NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
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An Organized Compilation of Summaries of Selected Decisions Addressing Civil Procedure Released by Our New York State Appellate Courts in August 2020. The Summaries Link to the Decisions. Click on "Table of Contents" in the Header of Any Page to Return There.

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The Second Department, reversing Supreme Court, determined the acceleration of the debt had not been revoked by the discontinuance of the foreclosure action and plaintiff's request for a declaration the acceleration had been revoked, made after the action was discontinued, was an improper request for an advisory opinion:

Upon discontinuance of the action, a judicial declaration on the issue of whether the plaintiff elected to revoke its acceleration would be merely advisory inasmuch as there was no active case in which such declaration could have an immediate effect. Indeed, by seeking voluntary discontinuance of the action, the plaintiff, in effect, waived any right to seek any further judicial relief in the action … . …

In this Department, a lender's mere act of voluntarily discontinuing an action does not constitute, in and of itself, an affirmative act revoking an earlier acceleration of the debt … . This is so because "the full balance of a mortgage debt cannot be sought without an acceleration, whereas the voluntary discontinuance of a foreclosure action may be occasioned for any number of different reasons, including those that have nothing to do with an intent to revoke the acceleration" … . Thus, it is the plaintiff who has authority to revoke its election to accelerate the mortgage debt under the terms of a note, and not the court. U.S. Bank Natl. Assn. v McCaffery, 2020 NY Slip Op 04805, Second Dept 8-26-20

> Practice Point: In the Second Department, the discontinuance of a foreclosure action does not, by itself, de-accelerate the mortgage debt so the six-year statute of limitations keeps running on any subsequent foreclosure action. Because a discontinuance terminates a court's involvement in the case, no further relief is available in that action because courts cannot issue advisory opinions.

APPEALS.

NOTWITHSTANDING ANY PRECEDENT TO THE CONTRARY, THE APPELLATE DIVISION CAN REVIEW THE RECORD OF A TRIAL AND FIND THE VERDICT UNSUPPORTED BY THE FACTS DESPITE THE ABSENCE OF A MOTION TO SET ASIDE THE VERDICT; HERE THE RECORD IN THIS TRAFFIC ACCIDENT CASE DID NOT SUPPORT THE FINDING THAT THE DRIVER OF A NEW YORK STATE THRUWAY DUMP TRUCK ACTED RECKLESSLY BY PARKING THE TRUCK ON THE SHOULDER OF THE THRUWAY (FOURTH DEPT).

The Fourth Department, refusing to follow any decisions to the contrary, determined, despite the defendant's failure to make a motion to set aside the verdict, the appellate court may review the record and render a judgment warranted by the facts. The Fourth Department, over a two-justice dissent, reversed the plaintiffs' verdict in this traffic accident case. Defendant, an employee of the New York State Thruway Authority, was the driver of a dump truck parked on the shoulder of the thruway while other employees picked up debris in the median. The truck was parked 18 inches to the left of the fog line. Plaintiffs' van drifted out of its lane and struck the back of the dump truck. The plaintiffs argued defendant was required by the relevant regulations to pull off "as far from traffic as feasible." The Fourth Department held that, although failure to pull off the highway further than 18 inches may demonstrate a lack of due care, it did not demonstrate recklessness as required by Vehicle and Traffic Law 1103:

… [A]t the time of the collision, defendant had parked the truck entirely outside of the travel lane approximately 18 inches to the left of the yellow fog line on or near the rumble strips located on the shoulder. Defendant had also activated multiple hazard lights on the truck, which consisted of regular flashers, two amber lights on the tailgate, beacon lights, and four flashing caution lights on the arrow board. Moreover, the undisputed evidence established that there were no weather, road, or lighting conditions creating visibility or control issues for motorists on the morning of the incident. Even if, as the court found, defendant knew or should have known that vehicles occasionally leave the roadway at a high rate of speed due to motorists being tired, distracted, or inattentive, we conclude that, here, it cannot be said that defendant's actions were of an "unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and . . . done . . . with conscious indifference to the outcome" … . Alexandra R. v Krone, 2020 NY Slip Op 04631, Fourth Dept 8-20-20

Practice Point: At least in the Fourth and Second Departments, a weight of the evidence appellate review is available whether or not a motion to set aside the verdict was made. Here no post-judgment motion was made and the verdict was reversed.

ATTORNEY'S FEES.

DEFENDANT OFFERED MORE TO SETTLE THE ACTION THAN WAS AWARDED PLAINTIFF AFTER TRIAL; DEFENDANT WAS THEREFORE ENTITLED TO ATTORNEY'S FEES PURSUANT TO CPLR 3220 (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant was entitled to attorney's fees pursuant to CPLR 3220 in this breach of contract action. The defendant offered $950,000 to settle the action before trial and the plaintiff was awarded about $525,000:

CPLR 3220 provides, in relevant part, that, in an action to recover damages for breach of contract, at any time at least 10 days prior to trial, a defendant may make "a written offer to allow judgment to be taken against [it] for a sum therein specified, with costs then accrued, if the [defendant] fails in his defense." If the plaintiff rejects the offer and thereafter "fails to obtain a more favorable judgment, [the plaintiff] shall pay the expenses necessarily incurred by the [defendant], for trying the issue of damages from the time of the offer" (CPLR 3220 …). Here, since the defendant's offer of $950,000 exceeded the plaintiff's award of $524,253.92 and the plaintiff rejected that offer, the court should have awarded the defendant its expenses, including attorneys' fees, incurred in trying the issue of damages from the date of its offer pursuant to CPLR 3220 … . Kirchoff-Consigli Constr. Mgt., LLC v Dharmakaya, Inc., 2020 NY Slip Op 04468, Second Dept 8-12-20

Practice Point: CPLR 3220 imposes consequences on the failure to settle a case. Where the settlement offer is higher than the judgment after trial, the plaintiff is liable for the defendant's trial-related expenses, including attorney's fees.

ATTORNEY'S FEES.

PLAINTIFF ENTITLED TO UNPAID SALARY, PREJUDGMENT INTEREST AND ATTORNEYS FEES PURSUANT TO LABOR LAW 198 AND CPLR 5001 IN THIS BREACH-OF-A-WRITTEN-EMPLOYMENT-CONTRACT ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to salary, prejudgment interest and attorney's fees stemming from plaintiff's employer's breach of a written employment agreement:

Pursuant to CPLR 5001 et seq., the plaintiff is entitled to such statutory prejudgment interest based on the defendant's breaches of the written agreement. Moreover, contrary to the defendant's contention, the plaintiff's unpaid wages … and the severance wages fall within the definition of wages as set forth in Labor Law § 190(1) … . Therefore, such wages are protected by the provisions set forth in Labor Law § 193 and fall within the ambit of remedies provided by Labor Law § 198 … . * * *

… [F]or the same reasons that the plaintiff is entitled to prejudgment interest, the plaintiff also established his entitlement to judgment as a matter law on so much of the second cause of action as sought an award of reasonable attorney's fees under Labor Law § 198(1-a) … . Gertler v Davidoff Hutcher & Citron , 2020 NY Slip Op 04731, Second Dept 8-26-20

> Practice Point: CPLR 5001 provides: "… Interest to verdict, report or decision … shall be recovered upon a sum awarded because of a breach of performance of a contract …". Labor Law 198(1-a) provides: "In any action instituted in the courts upon a wage claim by an employee … in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, [and] prejudgment interest as required under the civil practice law and rules …".

CLASS ACTIONS.

IN LIGHT OF THE REVERSAL BY THE COURT OF APPEALS, PLAINTIFF HOME HEALTH CARE AIDES WERE NOT ENTITLED TO CLASS CERTIFICATION ON THE QUESTION WHETHER THEY SHOULD BE PAID FOR THE SLEEP AND BREAK HOURS DURING 24-HOUR SHIFTS (SECOND DEPT).

The Second Department, on remittal after reversal by the Court of Appeals, determined plaintiffs, home health care aides, were not entitled to class certification on the question whether they were entitled to be paid for the sleep and break hours during 24-hour shifts. The Court of Appeals ruled that the NYS Department of Labor's (DOL's) finding that the flat-rate pay did not violate the Minimum Wage Order (Wage Order) was not irrational or unreasonable:

On March 26, 2019, the Court of Appeals reversed this Court's decision and order, concluding that the DOL's interpretation of the Wage Order did not conflict with the promulgated language and was not irrational or unreasonable … . The Court of Appeals remitted the matter to this Court to determine whether the plaintiffs' class certification motion was properly denied, considering the DOL's interpretation of the Wage Order as well as alternative bases for class certification asserted by the plaintiffs.

The proponent of a motion for class certification bears the burden of establishing the requirements of CPLR article 9 … . CPLR 901 sets forth five prerequisites to class certification. "These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority" … . "A class action certification must be founded upon an evidentiary basis" … .

… [I]n light of the DOL's interpretation of the Wage Order, the plaintiffs have failed to demonstrate entitlement to class certification on the question of whether the defendants violated the law by failing to pay them for all hours of a 24-hour shift. Although a worker must be paid minimum wage for the time he or she is "required to be available for work at a place prescribed by the employer," under the DOL interpretation of the Wage Order, a worker is not considered to be "available for work at a place prescribed by the employer" during designated meal and sleep breaks, totaling 11 hours of a 24-hour shift … . Moreno v Future Health Care Servs., Inc., 2020 NY Slip Op 04473, Second Dept 8-12-20

COMPLAINTS.

PLEADING REQUIREMENTS FOR A BREACH OF FIDUCIARY DUTY CAUSE OF ACTION WERE NOT MET; ATTORNEY REPRESENTING A CORPORATION DOES NOT OWE A FIDUCIARY DUTY TO SHAREHOLDERS OR EMPLOYEES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the pleading requirements for a breach of fiduciary duty cause of action were not met and defendant attorneys, who represented the corporation, not the decedent, did not owe a fiduciary duty to decedent:

We disagree with the Supreme Court's determination denying that branch of the Berger defendants' [attorneys'] motion which was pursuant to CPLR 3211(a)(7) to dismiss the sixth cause of action, alleging breach of fiduciary duty against them. " [T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendants misconduct'" … . A cause of action to recover damages for breach of fiduciary duty must be pleaded with the particularity required under CPLR 3016(b) … . Here, the sixth cause of action, alleging breach of fiduciary duty against the Berger defendants, contained only bare and conclusory allegations related to damages, without any supporting detail, and failed to satisfy the requirements of CPLR 3016(b) … .

Additionally, the complaint alleges that the Berger defendants represented Rockland Inc., and owed a fiduciary duty to the decedent based upon that representation. However, a corporation's attorney represents the corporate entity, not its shareholders or employees … . Mann v Sasson, 2020 NY Slip Op , 04737, Second Dept 8-26-20

> Practice Pointer: CPLR 3016(b) provides: "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Although the language of CPLR 3016(b) is not itself very specific, a breach of a fiduciary duty cause of action must be pled with specificity pursuant to the "breach of trust" language in CPLR 3016(b).

DISCOVERY.

CERTAIN DISCOVERY DEMANDS IN THIS NEGLIGENCE AND PUBLIC HEALTH LAW ACTION AGAINST A RESIDENTIAL CARE FACILITY ON BEHALF OF A FORMER RESIDENT SHOULD NOT HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined certain discovery demands by plaintiff should have been granted. Plaintiff's decedent was a resident at defendant's residential care facility and plaintiff brought an action against the facility alleging negligent care and violations of Public Health law 2801-d:

Supreme Court should have granted those branches of the plaintiff's motion which were to compel the defendants to comply with (1) his discovery demand number 30, (2) his discovery demand number 32 to the extent that it demands "[a]ll documents relating to meals provided to" the decedent, (3) his discovery demand number 33 to the extent that it demands "[a]ll documents relating to bed changing records for" the decedent, (4) his discovery demand number 34 to the extent that it demands "[a]ll documents relating to [the] movement of" the decedent, (5) his discovery demand number 35 to the extent that it demands "[a]ll documents relating to [the] washing of" the decedent, (6) his discovery demand number 36 to the extent that it demands "[a]ll documents relating to the change of position of" the decedent, and (7) his discovery demand number 51. Those demands related to the decedent's care, the staffing of nurses and nursing assistants who provided care to the decedent, and complaints or investigations of alleged substandard care or abuse involving the decedent … . Olmann v Willoughby Rehabilitation & Health Care Ctr., LLC, 2020 NY Slip Op 04750, Second Dept 8-26-20

DISMISS, MOTION TO.

QUESTION WHETHER A CONTRACT WHICH IS SILENT ABOUT ITS DURATION WAS PROPERLY TERMINATED REQUIRED CONSIDERATION OF THE INTENT OF THE PARTIES AND COULD NOT BE RESOLVED BASED UPON THE PLEADINGS ALONE; DEFENDANT'S MOTION TO DISMISS THE COMPLAINT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's (Goldman Sachs') motion to dismiss the complaint in this breach of contract action should not have been granted. The issue is whether a contract which is silent about its duration was properly terminated by Goldman. The issue requires consideration of the intent of the parties and could not be resolved based upon the pleadings:

… Supreme Court failed to examine the surrounding circumstances as well as the intent of the parties in discerning the original intent of the parties …. It improperly determined, as a matter of law, that a "reasonable time" justifying termination of the contract had elapsed and plaintiffs had not made any persuasive arguments to the contrary. In doing so, it relied upon its conclusion that Goldman was no longer receiving a meaningful benefit from the agreement, thus rejecting out of hand plaintiff's allegations in the amended complaint to the contrary.

As this is a motion to dismiss pursuant to CPLR 3211(a)(7), Supreme Court should have afforded the pleadings a liberal construction (see CPLR 3026), taken the allegations of the complaint as true, and afforded plaintiff[s] the benefit of every possible favorable inference. A motion court must only determine whether the facts as alleged fit within any cognizable legal theory … . Whether a plaintiff can ultimately establish its allegations should not be considered in determining a motion to dismiss … . "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" … . Charles Schwab Corp. v Goldman Sachs Group, Inc., 2020 NY Slip Op 04520, First Dept 8-13-20

> Practice Pointer: On a motion to dismiss the court must accept the allegations in a complaint as true. Failure to do so will mandate reversal on appeal. A clear-cut mistake like this should probably be remedied by a motion to reargue, not an expensive appeal.

DOCTRINE OF PRIMARY JURISDICTION.

DOCTRINE OF PRIMARY JURISDICTION PRECLUDED THIS CIVIL SUIT AGAINST OFFICERS OF THE UTILITY AFTER THE PUBLIC SERVICE COMMISSION DETERMINED PLAINTIFF'S ELECTRICITY HAD BEEN PROPERLY CUT OFF BY THE UTILITY BECAUSE PLAINTIFF HAD REPLACED THE METER (THIRD DEPT).

The Third Department determined the doctrine of primary jurisdiction precluded plaintiff's lawsuit against former officers of the Central Hudson Gas & Electric Corporation. Plaintiff believed the digital encoder receiver transmitter (ERT) installed at his home by the utility to replace an analog meter emitted cancer-causing radiation. Plaintiff removed the ERT and replaced it with an analog meter. The utility considered the meter dangerous and cut off plaintiff's electricity. Plaintiff complained to the Public Service Commission (PSC) which supported the utilities' power cut-off and informed plaintiff of his appeal rights. Plaintiff did not appeal and started the instant civil suit:

… [W]e find that Supreme Court was correct in its interpretation of the doctrine of primary jurisdiction. Under the doctrine of primary jurisdiction, a court has the discretion to refrain from exercising jurisdiction over a matter where an administrative agency also has jurisdiction, and the determination of the issues involved, under a regulatory scheme, depends upon the specialized knowledge and experience of the agency … . Here, the issues concern the particular meter used by Central Hudson, plaintiff's removal and replacement of same, the safety concerns caused by his actions and the validity of the disconnection of his service. These matters fall under the doctrine and, thus, were appropriate for PSC determination. We also agree with Supreme Court's assessment that the causes of action found in plaintiff's complaint amount to little more than a rebranding of his PSC claim and were properly dismissed … .

… [W]e agree with Supreme Court's determination that review of a PSC ruling is limited to a CPLR article 78 proceeding. "Supreme Court, in determining the motion for [summary judgment,] properly considered whether the . . . primary jurisdiction doctrine[] precluded the causes of action propounded by plaintiff[]" … , and that, in order to review the original ruling, it was incumbent upon plaintiff to bring an article 78 proceeding … . [Romine] v Laurito, 2020 NY Slip Op 04432, Third Dept 8-6-20

> Practice Points: Obviously, the proper vehicle for review of a decision made by an administrative agency is an Article 78 petition, not a "new" free-standing lawsuit like the civil suit brought here. I have not run into this issue before, but apparently a court can simply refrain from exercising jurisdiction over a matter that was decided by an administrative agency under the doctrine of primary

jurisdiction, deferring to the agency's expertise. Could the court have refrained from exercising jurisdiction if this action had been properly brought under Article 78?

EXPERT WITNESSES.

THE DEFENSE DID NOT NEED TO PROVIDE PLAINTIFF WITH "EXPERT-OPINION" NOTICE OF ITS INTENT TO CALL PLAINTIFF'S TREATING PHYSICIAN TO TESTIFY THAT PLAINTIFF'S COGNITIVE DEFICITS WERE THE RESULT OF A PRIOR STROKE, NOT THE TRAFFIC ACCIDENT; THE DOCTOR'S TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED AND THE $2,000,000 VERDICT SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was no need for the defendants to give prior notification to the plaintiff of the defendants' intent to call one of plaintiff's treating doctors to testify about the cause of plaintiff's cognitive deficits in this traffic accident case. The doctor would have testified the deficits were caused by a prior stroke. The testimony was precluded by Supreme Court because no "expert witness" notice had been provided to the plaintiff pursuant to CPLR 3101(d). The plaintiff was awarded $2,000,000 but the Second Department held the verdict should have been set aside:

A treating physician is permitted to testify at trial regarding causation, notwithstanding the failure to provide notice pursuant to CPLR 3101(d)(1) … ."Indeed, a plaintiff's treating physician could testify to the cause of the injuries even if he or she had expressed no opinion regarding causation in his or her previously exchanged medical report'"… . Here, the Supreme Court should not have precluded the plaintiff's treating physician from testifying regarding causation based on the defendants' failure to provide notice pursuant to CPLR 3101(d)(1), as that provision does not apply to treating physicians … . Moreover, under the circumstances of this case, the error in precluding this testimony cannot be deemed harmless.

Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 4404(a) to set aside the verdict on the issue of damages in the interest of justice and for a new trial on that issue. Duman v Scharf, 2020 NY Slip Op 04537, Second Dept 8-19-20

Practice Point: The requirement that a party must provide notice of the testimony of an expert witness pursuant to CPLR 3101 does not apply to plaintiff's treating physician who may give an opinion about the cause of plaintiff's injuries, even if causation is not addressed in the doctor's medical records.

LAW OF THE CASE.

THE ISSUE ON A PRIOR APPEAL WAS WHETHER THE MOTION TO AMEND THE COMPLAINT SHOULD HAVE BEEN GRANTED; THE ISSUE HERE IS WHETHER THE MOTION TO DISMISS THE COMPLAINT SHOULD BE GRANTED; THE ISSUES ARE DIFFERENT AND THE LAW OF THE CASE DOCTRINE DOES NOT APPLY (SECOND DEPT).

The Second Department determined a prior appeal in this matter did not trigger the law of the case doctrine:

… Supreme Court's determination that certain causes of action should be dismissed pursuant to CPLR 3211(a) was not precluded by this Court's determination on a prior appeal that similar causes of action were not palpably insufficient nor patently devoid of merit … . The law of the case doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision, and to the same question in the same case … . On the prior appeal, we determined only that the plaintiffs' proposed amendments were not so palpably insufficient as to warrant denial of the plaintiffs' motion to amend. On an ensuing motion to dismiss, however, the standard is whether the facts as alleged fit within any cognizable legal theory … . Katz v Hampton Hills Assoc. Gen. Partnership, 2020 NY Slip Op 04545, Second Dept 8-19-20

PREEMPTION.

TOWN LAW PREEMPTED BY STATE LAW RE THE DISCHARGE SETBACK FOR A BOW AND ARROW (SECOND DEPT).

The Second Department determined the town ordinance regulating the discharge setback for a bow and arrow was preempted by the conflicting provisions in Environmental Conservation Law (ECL) 11-0931:

The Town incorrectly contends that its ability to regulate the discharge setback of a bow and arrow is expressly authorized by Town Law § 130(27). That statute vests certain municipalities, including the Town, with the power to pass ordinances "prohibiting the discharge of firearms in areas in which such activity may be hazardous to the general public or nearby residents," provided that "[t]hirty days prior to the adoption of any ordinance changing the five hundred foot rule, a notice must be sent to the regional supervisor of fish and game of the environmental conservation department, notifying him of such intention" (Town Law § 130[27]). However, that statute is premised upon a definition of the term "firearm" that does not include a bow and arrow.

The Town unpersuasively contends that it is free to define for itself the meaning of "firearm," as used in Town Law § 130(27), so as to include "bow and arrow." Although Town Law § 130(27) does not expressly define "firearm," it can be readily inferred that the term is used in the same manner as in ECL 11-0931(4), which explicitly distinguishes between firearms and bows in setting forth discharge setback requirements (see ECL 11-0931[4][a][2]; see also 6 NYCRR 180.3[a] [defining "firearm" for purposes of ECL article 11]). Indeed, the mention of the "five hundred foot rule" in Town Law § 130(27) refers to the five-hundred-foot discharge setback required under ECL 11-0931(4). Construed in pari materia, these [the] two statutory provisions employ the same terminology to regulate the same subject matter, and demonstrate that the Town may not regulate the discharge setback of a bow and arrow in a manner inconsistent with State law. Hunters for Deer, Inc. v Town of Smithtown, 2020 NY Slip Op 04542, Second Dept 8-19-20

RENEW, MOTION TO.

DEFENDANT'S MOTION TO RENEW HIS OPPOSITION TO THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED; THE BANK HAD ORIGINALLY ALLEGED IT POSSESSED THE NOTE AND THEREFORE HAD STANDING TO FORECLOSE; SUBSEQUENTLY THE BANK SUBMITTED A LOST NOTE AFFIDAVIT IN SUPPORT OF ITS MOTION TO CONFIRM THE REFEREE'S REPORT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to renew his opposition to the bank's motion for summary judgment should have been granted in this foreclosure action. In support of its summary judgment motion the bank alleged it had standing based upon possession of the note. However, in support of the bank's subsequent motion to confirm the referee's report the bank submitted a lost note affidavit:

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]), and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]).

Here, in support of his cross motion for leave to renew, the borrower had a reasonable justification for his failure to present the new facts in opposition to the original motion, since the plaintiff had previously—and unequivocally—represented that the original note was in Investors' possession, and only later disclosed that the original note had in fact been lost, without providing any further details as to when the search for the note occurred, who conducted the search, and when the note was lost … .

Under these circumstances, the Supreme Court should have granted the borrower's cross motion for leave to renew and, upon renewal, denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the borrower, to strike his answer and counterclaims, and for an order of reference, based on unresolved issues of fact regarding the plaintiff's standing … . CitiMortgage, Inc. v Barbery, 2020 NY Slip Op 04377, Second Dept 8-5-20

> Practice Pointer: A clear example of the proper use of a motion to renew to address new facts that could change the outcome, here the determination whether the bank had standing to bring the foreclosure action based upon its possession of the note.

SERVICE OF PROCESS.

THE PROOF THE DEFENDANT WAS PROPERLY SERVED WAS NOT REBUTTED BY THE DEFENDANT'S UNSUBSTANTIATED ALLEGATIONS, SUPREME COURT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the proof that defendant was properly served with the summons and complaint was not rebutted by the defendant's unsubstantiated allegations:

"At a hearing to determine the validity of service of process, the burden of proving personal jurisdiction is upon the party asserting it, and that party must sustain that burden by a preponderance of the credible evidence" … ."In reviewing a determination made after a hearing, this Court's authority is as broad as that of the hearing court, and this Court may render the determination it finds warranted by the facts, taking into account that in a close case, the hearing court had the advantage of seeing the witnesses" … .

Here, viewing the evidence in its totality, the plaintiff met her burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process … . At the hearing, the process server testified to his independent recollection of his personal delivery of the papers to a person of suitable age and discretion at the defendant's dwelling, explained why he recalled this particular delivery, and gave testimony about the mailing. Among the exhibits the plaintiff presented at the hearing was a photograph, with a date, time, and GPS coordinates, depicting where the process server delivered the papers. The defendant's testimony verified that the person of suitable age and discretion, as named and described in the process server's affidavit, was consistent with the name and description of one of his co-tenants, his father. Although the defendant testified that his father was out of the country at the time of delivery, the defendant's testimony, which was unsubstantiated and, in critical respects, without a basis of personal knowledge, was insufficient to support the determination that he was not properly served. Sturrup v Scaria, 2020 NY Slip Op 04506, Second Dept 8-12-20

STATUTE OF FRAUDS.

PLAINTIFF AT-WILL EMPLOYEE WAS ENTITLED TO COMMISSIONS EARNED ON HIS ACCOUNTS BEFORE, BUT NOT AFTER, PLAINTIFF WAS TERMINATED; ALTHOUGH THE EMPLOYMENT CONTRACT WAS ORAL, IT WAS NOT SUBJECT TO THE STATUTE OF FRAUDS UNTIL AFTER PLANTIFF WAS TERMINATED. (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff, an at will employee, was not entitled to commissions on sales to any account generated by plaintiff earned after plaintiff was terminated. [that] Although the employment contract was oral, it was not subject to the statute of frauds until after plaintiff was terminated:

General Obligations Law § 5-701 (a) (1) provides that "[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . [b]y its terms is not to be performed within one year from the making thereof." "Only those agreements which, by their terms, have absolutely no possibility in fact and law of full performance within one year' will fall within the statute of frauds" … .

Here, plaintiff was an at-will employee of defendant, and "an at-will employment . . . is capable of being performed within one year despite the fact that compensation remains to be calculated beyond the one-year

period" … . We therefore reject defendant's contention that the court erred in denying its motion with respect to plaintiff's claim for payment of commissions fixed and earned during the course of plaintiff's employment with defendant … .

… [T]he court erred in denying [defendant's] motion [for summary judgment] with respect to plaintiff's claim for "commissions on sales to any accounts generated by [plaintiff] on a future and ongoing basis including post-termination of [plaintiff's] employment," i.e., the claim for commissions that would accrue subsequent to the termination of plaintiff's employment. Although "[a]n oral agreement that is terminable at will is capable of performance within one year and, therefore, does not come within the Statute of Frauds . . . [,] General Obligations Law § 5-701 (a) (1) bars enforcement of a promise to pay commissions that extends indefinitely, dependent solely on the acts of a third party and beyond the control of the defendant" … . Thus, the court erred in denying defendant's motion with respect to plaintiff's claim for commissions accruing subsequent to the termination of plaintiff's employment … . Bermel v Vital Tech Dental Labs, Inc., 2020 NY Slip Op 04666, Fourth Dept 8-20-20

Practice Point: A clear explanation why at-will employment contracts do not come within the Statute of Frauds.

STATUTE OF LIMITATIONS.

FORECLOSURE ACTION ON THE ENTIRE DEBT TIME-BARRED; QUESTION OF FACT WHETHER THE DEBT WAS DE-ACCELERATED; IF SO, ONLY THOSE INSTALLMENT PAYMENTS DUE WITHIN SIX YEARS OF THE START OF THE FORECLOSURE ACTION ARE RECOVERABLE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the foreclosure action on the entire debt was time-barred, but there was a question of fact whether the debt was de-accelerated such that the installment payments due during the six years prior to the commencement of the action were recoverable by the plaintiff bank (Chase):

… [T]he defendants demonstrated that the six-year statute of limitations (see CPLR 213[4]) began to run on July 7, 2009, when Chase accelerated the mortgage debt and commenced the prior foreclosure action … . Since the plaintiff did not commence the instant foreclosure action until more than six years later, on January 28, 2016, the defendants sustained their initial burden of demonstrating, prima facie, that the action was untimely … .

… [T]he plaintiff tendered evidence that, in May 2015, it sent letters to each of the defendants that purported to de-accelerate the entire debt … . However, such evidence is sufficient only to raise a question of fact as to whether those causes of action that sought unpaid installments which accrued within the six-year period of limitations preceding the commencement of this action (see CPLR 213[4] …) are barred by the statute of limitations due to this alleged de-acceleration by the plaintiff. Since the plaintiff failed to tender any evidence to rebut the defendants' showing that the statute of limitations bars the causes of action relating to unpaid mortgage installments which accrued on or before January 27, 2010, the Supreme Court should have granted that branch of the defendants' motion which was to dismiss those causes of action. U.S. Bank Trust, N.A. v Miele, 2020 NY Slip Op 04422, Second Dept 8-5-20

> Practice Point: When a foreclosure action is commenced, the debt is accelerated and the six-year statute of limitations on the entire debt starts to run. If the initial action is terminated and the debt is de-accelerated before the statute runs, the bank, may, in a subsequent foreclosure action, sue for the monthly payments which accrued during the six years before the second action.

STATUTE OF LIMITATIONS.

PLAINTIFFS SUED A FOSTER-CHILD PLACEMENT SERVICE FOR FRAUD AND NEGLIGENCE AFTER THE FOSTER CHILD SEXUALLY ASSAULTED PLAINTIFFS' BIOLOGICAL CHILD; THE FRAUD ACTION WAS NOT TIME-BARRED BECAUSE THE PLACEMENT SERVICE'S MERE KNOWLEDGE OF THE FOSTER CHILD'S SEXUAL BEHAVIOR IN 2008 DID NOT START THE SIX-YEAR STATUTE OF LIMITATIONS, AND THE NEGLIGENCE ACTION WAS SUPPORTED BY A DUTY OWED TO PLAINTIFFS' BIOLOGICAL CHILD (FOURTH DEPT).

The Fourth Department determined the fraud cause of action was not time-barred and the defendant's owed a duty which supported the negligence cause of action. The plaintiffs, who had a biological child, took in a foster child through Good Shepherd, a placement service. The plaintiffs were not aware that the foster child had a history of animal abuse and sexually inappropriate behavior. One day after plaintiffs' adoption of the foster child, the child sexually assaulted the biological child. Plaintiffs sued in fraud and negligence and Supreme Court denied Good Shepard's motion to dismiss:

A defendant's mere knowledge of something is not an element of a fraud cause of action; instead, a fraud cause of action requires a showing of, inter alia, the false representation of a material fact with the intent to deceive … . Thus, even assuming, arguendo, that Good Shepherd knew of the foster child's history of animal abuse and engaging in sexually inappropriate behavior as early as May 2008, we conclude that its knowledge thereof did not demonstrate that the alleged fraud occurred at that time. Good Shepherd submitted no evidence that, in May 2008, it falsely represented the foster child's relevant history with the intent to deceive plaintiffs. Thus, it did not establish as a matter of law that the fraud cause of action accrued in 2008 … . Moreover, Good Shepherd submitted the amended complaint, wherein plaintiffs alleged that, on numerous occasions in early 2012, they contacted Good Shepherd about the foster child's sexually inappropriate behavior and that, on each occasion, Good Shepherd assured them that the foster child had no history of that type of behavior. We therefore conclude that Good Shepherd failed to meet its initial burden of establishing that the fraud cause of action asserted in 2016 was barred by the applicable six-year statute of limitations (see CPLR 213 [8]). * * *

Although defendants contend that they did not owe the biological child a duty because they lacked control over the foster child during the four years that he lived with plaintiffs, control over a third-person tortfeasor is just one way to establish a duty. … [A]duty may also exist where "there is a relationship . . . between [the] defendant and [the] plaintiff that requires [the] defendant to protect [the] plaintiff from the conduct of others," and "the key . . . is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm" … . Stephanie L. v House of The Good Shepherd, 2020 NY Slip Op 04643, Fourth Dept 8-20-20

> Practice Point: The placement agency was hoping to show that it committed fraud in 2008 so that the fraud cause of action would be deemed time-barred, an unusual circumstance. But the court held the placement agency to the pleading requirements for fraud, a false representation of a material fact made with the intent to deceive, of which there was no evidence from 2008. So the statute did not start running then and action was not time-barred.

STATUTE OF LIMITATIONS.

QUESTION OF FACT WHETHER THE ACCELERATION OF THE DEBT IN 2010 WHEN THE FORECLOSURE ACTION WAS STARTED WAS REVOKED BEFORE THE SIX-YEAR STATUTE OF LIMITATIONS RAN OUT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff bank raised a question of the fact whether the acceleration of the debt at the time the foreclosure action was commenced in 2010 was revoked before the six-year statute of limitations ran out:

We nevertheless agree with plaintiff that its submissions in opposition to the motion raised a question of fact whether the present action was timely commenced. It is well settled that "[a] lender may revoke its election to accelerate the mortgage, [although] it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" … .

Here, plaintiff submitted evidence that its predecessor in interest mailed letters to defendants in January 2016, i.e., before the statute of limitations expired, revoking the prior acceleration of the mortgage. As plaintiff correctly contends, the evidence, including an affidavit of mailing, established that the letters were properly mailed to defendants at their address, thereby giving rise to the presumption that the letters were received by defendants … . Defendants' unsubstantiated denial of receipt was "insufficient to rebut the presumption of proper service at the address where all notices under the mortgage were to be sent" … . Moreover, on the limited record before us, we conclude that language of the letters and the surrounding circumstances raised a question of fact whether plaintiff's predecessor in interest validly revoked the prior acceleration of the mortgage and, thus, whether the present action was timely commenced … . U.S. Bank N.A. v Brown, 2020 NY Slip Op 04653, Fourth Dept 8-20-20

STATUTE OF LIMITATIONS.

THE 90-DAY CONTRACTUAL STATUTE OF LIMITATIONS WAS VALID AND ENFORCEABLE; THE BREACH OF CONTRACT CAUSE OF ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the 90-day statute of limitation in the contract applied and the breach of contract cause of action was therefore time-barred. The construction contract required an action to be brought within 90 days of the completion of construction:

… [An] "agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable'" … . " [T]he period of time within which an action must be brought . . . should be fair and reasonable, in view of the circumstances of each particular case. . . . The circumstances, not the time, must be the determining factor'" … . "Absent proof that the contract is one of adhesion or the product of overreaching, or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced" … .

Here, the [defendant] demonstrated, prima facie, that the time within which to commence this action had expired inasmuch as the plaintiff failed to commence this action within 90 days after May 31, 2011, when construction was indisputably complete … . Stonewall Contr. Corp. v Long Is. Rail Rd. Co., 2020 NY Slip Op 04505, Second Dept 8-12-20

SUMMARY JUDGMENT.

BECAUSE PLAINTIFF'S EXPERT AFFIDAVIT IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION DID NOT ADDRESS SEVERAL OF THE MALPRACTICE CLAIMS RAISED IN THE PLEADINGS, THOSE CLAIMS WERE DEEMED ABANDONED (FOURTH DEPT).

The Fourth Department noted that the affidavit of plaintiff's expert in this medical malpractice action did not address several of the allegations of defendant's negligence. Therefore the unaddressed claims were deemed abandoned:

The affidavit of plaintiff's expert anesthesiologist addressed defendant's conduct only with respect to the claims arising from defendant's alleged failure to ensure that the transport of Pasek [plaintiff] to the operating room was performed safely and his alleged failure to document the disconnection event and resulting blood loss in Pasek's medical chart. Inasmuch as plaintiff's expert failed to address the claims against defendant regarding the diagnosis, consulting, testing, examination, and pre- and post-operative treatment and did not identify any deviation with respect to defendant's efforts to ventilate, monitor, or resuscitate [plaintiff] Pasek, those claims are deemed abandoned. Supreme Court thus erred in denying defendant's motion with respect to those claims … , and we therefore modify the order accordingly. Pasek v Catholic Health Sys., Inc., 2020 NY Slip Op 04652, Fourth Dept 8-20-20

> Practice Point: Re: summary judgment in a medical malpractice action, if the defense expert adequately addresses the claims made in plaintiff's bill of particulars and some of those claims are not addressed by the plaintiff's expert in opposition, the unaddressed claims are abandoned.

SUMMARY JUDGMENT.

THE EVIDENCE SUBMITTED IN SUPPORT OF DEFENDANT'S SUMMARY JUDGMENT MOTION, INCLUDING AN ATTORNEY AFFIDAVIT, WAS NOT IN ADMISSIBLE FORM, THE MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's (CCC's) motion for summary judgment should not have been granted because the supporting evidence, including an attorney affidavit, was not in admissible form:

The affirmation of CCC's attorney was not based upon personal knowledge and, thus, was of no probative or evidentiary significance … . "The affidavit or affirmation of an attorney, even if he [or she] has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form, e.g., documents, transcripts" … . Here, however, the submissions by CCC on the motion were not in admissible form … . The emails and letters were offered for the truth of their contents and, therefore, constituted hearsay … . CCC failed to establish that any exception to the hearsay rule applied … . Since CCC failed to submit admissible evidence or an affidavit by a person having knowledge of the facts, it failed to establish its prima facie entitlement to judgment as a matter of law (see CPLR 3212[b] …). United Specialty Ins. v Columbia Cas. Co., 2020 NY Slip Op 04511, Second Dept 8-12-20