPERLY DISMISSED; THE RECOVERY UNDER THE WORKERS' COMPENSATION LAW WAS THE EXCLUSIVE REMEDY BECAUSE THE INTENTIONAL-TORT EXCEPTION DID NOT APPLY; THE ACTION WAS PRECLUDED BY THE RES JUDICATA DOCTRINE; IN ADDITION THERE WAS NO EVIDENCE DEFENDANTS ACTED WILLFULLY OR INTENTIONALLY (THIRD DEPT).

The Third Department determined the personal injury action brought by decedent's mother was properly dismissed because the recovery pursuant to the Workers' Compensation Law was the exclusive remedy. Plaintiff's decedent, 14-years-old, was killed operating a skid steer while illegally employed by defendant's (Park's) farm. Although plaintiffs recovered Workers' Compensation benefits, plaintiffs argued an exception to the exclusive-remedy restriction for intentional torts applied. The Third Department held the exclusive-remedy restriction applied and there was no evidence of willful or intentional conduct on the part of the defendants:

Inasmuch as the [Workers' Compensation] Board had already "determined that [decedent's] injuries were suffered accidentally and in the course of employment" for the Farm, the claim that the Farm or its employees are liable "for an intentional tort based on the same event is barred by the exclusive remedy and finality provisions of the Workers' Compensation Law, and by principles of res judicata" … . Even if the Board's decision did not have preclusive effect, however, Supreme Court properly rejected the contention that Park engaged in "deliberate acts . . . to injure [decedent] or to have him injured" so as to bring this case within an

exception to the exclusivity provisions of the Workers' Compensation Law … . The record reflects that decedent used the skid steer without anyone's knowledge and that, following the investigation into decedent's death, Park pleaded guilty to willful failure to pay unemployment insurance contributions (see Labor Law § 633), endangering the welfare of a child (see Penal Law § 260.10) and prohibited employment of a minor (see Labor Law § 133). It could be inferred from those facts that Park was negligent in failing to supervise decedent, or even reckless in exposing decedent to dangerous work that his age left him unsuited for, but not that Park acted out of a "willful intent to harm" decedent, as required … . Smith v Park, 2020 NY Slip Op 03583, Third Dept 6-25-20