NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
July 2020

An Organized Compilation of the Summaries of New York State Appellate Decisions Addressing Civil Procedure Released in July 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 on Any Page to Return There.

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The Second Department, reversing Supreme Court, determined the action should not have been dismissed for failure to file a note of issue because a valid 90-day notice had not been issued or served. The certification order issued by Supreme Court directing plaintiff to file a note of issue within 90 days did not meet the criteria for a 90-day notice required by CPLR 3216:

… [T]he record shows that neither the Supreme Court nor any of the defendants served, pursuant to CPLR 3216, a 90-day demand to file a note of issue on the plaintiff. … [A]lthough the court issued a certification order … directing the plaintiff to file the note of issue within 90 days of the order, it did not constitute a valid 90-day demand because it did not contain any language warning that the plaintiff's failure to file the note of issue within 90 days would result in dismissal pursuant to CPLR 3216 … . Additionally, the … certification order did not set forth specific conduct by the plaintiff constituting neglect … . Since the plaintiff was never served with a 90-day demand, the court should not have dismissed the complaint due to the plaintiff's failure to file the note of issue … .

… [T]he Supreme Court could not rely upon CPLR 3126 as a basis upon which to dismiss the complaint as the plaintiff's failure to timely file the note of issue or to move to extend the time to file the note of issue did not constitute disobedience of an "order for disclosure" (CPLR 3126 …).

We also disagree with the Supreme Court's determination denying the plaintiff's cross motion, pursuant to CPLR 2004, to extend her time to file the note of issue. Discovery is complete and the defendants failed to establish that they were prejudiced by the plaintiff's failure to timely file the note of issue and her delay in moving for an extension of time to do so … . Tolkoff v Goldstein, 2020 NY Slip Op 04341, Second Dept 7-29-20

90-DAY NOTICE.

THE COURT'S ORDER DIRECTING PLAINTIFFS TO FILE A NOTE OF ISSUE DID NOT COMPLY WITH THE CRITERIA FOR A 90-DAY NOTICE PURSUANT TO CPLR 3216; THE COURT SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' motion to restore the action to active status and to extend the time to serve and file a note of issue should have been granted. Supreme Court, after a compliance conference, directed plaintiffs to file a note of issue by August 4, 2016, which was 21 days from the date of the compliance conference order. The compliance order therefore did not meet the statutory criteria for a valid 90-day notice pursuant to CPLR 3216. Supreme Court should not have, sua sponte, directed dismissal of the complaint pursuant to CPLR 3216:

The compliance conference order dated July 14, 2016, did not constitute a valid 90-day demand pursuant to CPLR 3216 because it directed the plaintiffs to file a note of issue within 21 days, rather than 90 days, of the date of the order … . Furthermore, the compliance conference order failed to set forth any specific conduct constituting neglect by the plaintiffs in proceeding with the litigation (see CPLR 3216[b][3] …). In addition, the Supreme Court failed to give the parties notice and an opportunity to be heard prior to, sua sponte, directing dismissal of the complaint pursuant to CPLR 3216 … .

Since the statutory preconditions to dismissal were not met, the Supreme Court should not have, sua sponte, directed dismissal of the complaint pursuant to CPLR 3216 … .

Contrary to the respondents' contention, this action could not have properly been dismissed pursuant to CPLR 3126, since there was no motion requesting this relief … . Christiano v Heatherwood House at Holbrook II, LLC, 2020 NY Slip Op 03891, Second Dept 7-15-20

ABANDONMENT.

PLAINTIFF MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFENDANT'S DEFAULT IN THIS FORECLOSURE ACTION; EVEN THOUGH THE MOTION WAS WITHDRAWN, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's (US Bank's) motion to dismiss the complaint as abandoned pursuant to CPLR 3215(c) should not have been granted in this foreclosure action. Plaintiff had moved for an order of reference within one year of defendant's default but then withdrew the motion:

CPLR 3215(c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." "It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)" … . "As long as the plaintiff has initiated proceedings for the entry of a judgment within one year of the default, there is no basis for dismissal of the complaint pursuant to CPLR 3215(c)" … . Moreover, " the withdrawal of the plaintiff's motion for an order of reference [does] not demonstrate that the plaintiff failed to initiate proceedings for entry of a judgment of foreclosure and sale'" … .

Here, the Supreme Court should have denied that branch of US Bank's motion which was pursuant to CPLR 3215(c) to dismiss the complaint insofar as asserted against it as abandoned, because the plaintiff moved for an order of reference within one year of US Bank's default … . "In such cases, the complaint should not be dismissed, even if, as here, the plaintiff's motion is later withdrawn'" … . Bank of Am., N.A. v Wessen, 2020 NY Slip Op 04141, Second Dept 7-22-20

ADMINISTRATIVE LAW, PROMULGATION OF REGULATIONS.

THE REGULATION REQUIRING NEW YORK HEALTH INSURANCE POLICIES TO COVER MEDICALLY NECESSARY ABORTION SERVICES, WHICH INCLUDES AN EXEMPTION FOR 'RELIGIOUS EMPLOYERS,' IS CONSTITUTIONAL AND WAS PROPERLY PROMULGATED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Colangelo, affirming Supreme Court, determined the regulation requiring health insurance policies in New York to provide coverage for medically necessary abortion services, which includes an exemption for "religious employers," was properly promulgated and was constitutional. The Court of Appeals decision upholding a similar regulation for prescription contraceptives, Catholic Charities of Diocese of Albany v Serio (7 NY3d 510 [2006] …), was deemed the controlling precedent:

At issue in Catholic Charities of Diocese of Albany was the validity of a provision of the Women's Health and Wellness Act (…[hereinafter WHWA]) that requires health insurance policies that provide coverage for prescription drugs to include coverage for prescription contraceptives … . The WHWA also provided an exemption from coverage for "religious employers" (Insurance Law § 3221 [l] [16] [E]), which exemption contains the identical criteria as the exemption applicable here … . … As the constitutional arguments raised by plaintiffs here are the same as those raised and rejected in Catholic Charities of Diocese of Albany, Supreme Court properly concluded that they must meet the same fate by operation of the doctrine of stare decisis. "Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court will generally be followed in subsequent cases presenting the same legal problem" … .

We agree with Supreme Court that an analysis of the Boreali factors [Boreali v Axelrod, 71 NY2d 1] weighs in favor of rejecting plaintiffs' challenge that the Superintendent exceeded regulatory authority in promulgating the regulation at issue here. Roman Catholic Diocese of Albany v Vullo, 2020 NY Slip Op 03707, Third Dept 7-2-20

AMEND COMPLAINT, STATUTE OF LIMITATIONS.

CAUSE OF ACTION AGAINST THE LANDOWNER FOR A SLIP AND FALL IN THE LESSEE'S SHOPPING CENTER PARKING LOT SHOULD NOT HAVE BEEN DISMISSED BECAUSE THE LANDOWNER HAD SOME REPAIR RESPONSIBILITIES UNDER THE LEASE; ALTHOUGH THE ORIGINAL SUMMONS AND COMPLAINT DESCRIBED THE WRONG PROPERTY ADDRESS, THE AMENDED COMPLAINT, SERVED AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS, WAS TIMELY UNDER THE RELATION-BACK DOCTRINE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the complaint against the landowner in this slip and fall case should not have been dismissed. Plaintiff allegedly slipped and fell in the parking lot of a shopping center. Plaintiff sued the landowner three days before the statute of limitations expired. The property address of the shopping center was wrong on the original summons and complaint. A couple of months later plaintiff served a supplemental summons and amended complaint which corrected the address and added defendants. The cause of action against the landowner should not have been dismissed because the lease gave the property owner some authority over keeping the premises safe and because the relation-back theory rendered the amended complaint timely. The causes of action against the added defendants were deemed time-barred because the relation-back doctrine did not apply to them:

A motion to dismiss a cause of action pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's allegations, thereby conclusively establishing a defense as a matter of law … . Here, the defendants' own affidavits do not constitute documentary evidence within the meaning of CPLR 3211(a)(1) … , and the ground lease between them and Stavan, Inc., failed to utterly refute the plaintiff's factual allegations. "Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition" … . Although "a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" … , and, here, the lease required the lessee to "keep [the subject property] in good repair" and "make or cause to be made any and all repairs both inside and outside," the lease also gave the defendants the right to reenter the subject property and "perform and do such acts and things, and make such payments and incur such expenses as may be reasonably necessary to make . . . repairs to comply with the requirements" under the lease. Thus, the lease failed to conclusively establish a defense as a matter of law … . …

"The linchpin' of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period" … . Here, the plaintiff failed to demonstrate that the relation-back doctrine applied inasmuch as she did not establish that the additional defendants had knowledge of the claim or occurrence within the applicable limitations period, and that her failure to name them as defendants in the original complaint was due to a mistake on her part … . Pirozzi v Garvin, 2020 NY Slip Op 03932, Second Dept 7-15-20

AMEND COMPLAINT, STATUTE OF LIMITATIONS.

MOTION TO AMEND THE SUMMONS AND COMPLAINT TO ADD AN APPARENTLY MISNAMED PARTY AFTER THE STATUTE OF LIMITATIONS HAD RUN SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to amend the summons and complaint to add an apparently misnamed party after the statute of limitations had run should not have been granted:

On March 27, 2014, the plaintiff allegedly was injured while boarding a ski lift at Hunter Mountain in Hunter. On March 23, 2016, the plaintiff commenced this action against the defendants, Hunter Mountain and Hunter Mountain Resort, LLC, to recover damages for personal injuries. After the defendants failed to appear or answer the complaint, a default judgment dated April 18, 2018, was entered against the defendants. By notice of motion dated September 15, 2018, the plaintiff moved, inter alia, in effect, pursuant to CPLR 305(c) and 3025(b) for leave to amend the summons, complaint, and caption to name Hunter Mountain Ski Bowl, Inc., doing business as Hunter Mountain (hereinafter HMSB), as a defendant instead of the named defendant Hunter Mountain. …

Relief pursuant to CPLR 305(c) may be granted only where there is evidence that the correct defendant was served, albeit misnamed in the original process, and the correct defendant would not be prejudiced by the granting of the amendment … . While CPLR 305(c) may be used to cure a misnomer in the description of a party defendant, it cannot be used after the expiration of the statute of limitations as a device to add or substitute an entirely new defendant who was not properly served … .

… There is no evidence that HMSB and Hunter Mountain are one and the same entity … . … [T]he plaintiff failed to establish that he properly served HMSB or that the Supreme Court obtained jurisdiction over it … .

… [T]he plaintiff was not entitled to relief pursuant to CPLR 3025(b) for leave to amend the summons, complaint, and caption to add HMSB as a defendant, since he did not provide a copy of his proposed amended summons and complaint, … . The proposed amendments are patently devoid of merit because the statute of limitations bars any claim against HMSB, a new party to this action … , and the plaintiff failed to establish that the relation-back doctrine pursuant to CPLR 203(f) applied … . Nossov v Hunter Mtn., 2020 NY Slip Op 04175, Second Dept 7-22-20

APPEARANCE, DEFAULT.

ALTHOUGH IT IS POSSIBLE TO ENTER AN 'INFORMAL APPEARANCE' IN AN ACTION WHICH WILL AVOID A DEFAULT, THE APPEARANCE MUST BE MADE WITHIN THE STATUTORY TIME LIMITS; THE PLAINTIFF BANK'S MOTION FOR A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department affirmed the default judgment granted to plaintiff bank in this foreclosure action. The court rejected the argument that defendant (Hall) had entered a valid "Informal appearance:"

It is true that "[i]n addition to the formal appearances listed in CPLR 320(a), the law continues to recognize the so-called informal' appearance" … . "It comes about when the defendant, although not having taken any of the steps that would officially constitute an appearance under CPLR 320(a), nevertheless participates in the case in some way relating to the merits" … .

Although "an informal appearance can prevent a finding that the defendant is in default, thereby precluding entry of a default judgment" … , this is only true when the participation constituting the informal appearance occurred within the time limitations imposed for making a formal appearance … . Indeed, even service of a formal "notice of appearance will not protect the defendant from entry of a default judgment if, after service of the complaint, the defendant does not timely make a CPLR 3211 motion or serve an answer" … . Accordingly, an informal appearance, without more, does not somehow absolve a defendant from complying with the time restrictions imposed by CPLR 320(a) which govern the service of an answer or the making of a motion pursuant to CPLR 3211 … . Deutsche Bank Natl. Trust Co. v Hall, 2020 NY Slip Op 04292, Second Dept 7-29-20

ARTICLE 78.

AN ARTICLE 78 REVIEW OF THE RESPONSE TO A FOIL REQUEST MAY ONLY CONSIDER THE GROUND FOR THE INITIAL AGENCY DECISION; THE GROUNDS FOR A SUBSEQUENT DECISION ISSUED AFTER THE ARTICLE 78 PROCEEDING WAS COMMENCED SHOULD NOT HAVE BEEN CONSIDERED; PETITIONER'S REQUEST FOR THE METADATA OF THE DISCLOSED DOCUMENTS MUST BE DENIED BECAUSE METADATA WAS NOT 'REASONABLY DESCRIBED' IN THE FOIL REQUEST (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Article 78 review must be confined to the ground asserted in the agency's initial FOIL decision and could not consider the grounds asserted in the agency's subsequent decision issued after petitioner brought the Article 78 proceeding. The ground for the initial decision had been abandoned in the second decision. The court noted that the petitioner's demand for the metadata of the disclosed documents must be denied because metadata was not "reasonably described" in the FOIL request:

This proceeding is not in the nature of mandamus to compel. Instead, the standard of review is whether the denial of the FOIL request was "affected by an error of law" (CPLR 7803[3] …), for which judicial review is "limited to the grounds invoked by the agency" in its determination … . Since respondents abandoned the exemption raised in their initial decision, they cannot meet their burden to "establish[] that the . . . documents qualif[y] for the exemption" … . Further, as respondents "did not make any contemporaneous claim that the requested materials" fit the newly raised exemptions, "to allow [them] to do so now would be contrary to [Court of Appeals] precedent, as well as to the spirit and purpose of FOIL" … . …

An agency is only required to produce "a record reasonably described" (Public Officers Law § 89[3][a]). Contrary to petitioner's contention, the FOIL request for "complete copies" of communications and documents cannot fairly be read to have implicitly requested metadata associated with those copies. Matter of Barry v O'Neill, 2020 NY Slip Op 04007, First Dept 7-16-20

CLASS ACTIONS.

THE 2009 ROBERTS CASE APPLIES RETROACTIVELY TO RENT OVERCHARGES STEMMING FROM THE RENTAL OF DEREGULATED APARTMENTS BY LANDLORDS RECEIVING J-51 TAX BENEFITS; THE OVERCHARGES HERE MUST BE RE-CALCULATED IN ACCORDANCE WITH A RECENT RULING BY THE COURT OF APPEALS; THE CLASS OF TENANTS IN THIS RENT OVERCHARGE ACTION SHOULD NOT HAVE BEEN EXPANDED BY SUPREME COURT (FIRST DEPT).

The First Department, modifying Supreme Court, in a full-fledged opinion by Justice Richter, determined: (1) Roberts v Thishman, 13 NY3d 270 applies retroactively to landlords who rent deregulated apartments while receiving J-51 tax benefits; (2) the class of tenants bringing the rent-overcharge action should not have been expanded by Supreme Court; and (3) Supreme Court must re-calculate the rent overcharges in accordance with the recent Court of Appeals ruling in Matter of Regina, 2020 NYSlipOp 02127:

In Gersten v 56 7th Ave. LLC (88 AD3d 189, 198 [1st Dept 2011]), this Court held that Roberts should be applied retroactively because the decision simply interpreted a statute that had been in effect for a number of years, and did not establish a new principle of law. * * *

In Matter of Regina … , the Court of Appeals determined that "the overcharge calculation amendments [in the HSTPA (HousiNg Stability and Tenant Protection Act)] cannot be applied retroactively to overcharges that occurred prior to their enactment." The Court also resolved a split in this Department as to what rent records can be reviewed to determine rents and overcharges in Roberts cases … . Regina concluded that "under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in Roberts overcharge cases, absent fraud" … .Accordingly, we … remand the matter for the court to set forth a methodology consistent with the Rent Stabilization Law as interpreted by the Court of Appeals in Regina. …

… [T]he motion court improvidently exercised its discretion in expanding the class. The court's order failed to analyze whether class action status was warranted based on the criteria set forth in CPLR 901 and CPLR 902. Conducting that analysis ourselves, we find that the redefined class represents such a fundamental change in the theory of plaintiffs' case that expansion of the class would be improper. Dugan v London Terrace Gardens, L.P., 2020 NY Slip Op 04239, First Dept 7-23-20

COLLATERAL ESTOPPEL.

ARBITRATOR'S DECISION FINDING CLAIMANT WAS PROPERLY DISCHARGED FOR MISCONDUCT ENTITLED TO COLLATERAL ESTOPPEL EFFECT IN THE UNEMPLOYMENT INSURANCE PROCEEDING (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined the arbitration decision pursuant to the collective bargaining agreement should have been given collateral estoppel effect by the Administrative Law Judge (ALJ) in the unemployment insurance proceeding. The arbitrator found that the claimant engaged in misconduct warranting discharge. The arbitrator's decision was issued prior to the ALJ's decision. The ALJ found claimant did not engage in misconduct and was entitled to unemployment insurance benefits:

Although "the Board is not bound by arbitration decisions regarding [a] claimant's discharge issued subsequent to the time the Board rendered its decision"… , the Board was informed of the arbitration decision prior to its decision. As such, the factual findings of the arbitrator should have been accorded collateral estoppel effect in relation to the final unemployment insurance decision, so long as the parties had a full and fair opportunity to litigate the misconduct issue at the arbitration hearing … . The fact that the arbitration decision was issued after the conclusion of the unemployment insurance hearing does not preclude its consideration for collateral estoppel purposes, as "the final factfinder in the administrative process is the Board, not the ALJ" … . As the Board indicated that the arbitrator's decision was not part of the record before it — despite that decision being the focus of, and a copy of it annexed to, the employer's administrative appeal — the matter must be remitted in order for the employer to submit the arbitration decision into the record and to provide an opportunity for claimant and the employer to provide additional evidence and testimony regarding the nature of the arbitration hearing … . Matter of Bruce (Town of N. Hempstead–Commissioner of Labor), 2020 NY Slip Op 03705, Third Dept 7-2-20

DISCLOSURE, SUMMARY JUDGMENT.

DEFENDANT HOME OWNER DEMONSTRATED HE DID NOT HAVE SUPERVISORY CONTROL OVER PLAINTIFF'S WORK AND DID NOT HAVE ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE DANGEROUS CONDITION WHICH ALLEGEDLY RESULTED IN PLAINTIFF'S INJURIES IN THIS LABOR LAW 200 ACTION; SUPREME COURT SHOULD NOT HAVE CONSIDERED AN AFFIDAVIT FROM A NOTICE WITNESS WHO WAS NOT DISCLOSED PRIOR TO THE SUMMARY JUDGMENT MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant home owner's motion for summary judgment in this Labor Law 200 action should have been granted. Defendant was not home when plaintiff fell through an open hole in the deck while removing a window. The defendant demonstrated he did not have any control over the manner of plaintiff's work and did not have actual or constructive knowledge of the dangerous condition. Supreme Court should not have considered the affidavit of a nonparty who was not previously disclosed as a witness who had actual notice of the condition.

… [T]he defendant established, prima facie, that he did not exercise supervision or control over the performance of the work giving rise to the accident … . Further, to the extent that the accident could be viewed as arising from a dangerous or defective premises condition at the work site, the defendant established, prima facie, that he did not create or have actual or constructive notice of the alleged dangerous condition … .

In opposition, the plaintiffs failed to raise a triable issue of fact. We disagree with the Supreme Court's determination to consider the affidavit of a nonparty witness submitted by the plaintiffs in opposition to the defendant's motion. In his discovery demands, the defendant sought disclosure of, inter alia, the name of any witness who had actual notice of the alleged condition, or the nature and duration of such condition. The nonparty witness was not disclosed in the plaintiffs' discovery responses, the plaintiffs failed to offer an excuse for their failure to do so, and nothing that transpired during discovery would have alerted the defendant of the potential significance of the nonparty's testimony … . Casilari v Condon, 2020 NY Slip Op 04146, Second Dept 7-22-20

FAILURE TO STATE A CAUSE OF ACTION.

MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION MAY BE BROUGHT AT ANY TIME; THE SELLER WAS NOT OBLIGATED TO EXERCISE AN OPTION IN THE RESTRICTED REMEDIES CLAUSE OF THE REAL ESTATE PURCHASE CONTRACT BECAUSE THE BUYER NEVER DEMANDED SPECIFIC PERFORMANCE OF THE CONTRACT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, affirming Supreme Court and noting that a motion to dismiss for failure to state a cause of action may be brought at any time, determined the motion to dismiss this action for specific performance of a real estate purchase agreement was properly granted. The buyer argued it was entitled to specific performance because the seller was required to exercise one of the remedies described in the restricted remedies clause of the purchase agreement. The court disagreed and held the buyer never in fact demanded specific performance. Rather, the buyer indicated it would not close unless the seller remedied a tax misclassification and lowered the purchase price:

Supreme Court properly considered the seller's post note of issue CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action because it can be made at any time (CPLR 3211[e]). Thus, CPLR 3212(a)'s requirement of demonstrating good cause for the delay does not apply … . * * *

… .[T]he buyer maintains that Supreme Court erred in dismissing that claim by misreading Mehlman v 592-600 Union Ave. Corp. (46 AD3d 338 [1st Dept 2007]) in applying the contract's restricted remedy clause against it. That clause expressly and strictly limited the buyer to two remedies in the event the seller was unable to convey title to the premises pursuant to the terms of the contract: (i) terminate the contract and receive its down payment or (ii) consummate the transaction with a $25,000 credit to remedy any title issue. The buyer argues that our holdings in Mehlman and 101123 LLC v Solis Realty LLC (23 AD3d 107 [1st Dept 2005]) obligate the seller to concede the title defect and demand that the buyer exercise one of the options set forth in the restricted remedies clause at the closing, and that the seller's failure to satisfy this obligation enables the buyer to maintain its specific performance claim. * * *

… [A] seller unable to convey clear title for reasons contemplated in the parties' contract is entitled to invoke the restricted remedies clause in response to a buyer's demand for specific performance of the parties' contractual terms. Here, the buyer's allegations unmistakably demonstrate that it did not demand specific performance from the seller to convey title as alleged in the complaint, namely, by conveying title in accordance with the seller's contractual representation that there were no negative tax issues associated with the premises. Instead, the buyer

alleged in its complaint that it was ready, willing and able to close provided that the seller, inter alia, corrected the tax misclassification and reduced the purchase price to address the tax liabilities arising from the misclassification. In fact, the allegations underlying the claim demonstrate the complete absence of a demand for specific performance of the parties' contract. Rather, according to those allegations, the buyer's demand would result only if the seller did not comply with the buyer's condition to close. These allegations, as a matter of law, demonstrate that the seller was not obligated to invoke the restricted remedies clause. Thus, under these circumstances, the buyer is precluded from seeking from the seller specific performance of their contract. M&E 73-75, LLC v 57 Fusion LLC, 2020 NY Slip Op 04372, First Dept 7-30-20

FORUM NON CONVENIENS, SERVICE OF PROCESS.

ALTHOUGH THE MOTION TO DISMISS FOR FAILURE TO SERVE A DEFENDANT SHOULD HAVE BEEN DENIED AND THE MOTION TO EXTEND TIME TO SERVE GRANTED, THE MOTION TO DISMISS ON FORUM NON COVENIENS GROUNDS WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the motion to dismiss the complaint based upon the failure to serve defendant (Bryan) should have been denied and plaintiff's motion to extend the time to serve defendants (Bryan and Carroll) should have been granted. However the action was properly dismissed on forum non conveniens grounds:

… [T]he plaintiff promptly sought an extension after Bryan challenged the court's jurisdiction, the respective insurance carriers for Bryan and Carroll had actual notice of this action within 120 days of its commencement, there was evidence of a potentially meritorious cause of action, and there was no demonstrable prejudice to Bryan and Carroll … . Accordingly, that branch of the respondents' motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against Bryan must be denied, and the plaintiff's cross motion pursuant to CPLR 306-b to extend the time to serve both Bryan and Carroll must be granted.

However, the Supreme Court providently exercised its discretion in granting that branch of the respondents' motion which was pursuant to CPLR 327(a) to dismiss the complaint insofar as asserted against them on the ground of forum non conveniens. In granting that branch of the respondents' motion, the court properly considered all the relevant factors … , including that the plaintiff and the respondents are residents of New Jersey, Carroll was also a resident of New Jersey at the time of the accident, Bryan's insurance policy was issued in New Jersey, and both vehicles involved in the accident were registered in New Jersey … . The fact that the

accident occurred in New York is insufficient by itself to provide the substantial nexus required to warrant the retention of jurisdiction in the State of New York … . Considering all of the relevant factors, including the fact that the plaintiff primarily received medical treatment for her alleged injuries in New Jersey, we find no basis to disturb the court's determination to dismiss the action insofar as asserted against the respondents on forum non conveniens grounds … . DelGrosso v Carroll, 2020 NY Slip Op 04148, Second Dept 7-22-20

FORUM NON CONVENIENS.

DEFENDANTS' MOTION TO DISMISS ON THE GROUND OF FORUM NON CONVENIENS IN THIS PERSONAL INJURY ACTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss this personal injury case on the ground of forum non conveniens grounds (CPLR 327) should have been granted:

On a motion pursuant to CPLR 327 to dismiss the complaint on the ground of forum non conveniens, the burden is on the movant to demonstrate the relevant private or public interest factors that militate against a New York court's acceptance of the litigation. "Among the factors the court must weigh are the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the actionable events, and the burden which will be imposed upon the New York courts, with no one single factor controlling" … . …

… New York courts need not entertain causes of action lacking a substantial nexus with New York … . In this case, the accident occurred in New Jersey, the decedent was a resident of New Jersey and, as a result of the accident, received medical treatment in New Jersey before her death; the plaintiff is a resident of Georgia, and none of the potential witnesses are believed to be residents of New York. Although the defendant Port Authority of New York and New Jersey is a statutory resident of New York … , and the defendant Champlain Enterprises, Inc., is a New York corporation, when taking into consideration all of the relevant factors , we find that the defendants established that New York is an inconvenient forum in which to prosecute this action … .

However, in order to assure the availability of a forum for the action, our reversal and granting of the motion to dismiss the complaint pursuant to CPLR 327 is conditioned on the defendants stipulating to waive jurisdictional and statute of limitations defenses as indicated herein\ … . Sikinyi v Port Auth. of N.Y. & N.J., 2020 NY Slip Op 03683, Second Dept 7-1-20

INJUNCTIONS.

PLAINTIFF PRESENTED CLEAR AND CONVINCING EVIDENCE SUPPORTING THE CAUSES OF ACTION AGAINST A NEIGHBOR FOR TRESPASS, PRIVATE NUISANCE, AND VIOLATION OF THE CIVIL RIGHTS LAW; THE MOTION FOR A PRELIMINARY INJUNCTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for a preliminary injunction in this dispute between neighbors should have been granted. Plaintiff alleged the neighbor repeatedly damaged and defaced plaintiff's property and installed a surveillance camera aimed at plaintiff's property. The Fourth Department went through the elements required for issuance of a preliminary injunction and described the proof offered in support of the trespass, private nuisance and Civil Rights Law causes of action:

Plaintiff's supplemental affidavit and photographs submitted in support of the motion demonstrate that Nichols repeatedly drove across her lawn and blew snow with his snowblower onto the side of plaintiff's house, allegedly causing damage to her awning and fence. Both events were intentional invasions of plaintiff's interest in the exclusive possession of her land. Furthermore, although "an action for trespass over the lands of one property owner may not be maintained where the purported trespasser has acquired an easement of way over the land in question" … , plaintiff established that the acts allegedly committed by Nichols on the easement exceeded the scope of the easement and did not constitute a reasonable use of his interest in the easement … . Thus, plaintiff demonstrated a likelihood of success on the merits of her trespass claim. …

The evidence submitted by plaintiff established that Nichols drove across plaintiff's lawn, used a snowblower to blow snow onto her house, tampered with and removed her property markers, parked his vehicle so as to obstruct plaintiff's driveway, drove on the freshly paved driveway and left tire tracks in the asphalt, and repeatedly painted a white line across the driveway. That conduct exceeds the scope of the easement and may fairly be characterized as a substantial interference with plaintiff's use and enjoyment of her property. Thus, plaintiff demonstrated a likelihood of success on the merits of her private nuisance claim.

Plaintiff's affidavit and video evidence also submitted on the motion demonstrate that Nichols threatened to install a "150-foot night vision camera" in his backyard and to point it directly into plaintiff's backyard and at her living room. As Nichols installed the surveillance camera, he stated to plaintiff, "It's gonna look right in your fucking living room! . . . You're on camera bitch! . . . Smile for the camera bitch!" Thus, plaintiff also demonstrated a likelihood of success on the merits of her claim under Civil Rights Law § 52-a. Cangemi v Yeager, 2020 NY Slip Op 04023, Fourth Dept 7-17-20

JURISDICTION, FOREIGN CORPORATIONS.

DEFENDANT DID NOT DEMONSTRATE THE FOREIGN CORPORATION WAS DOING BUSINESS IN NEW YORK WITHOUT AUTHORIZATION; DEFENDANT'S MOTION TO DISMISS THE COMPLAINT IN THIS FORECLOSURE ACTION ON THAT GROUND SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a defendant in this foreclosure action brought by a foreign corporation did not demonstrate the corporation was doing business in New York without authorization. Therefore defendant's motion to dismiss the complaint on that ground should not have been granted:

"Business Corporation Law § 1312(a) constitutes a bar to the maintenance of an action by a foreign corporation found to be doing business in New York without . . . the required authorization to do business there" … . "The purpose of that section is to regulate foreign corporations which are doing business' within the State, not . . . to enable the avoidance of contractual obligations" … . "[T]he party relying upon this statutory barrier bears the burden of proving that the corporation's business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction"… . "[A]bsent proof establishing that the [subject corporation] is doing business in New York, it is presumed that [it] is doing business in [the] State of incorporation, and not in New York" … .

The defendant failed to establish, prima facie, that "[the appellant] conducted continuous activities in [New York] essential to its corporate business" … . Therefore, "the presumption that [the appellant] does business, not in New York but in its State of incorporation has not been overcome" … . JPMorgan Chase Bank, N.A. v Didato, 2020 NY Slip Op 03903, Second Dept 7-15-20

NOTE OF ISSUE, MOTION TO VACATE.

MOTION TO VACATE THE NOTE OF ISSUE AND COMPEL DISCOVERY PROPERLY DENIED; MISAPPROPRIATION OF TRADE SECRETS AND BREACH OF A NON-COMPETITION CLAUSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined: (1) plaintiff's motion to vacate the note of issue and compel additional discovery was properly denied because the criteria of 22 NYCRR 202.21 were not met; (2) the misappropriation of trade secrets cause of action re: customer lists was properly dismissed; (3) the misappropriation of trade secrets cause of action re: development of a laser should not have been dismissed; and (4), the breach of the non-competition clause cause of action should not have been dismissed:

The elements of a cause of action to recover damages for misappropriation of trade secrets are: (1) possession of a trade secret; and (2) use of that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means (see Tri-Star Light. Corp. v Goldstein, 151 AD3d 1102, 1106). A trade secret includes any compilation of information which provides the company with an opportunity to obtain an advantage over competitors who do not know or use it … . …

… [T]he plaintiff raised triable issues of fact as to whether the defendant used its trade secrets in the manufacture of particular lasers … . …

A restrictive covenant will not be enforced if it is unreasonable in time, space, or scope … . Thus, "a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" … . … [T]he plaintiff raised a triable issue of fact regarding whether the noncompetition clause should be partially enforced. A restrictive covenant may be partially enforced to the extent necessary to protect a company's legitimate interests … . In particular, "restrictive covenants will be enforceable to the extent necessary to prevent the disclosure or use of trade secrets or confidential customer information" … . Photonics Indus. Intl., Inc. v Xiaojie Zhao, 2020 NY Slip Op 04330, Second Dept 7-29-20

NOTICE OF CLAIM.

MOTIONS FOR LEAVE TO FILE LATE NOTICES OF CLAIM IN THIS "POLLUTION ESCAPING FROM A LANDFILL" CASE SHOULD HAVE BEEN GRANTED; THE STATUTE OF LIMITATIONS HAD BEEN TOLLED BY THE FILING OF A FEDERAL CLASS ACTION SUIT; ALTHOUGH THERE WAS NO ADEQUATE EXCUSE, THE RESPONDENT WAS AWARE OF THE CLAIMS AND COULD NOT DEMONSTRATE PREJUDICE FROM THE DELAY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the motions for leave to file late notices of claim in these actions stemming from pollution escaping from a landfill should have been granted. Although leave to file a late notice of claim can not be granted after the statute of limitations has run, here the statute of limitations was tolled by the filing of a federal class action suit:

Although more than one year and ninety days had elapsed between the November 2016 accrual date alleged in claimants' proposed notices of claim and their application for leave to serve late notices of claim, we agree with claimants that the filing of the federal class action in March 2017, in which claimants are putative class members, tolled the statute of limitations … . …

… [T]he court abused its discretion in denying their application insofar as it sought leave to serve late notices of claim on respondent … . "In determining whether to grant such [relief], the court must consider, inter alia, whether the claimant[s have] shown a reasonable excuse for the delay, whether the [respondent] had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the [respondent]" … . Although claimants failed to establish a reasonable excuse for the delay, "[t]he failure to offer an excuse for the delay is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]" … .

… [B]ecause respondent knew that its Site was upgraded to a Class 2 site in 2015 and because similarly situated individuals served timely notices of claim on respondent alleging "substantively identical" exposure to the Site's pollutants and resulting damages … , we conclude that claimants established that respondent received the requisite actual timely knowledge of the claims claimants now assert. We further conclude that claimants met their initial burden of establishing that respondent would not be substantially prejudiced by the delay inasmuch as respondent has been investigating similar claims since early 2017 … and that, in opposition, respondent failed to make a "particularized showing" of substantial prejudice caused by the late notice … . Matter of Bingham v Town of Wheatfield, 2020 NY Slip Op 04241, Fourth Dept 7-24-20

NOTICE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, FORECLOSURE.

PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 AND 1306 IN THIS FORECLOSURE ACTION; PROOF REQUIREMENTS EXPLAINED IN SOME DEPTH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff loan services company (Aurora/Nationstar) did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 13O4 and 1306. Therefore, Aurora's motion for summary judgment in this foreclosure action should not have been granted. The court, noting that "lack of notice' may be raised at any time, explained defendant did not waive the "lack of notice" defense because defendant denied the plaintiff's complaint-allegations of compliance and raised the issue in opposition to plaintiff's motion for summary judgment. The Second Department further found defendant was not entitled to summary judgment because "lack of notice" was not demonstrated as a matter of law. The decision provides a valuable explanation of the proof requirements for compliance with RPAPL 1304 and 1306:

In support of its motions, Aurora submitted the affidavit of Jerrell Menyweather, a document execution specialist employed by Nationstar, along with a copy of a 90-day notice addressed to the defendant, and a proof of filing statement pursuant to RPAPL 1306 from the New York State Banking Department. Although Menyweather stated in the affidavit that the RPAPL notices were sent to the defendant at her last known address and the subject property, Menyweather did not have personal knowledge of the mailing, and Aurora failed to provide any documents to prove that the notices were actually mailed … . Aurora also failed to submit a copy of any United States Post Office document indicating that the notices were sent by registered or certified mail as required by the statute … . Furthermore, Menyweather did not aver that he was familiar with Aurora's mailing practices and procedures, and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . Nationstar Mtge., LLC v Matles, 2020 NY Slip Op 03793, 7-8-20

REFEREE'S REPORTS.

SUPREME COURT SHOULD NOT HAVE CONFIRMED THE REFEREE'S REPORT ABSENT A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the referee's report should not have been confirmed in the absence of a hearing on notice to the property owner, TEP:

… [T]he Supreme Court should not have confirmed the referee's report in the absence of a hearing on notice to TEP (see CPLR 4313 …). Although the notice accompanying the plaintiff's proposed referee's oath notified TEP of the due date for the submission of documents to the referee, it did not indicate that the submission of such papers would be in lieu of a hearing … . Further, the Supreme Court erred in rejecting TEP's contention, raised in opposition to the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, that " [t]he referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record inasmuch as the computation was premised upon unproduced business records'" … . Moreover, the referee's report also failed to identify any documents or other sources upon which the referee based her finding that the mortgaged premises should be sold in one parcel … . HSBC Bank USA, N.A. v Tigani, 2020 NY Slip Op 03901, Second Dept 7-15-20

REMOVAL FROM CITY COURT.

TENANT'S MOTION TO REMOVE AN EVICTION PROCEEDING FROM CIVIL COURT AND CONSOLIDATE IT WITH A BREACH-OF-LEASE ACTION IN SUPREME COURT SHOULD HAVE BEEN GRANTED; LEASE PROVISIONS PRECLUDED THE COUNTERCLAIMS AND EQUITABLE RELIEF IN THE EVICTION PROCEEDING, BUT THAT RELIEF IS AVAILABLE IN THE SUPREME COURT PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's (tenant's) motion pursuant to CPLR 602(b) to remove a summary proceeding (eviction proceeding) from Civil Court and consolidate it with the breach-of-lease proceeding in Supreme Court should have been granted:

On January 1, 2015, the plaintiff executed a five-year commercial lease with the defendant for a condominium unit in a building in Brooklyn for the purpose of operating a medical practice on the premises. In May 2017, the defendant commenced a summary proceeding against the plaintiff in the Civil Court, Kings County, to recover possession of the premises and unpaid rent. In October 2017, the plaintiff commenced this action against the defendant in the Supreme Court, Kings County, inter alia, to recover damages for breach of the lease. The plaintiff also moved, in effect, pursuant to CPLR 602(b) to remove the summary proceeding from the Civil Court to the Supreme Court and to consolidate it with the instant action. … Although the Civil Court is the preferred forum for the resolution of landlord-tenant disputes when the tenant may obtain full relief in a summary proceeding … , here, the lease provisions preclude the plaintiff from asserting counterclaims in the summary proceeding and the equitable relief sought by the plaintiff in the Supreme Court is unavailable to it in the summary proceeding in Civil Court … . Barkagan v S&L Star Realty, LLC, 2020 NY Slip Op 03759, Second Dept 7-8-20

RES JUDICATA, COLLATERAL ESTOPPEL.

ALTHOUGH DEFENDANTS' INSURER OBTAINED A DECLARATORY JUDGMENT (BY DEFAULT) THAT IT WAS NOT OBLIGATED TO PAY NO-FAULT BENEFITS TO PLAINTIFF PEDESTRIAN IN THIS TRAFFIC ACCIDENT CASE, THE DECLARATORY JUDGMENT DID NOT PRECLUDE, UNDER EITHER CLAIM OR ISSUE PRECLUSION, PLAINTIFF'S PERSONAL INJURY ACTION AGAINST DEFENDANTS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, after a comprehensive analysis of res judicata and collateral estoppel, refusing to follow the Second Department, determined a default judgment in a declaratory judgment action brought against plaintiff by defendant driver/owner's insurer (Nationwide) did not preclude plaintiff's subsequent personal injury action against defendants. Plaintiff alleged he was walking his motorcycle across a street when he was struct by defendants' vehicle. Nationwide brought the declaratory judgment action to obtain a ruling it was not obligated to pay no-fault benefits to plaintiff and plaintiff did not appear in that action:

Claim preclusion prevents relitigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions that either were raised or could have been raised in the prior proceeding … . As the Court of Appeals has stressed, this "identity" requirement is a "linchpin

of res judicata," which applies "only when a claim between the parties has been previously brought to a final conclusion'" … . Stated differently, the "doctrine of res judicata only bars additional actions between the same parties on the same claims based upon the same harm" … . …

Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action … . Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action … . There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party … .

… ."An issue is not actually litigated" for collateral estoppel purposes "if, for example, there has been a default" … . …

Claim preclusion cannot apply here, because plaintiff and defendants are litigating a claim against each other for the first time. * * * Defendants' rights to be defended and indemnified by Nationwide remained intact regardless of the outcome of the no-fault benefits dispute. Rojas v Romanoff, 2020 NY Slip Op 04237, First Dept 7-23-20

SERVICE OF OBJECTIONS, FAMILY LAW.

ALTHOUGH MOTHER WAS GENERALLY AWARE FATHER HAD MOVED TO DELAWARE, FATHER DID NOT SPECIFY AN AGENT FOR SERVICE AS REQUIRED BY THE FAMILY COURT ACT; THEREFORE SERVICE OF MOTHER'S OBJECTIONS TO THE SUPPORT MAGISTRATE'S ORDER AT FATHER'S LAST KNOWN ADDRESS WAS PROPER (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's objections to the Support Magistrate's order should not have been rejected on the ground father was not properly served. The papers were served at father's prior address in Brooklyn. Although mother was aware father may live in Delaware from representation made to the court, father did not specify an agent for service as required by Family Court Act. Therefore service at father's last known address was proper:

"Family Court Act § 439(e) provides, in pertinent part, that [a] party filing objections shall serve a copy of such objections upon the opposing party,' and that [p]roof of service upon the opposing party shall be filed with the [Family Court] at the time of filing of objections and any rebuttal'" … . Here, the mother served her objections upon the father at an address in Brooklyn, which was the same address she listed for the father in her petition.

The court rejected the proof of service because, inter alia, the court file reflected a Delaware address for the father. While the mother was generally aware that the father represented to the court that his address was in Delaware, there was no evidence in the record that the address was ever disclosed to the mother. Moreover, following the mailing of the original summons to the father's Brooklyn address, he filed an Address Confidentiality Affidavit. In his Address Confidentiality Affidavit, the father failed to specify an agent for service, and there was no evidence that the mother ever received notice of an agent for service for the father as required by Family Court Act § 154-b(2)(c). Under these circumstances, the mother had insufficient notice of the father's purported new address in Delaware and lacked notice of an agent for service for the father. Therefore, service upon the father at the address last known to the mother was proper (see CPLR 2103[b][2] …). Matter of Deyanira P. v Rodolfo P.-B., 2020 NY Slip Op 03918, Second Dept 7-15-20

SERVICE OF ORDER, FAMILY LAW.

ABSENT PROOF OF SERVICE OF THE SUPPORT MAGISTRATE'S ORDER ON FATHER OR FATHER'S COUNSEL, THE TIME FOR FILING OBJECTIONS TO THE ORDER NEVER BEGAN RUNNING (SECOND DEPT).

The Second Department, reversing Family Court, determined the time for filing objections to the order of the Support Magistrate never started to run because there was no evidence the order was served or mailed, notwithstanding father's possession of the order:

Pursuant to Family Court Act § 439(e), objections to an order of a Support Magistrate must be filed within 30 days after the date on which the order is provided to the objecting party in court or by personal service, or within 35 days after the date in which the order is mailed to the objecting party … . When a party is represented by counsel, the 35-day time requirement does not begin to run until the final order is mailed to counsel … . Here, the father and the father's prior counsel indicated that neither of them received the Support Magistrate's order by either personal service or mail. In addition, there is no evidence in the record demonstrating that the Support Magistrate's order was mailed or personally served on the father's counsel. Since there is no evidence in the record indicating that the Support Magistrate's order was personally served or mailed to the father's counsel … , the time in which the father was required to file his objections never began to run … . Contrary to the Family Court's determination, the father's actual possession of the Support Magistrate's order, which prior counsel indicated was obtained from the Family Court record room, is not dispositive, as the time limitations of Family

Court Act § 439(e) do not begin to run until service is effectuated in accordance therewith … . Hughes v Lugo, 2020 NY Slip Op 04308, Second Dept 7-29-20

SERVICE OF PROCESS, DEFAULT.

DEFENDANT'S MOTION TO VACATE ITS DEFAULT BECAUSE IT WAS NEVER SERVED WITH THE SUMMONS AND COMPLAINT SHOULD HAVE BEEN GRANTED; THE ADDRESS ON FILE WITH THE SECRETARY OF STATE WAS INCORRECT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate its default because it was never served with the summons and complaint should have been granted. The defendant demonstrated the address on file with the Secretary of State was incorrect and the failure to update the address was not a deliberate attempt to avoid service:

" CPLR 317 provides, generally, that a defendant is entitled to vacatur of a default judgment if it is established that he [or she] did not receive personal notice of the summons in time to defend and that he [or she] has a meritorious defense'"… . "It is also well established that service on a corporation through delivery of process to the Secretary of State is not personal delivery' to the corporation or to an agent designated under CPLR 318" … . While it is not necessary for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for its delay … , a defendant is not entitled to relief under that statute where its failure to receive notice of the summons "was a result of a deliberate attempt to avoid such notice" … .

Here, the defendant established its entitlement to relief from its default under CPLR 317 by demonstrating that the address on file with the Secretary of State at the time the summons and complaint were served was incorrect, and that it did not receive actual notice of the summons and complaint in time to defend itself against this action … . Contrary to the plaintiff's contention, an order dated August 21, 2013, issued in connection with the 2009 action, which was mailed to the defendant at the subject property, did not place the defendant on notice that the address on file with the Secretary of State was incorrect … . In addition, the evidence does not suggest that the defendant's failure to update its address with the Secretary of State constituted a deliberate attempt to avoid service of process … . Moreover, the defendant met its burden of demonstrating the existence of a potentially meritorious defense … . Golden Eagle Capital Corp. v Paramount Mgt. Corp., 2020 NY Slip Op 03770, Second Dept 7-8-20

SERVICE OF PROCESS.

DEFENDANTS' CONCLUSORY AND UNSUBSTANTIATED CLAIMS DID NOT REBUT THE SWORN ALLEGATIONS OF PROPER SERVICE AND MAILING OF THE SUMMONS, COMPLAINT AND REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1303 NOTICE IN THIS FORECLOSURE ACTION; THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss the complaint in the foreclosure action on the ground defendants were never served should not have been granted:

… [T]he affidavit of service contained sworn allegations reciting that service was made upon Simone Cohen at 4:48 p.m. on March 3, 2009, by delivering to her the summons, complaint, and notice required by RPAPL 1303 at the subject property. The affidavit of service included a description of Simone Cohen. Another affidavit of service of the same process server contained sworn allegations reciting that service was made upon Avi Cohen by delivering a copy of the relevant papers to "SIMONE COHEN (WIFE)," a person of suitable age and discretion, at 4:48 p.m. on March 3, 2009, at the subject property, "[s]aid premises being the Defendant's dwelling place within the State of New York," and described Simone Cohen as above. The process server further averred that on March 4, 2009, he mailed those documents to Avi Cohen at the address of the subject property "by depositing a true copy of the same in a postpaid, properly addressed envelope in a[n] official depository under the exclusive care and custody of the United States post office." Two additional affidavits of service recited that on March 4, 2009, copies of the summons were mailed to each defendant at the subject property.

Contrary to the determination of the Supreme Court, the defendants' submissions failed to rebut the affidavit of service, since they stated only that Simone Cohen could not have been present at the time of the alleged service since she picked up her children from school every Tuesday and that she could not have understood or answered the process server's questions or understood the import of the legal papers since she was not proficient in English. The defendants' conclusory and unsubstantiated submissions did not rebut the sworn allegation that a person fitting the physical description of Simone Cohen was present at the residence at the time and accepted service … . Moreover, Avi Cohen did not deny that he received the papers in the mail and thus did not overcome the inference of proper mailing that arose from the affidavit of service … . Nationstar Mtge., LLC v Cohen, 2020 NY Slip Op 04312, Second Dept 7-29-20

STANDING, ZONING.

LOCAL LAW REVISING ZONING DISTRICTS AND ALLOWING MINING WAS VALIDLY ENACTED; CONTRARY TO SUPREME COURT'S FINDING, TWO PETITIONERS HAD STANDING BY VIRTUE OF THEIR OWNING PROPERTY SUBJECT TO THE NEW ZONING PROVISIONS; ONE PORTION OF THE LOCAL LAW USURPED THE POWERS OF THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) AND WAS ANNULLED; ANOTHER PORTION ADDRESSING TRUCK TRAFFIC VIOLATED THE VEHICLE AND TRAFFIC LAW AND WAS ANNULLED (THIRD DEPT).

The Third Department, in a comprehensive and detailed decision which can not be fairly summarized here, determined a local law which included and new zoning map, revised zoning districts and allowed mining on properties with existing permits was validly enacted. Disagreeing with Supreme Court, the Third Department noted that two of the petitioners, Holser and Hastings, had standing to challenge the State Environmental Quality Review Act (SEQRA) review by virtue of owning property subject to the rezoning ordinance. The court found that one section of the Local Law usurped powers reserved under SEQRA requiring annulment of that section. The court found that another paragraph of the Local Law prohibiting the transport of minerals on town roads did not carve out exceptions for deliveries as required by the Vehicle and Traffic Law. With respect to the standing issue, the court wrote:

For purposes of standing, when a property owner challenges the SEQRA review process undertaken in conjunction with a zoning enactment to which its property is subject, "ownership of the subject property confers a legally cognizable interest in being assured that the Town satisfied SEQRA before taking action to rezone its land" … . "[S]tanding should be liberally constructed so that land use disputes are settled on their own merits rather than by preclusive, restrictive standing rules. To that end, the allegations contained in a petition are deemed to be true and are construed in the light most favorable to the petitioner" … . Holser and Hastings have demonstrated that they reside in the Town and own property therein. It is not necessary to assert "proof of special damage or in-fact injury" … , nor do they have to state a noneconomic environmental harm. All that is necessary for standing is to demonstrate ownership of property subject to the rezoning ordinance … . Matter of Troy Sand & Gravel Co., Inc. v Town of Sand Lake, 2020 NY Slip Op 04212, Thrid Dept 7-23-20

STANDING.

HEARSAY DID NOT PROVE BANK HAD STANDING IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence submitted by plaintiff bank to establish standing in this foreclosure action was inadmissible hearsay:

"… [T]he plaintiff submitted the affidavit of a foreclosure specialist for Seterus, Inc. (hereinafter Seterus), which purports to be a subservicer for the Federal National Mortgage Association as assignee of the plaintiff as assignee of OneWest. The affidavit constitutes inadmissible hearsay, as the foreclosure specialist did not attest that he had personal knowledge of OneWest's business practices and procedures … , or that any records provided by OneWest were incorporated into Seterus's own records … , and also did not submit any documents to show that OneWest possessed the note at the time of the commencement of this action (see CPLR 4518[a] …). Since the foreclosure specialist also failed to establish a foundation to show that he had personal knowledge as to whether OneWest possessed the note prior to commencement of the action (see CPLR 3212[b] …), the plaintiff failed to establish its standing. The documents attached to the affirmation of counsel for the plaintiff are inadmissible hearsay as counsel failed to establish a foundation for admission of such documents as business records and the foreclosure specialist's affidavit does not reference the records attached to counsel's affirmation … . Moreover, even if a proper foundation for the admissibility of the business records had been established, the submitted documents do not show that OneWest had ownership of and the right to enforce the note at the time of the commencement of the action … . The plaintiff also failed to show OneWest's standing based upon a purported written assignment of the mortgage from MERS [Mortgage Electronic Registration system] to OneWest, as the plaintiff did not demonstrate that MERS had the authority to assign the note …". Ocwen Loan Servicing, LLC v Schacker, 2020 NY Slip Op 04313, Second Dept 7-29-20

STATUTE OF LIMITATIONS, FORECLOSURE.

ATTEMPTS TO DE-ACCELERATE THE DEBT, INCLUDING VOLUNTARY DISCONTINUANCES AFTER THE DEATH OF THE DEFENDANT, WERE INEFFECTUAL, THE FORECLOSURE ACTION IS TIME-BARRED (THIRD DEPT).

The Third Department, over a two-justice concurrence, determined the statute of limitations began to run in 2009 when the mortgage debt was accelerated in this foreclosure action and the attempts to subsequently de-accelerate the debt after the death of the defendant, including voluntary discontinuances, were ineffectual. Therefore the action was time-barred:

With respect to the notices of discontinuance in the 2009 and 2013 actions, we note that we, as well as other Appellate Divisions, have held that the voluntary discontinuance of an action, without more, will not generally constitute an affirmative act that revokes a lender's election to accelerate a debt … . * * *

In the 2009 action, plaintiff filed its notice of voluntary discontinuance roughly 13 months after decedent had passed away, without having sought substitution of a legal representative to act on behalf of decedent's estate (see CPLR 1021; see also SCPA 1002, 1401, 1402 [1] [b]). Thus, as the action was stayed and there was no substitution of a proper defendant, the notice of voluntary discontinuance filed in the 2009 action was without effect. … As for the notice of discontinuance filed in the 2013 action, plaintiff commenced that action against decedent, despite the fact that she had died more than two years earlier. As a result, the 2013 action was a nullity from its inception and the subsequent notice of voluntary discontinuance was void … .

We similarly find that, under the circumstances of this case, the July 2015 and September 2015 notices did not constitute affirmative acts that would notify decedent's legal representative that the prior debt acceleration was revoked, that the debt was de-accelerated and that the loan was reinstated to installment payments. Irrespective of the content and substance of the July 2015 and September 2015 notices, plaintiff addressed the notices to decedent, who had been deceased for more than four years, and mailed them to the mortgaged property. The record reflects that the September 2015 letter, which was sent by both regular mail and certified mail, was returned as undeliverable. Beneficial Homeowner Serv. Corp. v Heirs at Large of Ramona E. Thwaits, 2020 NY Slip Op 03709, Third Dept 7-2-20

STATUTE OF LIMITATIONS.

PLAINTIFF'S DECEDENT'S MEDICAL MALPRACTICE AND WRONGFUL DEATH ACTIONS WERE NOT TIME-BARRED, SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the medical malpractice and wrongful death causes of action on behalf of decedent should not have been dismissed as time-barred:

The plaintiff's decedent died due to complications related to cancer on August 29, 2015. On May 26, 2016, the plaintiff commenced this action to recover damages for wrongful death and medical malpractice against, among others, the defendants Forest Hills Hospital (hereinafter FHH) and Sergio Martinez, a physician (hereinafter together the defendants). As is relevant to these appeals, the complaint alleged negligent acts and omissions by the defendants related to the decedent's hospitalization at FHH from July 30, 2013, to August 1, 2013. After joinder of issue, Martinez and FHH separately moved pursuant to CPLR 3211(a)(5) to dismiss, as time-barred, so much of the complaint as was based upon alleged acts of malpractice committed before November 26, 2013, insofar as asserted against each of them. … Supreme Court granted the defendants' separate motions. …

We disagree with the Supreme Court's determination that the statute of limitations barred causes of action to recover damages for medical malpractice that accrued prior to November 26, 2013 (i.e., 2½ years before the date the action was commenced), rather than February 28, 2013 (i.e., 2½ years before the date of the decedent's death) (see EPTL 5-4.1 …). Since, at the time of his death, the decedent had a valid cause of action to recover damages for medical malpractice based upon acts or omissions occurring on or after February 28, 2013, and since the wrongful death cause of action was commenced within two years of the date of his death, the wrongful death cause of action was timely commenced … . Accordingly, any causes of action to recover damages for medical malpractice that accrued on or after February 28, 2013 (i.e., within 2½ years of the decedent's death), including the decedent's July 2013 hospitalization, were timely. Further, the plaintiff then had one year from the decedent's death to assert a cause of action alleging conscious pain and suffering (see CPLR 210[a]; …). Perez v Baez, 2020 NY Slip Op 04329, Second Dept 7-29-20

STATUTE OF LIMITATIONS.

QUESTIONS OF FACT WHETHER THE CONTINUOUS REPRESENTATION DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS ARCHITECTURAL MALPRACTICE/BREACH OF CONTRACT ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact about whether the continuous representation doctrine tolled the statute of limitations in this architectural malpractice/breach of contract action. Defendant's decedent was hired by plaintiff to construct a four-story condominium. Although the work was completed in 2008 there were problems getting approval by the city and new architectural services contracts were entered in 2015 and 2018. The court noted that, where a motion to dismiss pursuant to CPLR 3211 is made on statute-of-limitations grounds, a plaintiff may remedy any defects in the pleadings in an affidavit:

"[A]n action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort" is subject to a three-year statute of limitations (CPLR 214[6] …). Such an action, founded upon "defective design or construction accrues upon the actual completion of the work to be performed and the consequent termination of the professional relationship" … . However, "a professional malpractice cause of action asserted against an architect or engineer may be tolled under the continuous representation' doctrine if the plaintiff shows its reliance upon a continued course of services related to the original professional services provided" … . * * *

Even if the defendant had met her prima facie burden, the plaintiff raised a question of fact as to whether the continuous representation toll applied. Specifically, the plaintiff averred in an affidavit in opposition to the motion that [defendant's decedent] continued to work on the project from 2008 through the time that the parties entered into the 2015 agreement, including by continuing to revise the plans so as to subdivide the property, regularly meeting with the plaintiff, renewing building permits with the plaintiff, meeting with a "commissioner" at the DOB [NYC Department of Buildings] to discuss revised plans, and filing an application concerning the project with the DOB in 2014. Anderson v Pinn, 2020 NY Slip Op 03636, Second Dept 7-1-20

STATUTE OF LIMITATIONS.

THE ACTION ALLEGING DEFECTIVE CONSTRUCTION OF A CONDOMINIUM ACCRUED WHEN THE WORK WAS COMPLETED, I.E., WHEN THE CERTIFICATE OF OCCUPANCY WAS ISSUED; THE ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the action alleging defective construction of a condominium was time-barred. The action accrued the work was completed, i.e., when the certificate of occupancy was issued:

A claim for damages arising from defective construction accrues on the date of completion of the work … . "This rule applies no matter how a claim is characterized in the complaint' because all liability' for defective construction has its genesis in the contractual relationship of the parties'" … . Here, the corporate defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the first through third and fifth through seventh causes of action insofar as asserted against them. The corporate defendants established that the causes of action accrued on October 5, 2007, the date the certificate of occupancy was issued … , and that this action was not commenced until June 2016, more than eight years later, at which time the applicable statutes of limitations had expired. Board of Mgrs. of the 23-23 Condominium v 210th Place Realty, LLC, 2020 NY Slip Op 04143, Second Deptp 7-22-20

SUBPOENAS.

THE ATTORNEY GENERAL PROPERLY SERVED VALID SUBPOENAS ON THE VIRTUAL CURRENCY COMPANIES PURSUANT TO GENERAL BUSINESS LAW 352 (MARTIN ACT) IN A FRAUD INVESTIGATION; ONCE THE MOTIONS TO VACATE OR MODIFY THE EX PARTE ORDER RE: THE ISSUANCE OF THE SUBPOENAS WAS DETERMINED, THE COURT NO LONGER HAD ANY AUTHORITY OVER THE ATTORNEY GENERAL'S INVESTIGATION; THEREFORE THE VIRTUAL CURRENCY COMPANIES' SUBSEQUENT MOTION TO DISMISS WAS NOT PROPERLY BEFORE SUPREME COURT OR THE APPELLATE DIVISION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gesmer, determined that the Attorney General (petitioner) properly served subpoenas on the virtual currency companies (respondents) pursuant to General Business Law (GBL) 352 (Martin Act) in a fraud investigation. The subpoenas were attacked on several grounds, all of which were rejected: (1) subject matter jurisdiction (arguing the virtual currency is not a commodity or a security): (2) long-arm jurisdiction (arguing insufficient contacts with New York); (3) ex parte order was not certified as required by GBL 352 (court found this a technical not jurisdictional defect). But before addressing the issues raised on appeal, the Second Department held that the court did not have statutory authority under the GBL to address the respondents' motion to dismiss (which was the basis of the appeal). Under the GBL, once the motions to vacate or modify the subpoenas were determined, the court has no authority over the Attorney General's investigation:

… [U]nder the Martin Act's statutory scheme, once Supreme Court has issued an order responding to a GBL 354 application, it has no further role in the Attorney General's investigation, except to rule on a motion by either party to vacate or modify the order, as respondents made here. Accordingly, once the court issued the order authorized by GBL 354 on April 24, 2019, and modified it by order dated May 16, 2019, the proceeding before it was concluded and there was no action or proceeding for Supreme Court to "dismiss" on May 21, 2019 when respondents filed their motion that resulted in the order now before the court. All that remained was the Attorney General's ongoing investigation, in which, by statute, the courts have no further role at this stage. Indeed, neither party cites to, and this Court is unaware of, any prior case in which the subject of a Martin Act investigation has moved to "dismiss" an application by the Attorney General for an order pursuant to GBL 354. Matter of James v iFinex Inc., 2020 NY Slip Op 03880, First Dept 7-9-20

SUMMARY JUDGMENT IN LIEU OF COMPLAINT.

THE PROMISSORY NOTE WAS NOT DEMONSTRATED TO BE AN INSTRUMENT FOR THE PAYMENT OF MONEY ONLY, THE MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in lieu of complaint (CPLR 3213) based upon a promissory note should not have been granted. The note was not demonstrated to be an instrument for the payment of money only:

Pursuant to CPLR 3213, a plaintiff demonstrates its prima facie entitlement to judgment as a matter of law with respect to a promissory note if it shows "the existence of a promissory note, executed by the defendant, containing an unequivocal and unconditional obligation to repay, and the failure by the defendant to pay in accordance with the note's terms" … . "Where the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable" … . Once the plaintiff has established its prima facie entitlement to judgment as a matter of law, "the burden then shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense" … .

Here, the plaintiffs failed to establish, prima facie, that the subject promissory note was an instrument for the payment of money only … . In support of their motion, the plaintiffs submitted the promissory note, which refers to the asset sale/purchase agreement and provides the defendants with "an absolute right of set-off against the entire unpaid principal balance of [the] Note based upon any and all provisions of the Asset Sale/Purchase Agreement." Under the circumstances, "outside proof" was required, "other than simple proof of nonpayment," to establish the plaintiffs' prima facie case … . Express Valentine Auto Repair Shop, Inc. v New York Taxi 2, Inc., 2020 NY Slip Op 03644, Second Dept 7-1-20

SUMMARY JUDGMENT.

NEW THEORY PRESENTED IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LACK-OF-INFORMED-CONSENT CAUSE OF ACTION SHOULD NOT HAVE BEEN CONSIDERED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's lack-of-informed-consent cause of action in this medical malpractice case should have been dismissed. Plaintiff had alleged a new theory in response to defendant's motion for summary judgment which should not have been considered because the theory was not discernable from the pleadings:

… [T]he Supreme Court should have granted that branch of the defendant's motion which was for summary judgment dismissing the cause of action to recover damages for lack of informed consent insofar as asserted against him. The defendant made a prima facie showing of his entitlement to judgment as a matter of law dismissing that cause of action insofar as asserted against him through the affidavit of his expert, the deposition testimony, and the written consent form signed by the plaintiff, which demonstrated that the defendant disclosed to the plaintiff the risks, benefits, and alternatives to the procedure … .

In opposition, the plaintiff alleged, for the first time, a new theory that the procedure performed by the defendant exceeded the scope of her consent in specific respects, a theory that was not referred to when the plaintiff's counsel questioned the defendant at his deposition. The general rule is that " [a] plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars'" … . If the theory is discernable from the pleadings, it may be considered … , especially if the theory is referred to in the depositions … . In this case, the assertion of the new theory was not discernable from the pleadings, nor alluded to by the plaintiff's counsel when deposing the defendant … . Therefore, that theory should not have been considered. Larcy v Kamler, 2020 NY Slip Op 03652, Second Dept 7-1-20

TELEPHONE, TESTIMONY BY, SWORN TESTIMONY.

FAMILY COURT ALLOWED MOTHER TO TESTIFY BY TELEPHONE WITHOUT WARNING HER A NOTARY SHOULD BE PRESENT SO SHE COULD BE SWORN AND THEN, SUA SPONTE, REJECTED MOTHER'S TESTIMONY BECAUSE IT WAS NOT SWORN; NEW HEARING ORDERED (THIRD DEPT).

The Third Department, reversing Family Court in this child support violation proceeding, determined that mother's testimony by telephone should not have been rejected, sua sponte, because it was unsworn. Family Court allowed mother to testify and mother, who was facing incarceration for the child-support violation, had not been warned to have a notary present so her testimony could be sworn:

In noting the lack of a notary present with the mother to swear her in, Family Court correctly identified a critical issue about to unfold at the hearing, but then took no timely corrective action to address the issue, permitted the unsworn questioning to occur and then, in its written decision, found fault with the very unsworn testimony methodology that it had permitted to occur at the hearing. The correct course of action would have been for the court to explain up front that, if the mother wished to testify, she would have to do so under oath and then administer the oath itself if the mother had not made other suitable arrangements. Given that the mother was facing a potential period of incarceration of up to six months in the event that Family Court determined that her failure to pay child support was willful (see Family Ct. Act § 454 [3] [a]), the mother's testimony was essential to the court's determination as to whether she had had the ability to pay or willfully disobeyed the prior support order. Thus, having permitted the mother to give unsworn testimony telephonically, it was error for Family Court to thereafter sua sponte rule, nearly 1½ months after the hearing, that it would not credit the mother's testimony given that it was not sworn. Matter of Burnett v Andrews-Dyke, 2020 NY Slip Op 03838, Third Dept 7-9-20

VERDICT, MOTION TO SET ASIDE.

ALTHOUGH A FRYE HEARING WAS NOT NECESSARY BECAUSE BIOMECHANICAL ENGINEERING IS AN ACCEPTED SCIENTIFIC THEORY, THE BIOMECHANICAL ENGINEER'S TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN THIS REAR-END COLLISION CASE; NO FOUNDATION WAS LAID FOR THE ENGINEER'S TESTIMONY; PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to set aside the defense verdict in this rear-end collision traffic accident case should have been granted. Although Supreme Court was correct in finding that a Frye hearing was not necessary because biomechanical engineering is an accepted scientific theory, no proper foundation was laid for the defense expert's (Toosi's) testimony:

The court properly relied upon a decision of this Court and a decision of the Appellate Term, First Department, in determining that biomechanical engineering is a scientific theory accepted in the field … . …

Separate and distinct from the Frye inquiry is the " admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case'" … . "The question is whether the expert's opinion sufficiently relates to existing data or is connected to existing data only by the ipse dixit of the expert" … . Here, the defendant failed to establish that Toosi's opinions related to existing data and were the result of properly applied accepted methodology … . Thus, Toosi's testimony should have been precluded. Guerra v Ditta, 2020 NY Slip Op 03771, Second Dept 7-8-20

VERDICT, MOTION TO SET ASIDE.

WHETHER THE DEFENDANT FIRST STOPPED AT THE STOP SIGN OR DROVE THROUGH THE STOP SIGN DOESN'T MATTER BECAUSE EITHER WAY THE VEHICLE AND TRAFFIC LAW WAS VIOLATED; PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for a judgment as a matter of law (CPLR 4401) was properly denied, but the motion to set aside the defense verdict in this intersection traffic accident case (CPLR 4404 (a)) should have been granted. Defendant violated the Vehicle and Traffic Law by proceeding into the intersection on a road controlled by a stop sign. Whether defendant first stopped at the stop sign or went through the stop sign doesn't matter:

… [T]he Supreme Court should have granted the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict as contrary to the weight of the evidence and for a new trial. The evidence established that the defendant violated Vehicle and Traffic Law §§ 1142(a) and 1172(a) … . The defendant's statutory duty to yield to the plaintiff continued even after the defendant entered the intersection. Such statutory violations constitute negligence as a matter of law and could not properly be disregarded by the jury … . Accordingly, the jury could not have returned a verdict that the defendant was not negligent on any fair interpretation of the evidence … . Ramirez v Cruse, 2020 NY Slip Op 04334, Second Dept 7-29-20