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 September 2020. 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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ADJOURNMENTS, ATTORNEYS.

APPELLANT'S REQUEST FOR AN ADJOURNMENT TO FIND NEW COUNSEL SHOULD HAVE BEEN GRANTED; THE NEARLY $800,000 JUDGMENT AGAINST THE APPELLANT REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined appellant's request for an adjournment to find new counsel should have been granted. The appellant's attorney had also represented other respondents and had drawn up a settlement agreement. The appellant declined to sign settlement and the court entered a judgment against the appellant for nearly $800,000:

The granting of an adjournment for any purpose rests within the sound discretion of the court … , and its determination will not be disturbed absent an improvident exercise of that discretion … . In deciding whether to grant an adjournment, the court must engage in a balanced consideration of numerous relevant factors, including the merit or lack of merit of the proceeding, prejudice or lack thereof to the petitioner, the number of adjournments granted, the lack of intent to deliberately default or abandon the action, and the length of the pendency of the proceeding … .

Under the circumstances of this case, the Supreme Court improvidently exercised its discretion in denying the appellant's request for an adjournment to obtain new counsel … . There was no prejudice to the petitioner, no lack of diligence by the appellant, and no substantial delay in the proceeding … . Matter of People of State of N.Y. v Emstar Pizza, Inc., 2020 NY Slip Op 04950, Second Dept 9-16-20

APPEALS, JUDGES.

THE ONLY WAY TO COMPEL A JUDGE TO SIGN A DOCUMENT TO CREATE AN APPEALABLE PAPER IS A MANDAMUS ACTION PURSUANT TO ARTICLE 78; THE FAILURE TO BRING THE ARTICLE 78 PROCEEDING PRECLUDED APPEAL IN THIS CASE; THE OPINION INCLUDES A COMPREHENSIVE EXPLANATION OF WHAT THE REQUIREMENTS OF AN APPEALABLE PAPER ARE AND SHOULD BE CONSIDERED DEFINITIVE ON THE TOPIC (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, over a concurrence, determined the plaintiffs' only option when the judge refused to sign the transcript of the oral decision (CPLR 2219) and, in the alternative, refused to sign the proposed order with notice of settlement (22 NYCRR 202.48[a]), was a mandamus proceeding to compel the judge to sign. Without the judge's signature, there was no appealable paper and plaintiffs could not appeal the decision disqualifying plaintiffs' counsel. Because the four-month statute of limitations for bringing an Article 78 (mandamus) action had long passed, the plaintiffs could not bring the appeal. The opinion includes a clear and comprehensive explanation of what constitutes appealable paper pursuant to CPLR 2219 and 22 NYCRR 202.48[a] which should be saved as a reference resource:

… [T]he Justice failed or refused to later sign the transcript of the proceedings, and therefore, the transcript never qualified as an order for purposes of its enforcement or for an appeal … . While the transcript bears the signature of the court reporter who certified its truth and accuracy, the court reporter's certification does not substitute for the plain and separate obligation set forth in CPLR 2219(a) that a judge or justice sign his or her name or initials to the document (see CPLR 5512[a] …). The absence of the Justice's signature on the transcript had the effect of preventing the plaintiffs from directly appealing the adverse determination to the Appellate Division.

Likewise, the Justice failed or refused to sign the proposed order that was submitted to him, with a copy of the transcript and with notice of settlement. Such an order, if signed with or without modification of its proposed language, would have become an enforceable order and subject to appeal. Parties are entitled to orders that are both enforceable and appealable, and those fundamental rights should not be thwarted by any jurists' unwitting failure to abide by the requirements of CPLR 2219(a) … . * * *

Absent a proceeding pursuant to CPLR article 78, the plaintiffs can receive no relief on this appeal. This Court cannot compel under the guise of CPLR 2219(a) and 22 NYCRR 202.48 relief that can only be properly accomplished by mandamus, which is now untimely. Charalabidis v Elnagar, 2020 NY Slip Op 04913, Second Dept 9-16-20

DECLARATORY JUDGMENTS.

A MOTION TO DISMISS AN ACTION FOR A DECLARATORY JUDGMENT FOR FAILURE TO STATE A CAUSE OF ACTION, WHERE THERE ARE NO QUESTIONS OF FACT, SHOULD BE TREATED AS A MOTION FOR A DECLARATION IN DEFENDANT'S FAVOR (SECOND DEPT).

The Second Department noted that where a motion to dismiss an action for declaratory judgment is made, the motion should be deemed for a declaration in defendant's favor:

The courts may consider "the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action where 'no questions of fact are presented [by the controversy]'" … . "Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action should be taken as a motion for a declaration in the defendant's favor and treated accordingly" … . Astoria Landing, Inc. v New York City Council, 2020 NY Slip Op 05174, Second Dept 9-30-20

DECLARATORY JUDGMENTS.

MOTION TO DISMISS A DECLARATORY JUDGMENT ACTION FOR FAILURE TO STATE A CAUSE OF ACTION SHOULD BE TREATED AS A MOTION FOR A DECLARATORY JUDGMENT IN DEFENDANT'S FAVOR; TWO CAUSES OF ACTION NOT INCLUDED IN THE NOTICE OF CLAIM PROPERLY DISMISSED ON THAT GROUND (SECOND DEPT).

The Second Department determined the motion to dismiss the declaratory judgment action should have been treated as a motion for a declaration in the defendant's favor. The action concerned fines imposed on plaintiff home-owner by NYC for the alleged failure to have the in-home elevator inspected once a year. Plaintiff alleged the relevant regulations were unconstitutional. Plaintiff also included causes of action for breach of contract and promissory estoppel. The contract and estoppel causes of action were dismissed because they were not included in plaintiff's notice of claim. The regulations were deemed constitutional. With regard to the declaratory judgment cause of action and the notice of claim, the court wrote:

"'A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration'" … . "[W]here a cause of action is sufficient to invoke the court's power to 'render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy' (CPLR 3001; see CPLR 3017[b]), a motion to dismiss that cause of action should be denied" … . However, upon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment where "'no questions of fact are presented [by the controversy]'" … . Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action "should be treated as one seeking a declaration in [the] defendant's favor and treated accordingly" … . * * *

A timely notice of claim is a condition precedent to maintaining an action against the City of New York (see Administrative Code § 7-201 …). Here, the notice of claim attached to the complaint fails to include any allegations relating to the plaintiff's causes of action to recover damages for breach of contract and promissory estoppel … . Neuman v City of New York, 2020 NY Slip Op 05052, Second Dept 9-23-30

DEFAULT JUDGMENTS.

LAW-OFFICE-FAILURE ALLEGATIONS WERE INSUFFICIENT; PLAINTIFF'S MOTION TO ENTER A DEFAULT JUDGMENT IN THIS PEDESTRIAN ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to enter a default judgment in this pedestrian accident case should have granted. The law-office-failure allegations were deemed insufficient:

In order to successfully oppose a motion for leave to enter a default judgment, a defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate the existence of a potentially meritorious defense to the action … .

Here, the … defendants' conclusory explanation that their attorney misplaced the file and that the office was understaffed was insufficient to establish a reasonable excuse for the default … . Since the … defendants failed to demonstrate a reasonable excuse for their default, this Court need not consider whether they proffered a potentially meritorious defense to the action … . Maldonado v Mosquera, 2020 NY Slip Op 04934, Second Dept 9-16-20

DEFAULT, MOTION TO VACATE.

NASSAU COUNTY SUPREME COURT CANNOT VACATE A DEFAULT ORDER ISSUED BY NEW YORK COUNTY SUPREME COURT, DESPITE THE CHANGE OF VENUE FROM NEW YORK COUNTY TO NASSAU COUNTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Nassau County Supreme Court could not vacate the default order issued by New York County Supreme Court, even though New York County Supreme Court had granted a change of venue to Nassau County:

The Supreme Court, Nassau County, had no authority to vacate the order of the Supreme Court, New York County … . A motion to vacate an order must be addressed to the court that made the order (see CPLR 5015[a]), and no court other than the one that rendered the order may entertain a motion to vacate it … . In any event, contrary to the defendants' contention, the Supreme Court, New York County, did not lack subject matter jurisdiction to issue the New York County default order one day after its order granting a change of venue to Nassau County, since the "Supreme Court is a court possessing State-wide jurisdiction and is competent to entertain a motion no matter where the underlying action is pending" … . London v 107 (160) Realty, LLC, 2020 NY Slip Op 05195, Second Dept 9-30-20

DEPOSITIONS.

SUPREME COURT PROPERLY LIMITED THE DEPOSITION QUESTIONING OF A DOCTOR IN THIS MEDICAL MALPRACTICE ACTION AND PROPERLY ORDERED THAT THE DEPOSITION BE SUPERVISED BECAUSE OF MISCONDUCT ON BOTH SIDES DURING A PRIOR DEPOSITION (SECOND DEPT).

The Second Department, over an extensive dissent, determined Supreme Court properly issued a protective order limiting the deposition questioning of a doctor (Brem) in this medical malpractice action and properly ordered that the deposition be supervised. Both sides had engaged in misconduct at the prior deposition:

… [T]he Supreme Court providently exercised its discretion in granting those branches of Winthrop's [the hospital's] motion which were for a protective order to the extent of limiting further questioning of Brem solely to his observations and treatment of decubitis ulcers sustained by Slapo [plaintiff's decedent] and to direct that Brem's continued deposition be supervised by a special referee. While we agree with the court's characterization of the improper conduct of Slapo's attorney at Brem's deposition, we observe that the defense attorneys violated 22 NYCRR 221.1 by making numerous objections and making speaking objections. We further note that Brem violated 22 NYCRR 221.2 by refusing to answer questions. Given the obstructive conduct by the defense attorneys and Brem in violation of 22 NYCRR part 221, and the improper conduct of Slapo's attorney during the deposition, we agree with the court that appropriate supervision of the balance of Brem's deposition is necessary. Because both sides have engaged in arguably sanctionable conduct during the course of Brem's deposition … , it was inappropriate to compel the plaintiff to solely bear the cost of supervision thereof. Further, without the consent of all the parties, the court may not compel a party to pay for or contribute to the cost of an outside referee (see CPLR 3104[b] …). Accordingly, we modify the order so as to direct that Brem's continued deposition be supervised by a court-employed special referee … , a judicial hearing officer, or a court attorney referee. Slapo v Winthrop Univ. Hosp., 2020 NY Slip Op 04887, Second Dept 9-2-20

DOCUMENTARY EVIDENCE, MOTION TO DISMISS.

MOTION TO DISMISS THE BREACH OF CONTRACT ACTION BASED ON DOCUMENTARY EVIDENCE PURSUANT TO CPLR 3211 (a)(1) SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant condominium-board-of-managers' motion to dismiss plaintiff condominium-owner's complaint based on documentary evidence should have been granted:

The plaintiff commenced this action against the defendant Board of Managers … (hereinafter the Board) … challenging the Board's allocation of common expenses, after the Condominium's first year of operation, in accordance with the first-year budget set forth in the Condominium offering plan. The plaintiff alleged that this method of allocating common expenses following the Condominium's first year was a breach of the Board's contractual duties and resulted in an overassessment of common charges to the plaintiff. * * *

As to the breach of contract cause of action, "[t]o succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" … . Here, the Condominium offering plan,

declaration, and bylaws (hereinafter collectively the governing documents) utterly refuted the plaintiff's factual allegations and conclusively established a defense as a matter of law to the breach of contract cause of action. In particular, the plaintiff admitted in the amended complaint that the common charges assessed to its unit since the inception of its ownership have been in accordance with the allocations set forth in "Schedule B — First Year's Budget," contained in the offering plan. The plaintiff's allegation that the Board was obligated to reallocate the common expenses after the first year of the Condominium's operation, based upon an assessment of the commercial unit owners' actual use of and benefit from the services and other items covered by the common expenses, is refuted by the governing documents. Those documents do not provide for an assessment of actual use and benefits, but rather, specify that, on at least a yearly basis, the Board will "allocate and assess [the] Common Charges amongst the Unit Owners in accordance with allocations set forth in the First Year's Budget." 189 Schermerhorn Owners Co., LLC v Board of Mgrs. of the Be@Schermerhorn Condominium, 2020 NY Slip Op 05021, Second Dept 9-23-20

DOCUMENTARY EVIDENCE, MOTION TO DISMISS.

THE MOTION TO DISMISS THE BREACH OF CONTRACT CAUSE OF ACTION BASED ON DOCUMENTARY EVIDENCE DID NOT ESTABLISH A DEFENSE AS A MATTER OF LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss the breach of contract cause of action should not have been dismissed:

… [T]he plaintiff stated a cause of action, in effect, to recover damages for breach of contract based on an alleged breach of the implied covenant of good faith and fair dealing inherent in the parties' contract . The plaintiff alleged, in effect, that there was an implied understanding that the defendant would cooperate with the plaintiff's efforts to legally change the usage of the rental space, which would require approval by the DOB, and, therefore, the defendant's… failure to cooperate in legalizing the premises constitutes a breach of contract.

"A party seeking dismissal pursuant to CPLR 3211(a)(1) on the ground that its defense is based on documentary evidence must submit documentary evidence that resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim" … . "In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable" … . Here, the evidence submitted by the defendant either was not "documentary" within the meaning of CPLR 3211(a)(1) or failed to conclusively establish a defense to the third cause of action as a matter of law … . Twinkle Play Corp. v Alimar Props., Ltd., 2020 NY Slip Op 04987, Second Dept 9-16-20

EDUCATION-SCHOOL LAW, MUNICIPAL LAW, SUA SPONTE.

DEFENDANTS' MOTION TO DISMISS CLAIMS NOT INCLUDED IN THE NOTICE OF CLAIM PROPERLY GRANTED; MOTION TO AMEND THE NOTICE OF CLAIM AND MOTION FOR LEAVE TO FILE A LATE NOTICE PROPERLY DENIED; JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE CLAIM FOR LOSS OF SERVICES BECAUSE THAT RELIEF WAS NOT REQUESTED (SECOND DEPT).

The Second Department determined defendants' motion to dismiss claims that were not in the notice of claim was properly granted, and plaintiffs' motions to amend the notice of claim and for leave to file a late notice of claim were properly denied. The Second Department noted that the loss of services claim should not have been dismissed (sua sponte) because that relief was not requested. The action alleged negligent supervision by the school. Plaintiff student was allegedly pushed into a wall during gym class by another student who had been bullying her for some time:

The plaintiffs' new claims of other purported bullying incidents and Dupper's [plaintiff-student's father's] claim that he suffered stress, anxiety, and depression as a result of the … incident constitute new theories of liability which were not included in the notice of claim and should be dismissed … . …

The plaintiffs' proposed amendments to the notice of claim add substantive new facts and new theories of liability not set forth in the original notice of claim and which are not permitted as late filed amendments to a notice of claim under General Municipal Law § 50-e(6) … . …

… [T]he plaintiffs' failure to include a proposed notice of claim with their cross motion alone was a sufficient basis for denying that branch of the cross motion … . C.D. v Goshen Cent. Sch. Dist., 2020 NY Slip Op 04916, Second Dept 9-16-20

FAILURE TO PROSECUTE.

ISSUE WAS NEVER JOINED, THEREFORE THE ACTION COULD NOT BE DISMISSED FOR FAILURE TO PROSECUTE PURSUANT TO CPLR 3216 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the action should not have been dismissed pursuant to CPLR 3216 for failure to prosecute because issue was never joined:

CPLR 3216(b)(1) states that no dismissal should be made under this statute unless issue has been joined. " A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met'" … . Here, none of the defendants submitted an answer to the complaint and, thus, issue was never joined (see CPLR 3216[b][1] …). Since at least one precondition set forth in CPLR 3216 was not met, the Supreme Court was without power to issue an order conditionally dismissing the action pursuant to that statute … . OneWest Bank, FSB v Singh, 2020 NY Slip Op 04957, Second Dept 9-16-20

FORECLOSURE, SERVICE OF PROCESS.

DEFENDANT PRESENTED SUFFICIENT PROOF SHE DID NOT LIVE AT THE ADDRESS WHERE THE FORECLOSURE COMPLAINT WAS SERVED TO WARRANT A HEARING; THERE WAS NO SHOWING THAT HER FAILURE TO UPDATE HER ADDRESS WITH THE DEPARTMENT OF MOTOR VEHICLES WAS TO PREVENT SERVICE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to enter a default judgment in this foreclosure action should not have been granted without first holding a hearing on defendant's claim she was never served with the complaint. The defendant presented proof, including a lease, demonstrating she did not live at the address where service was made. The fact that defendant had not updated her address with the Department of Motor Vehicles did preclude defendant from demonstrating she lived at a different address because there was no evidence of a deliberate misrepresentation to prevent service:

… [T]he defendant successfully rebutted the process servers' affidavits through her specific averments that, at the time of each purported service, neither the New York Avenue address, nor the subject premises, was her residence, actual dwelling place, or usual place of abode … . Rather, the defendant averred that at the time of

each purported service, she resided at an address on Albany Avenue in Brooklyn. The defendant annexed to her affidavit her lease for the Albany Avenue premises covering the period from January 25, 2014, through January 31, 2015, money orders made payable to the Albany Avenue landlord within the lease period, the defendant's 2015 W-2 bearing the Albany Avenue address, utility bills during the lease period bearing the Albany Avenue address, and bank statements during the lease period bearing the Albany Avenue address. These records, in conjunction with the defendant's sworn statements, are evidence that the defendant did not reside at the locations where process was served, and were sufficient to warrant a hearing … . Nationstar Mtge., LLC v Esdelle, 2020 NY Slip Op 04956, Second Dept 9-16-20

FORECLOSURE, SUA SPONTE.

JUDGE'S SUA SPONTE DISMISSAL OF THE FORECLOSURE COMPLAINT WAS NOT WARRANTED; NO EXTRAORDINARY CIRCUMSTANCES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's motion to vacate the sua sponte dismissal of the foreclosure complaint should have been granted:

… [I]n a status conference order … , the Court Attorney Referee … directed the plaintiff to file an application seeking an order of reference by the date of the final status conference. Following the final status conference … , the Court Attorney Referee … determined that the plaintiff failed to show good cause for its failure to move for an order of reference as directed, and recommended that the action be dismissed. … [T]he Supreme Court directed dismissal of the complaint. …

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . Here, the Supreme Court was not presented with any extraordinary circumstances warranting a sua sponte dismissal of the complaint … . Indeed, at the time the plaintiff was directed to file an application for an order of reference, an order of reference, as well as a judgment of foreclosure and sale, had already been issued. Bank of N.Y. v Ramirez, 2020 NY Slip Op 05024, Second Dept 9-23-20

FORECLOSURE, SUA SPONTE.

ALTHOUGH THE MOTION TO VACATE THE JUDGMENT OF FORECLOSURE FOR LACK OF PERSONAL JURISDICTION WAS PROPERLY GRANTED FOR THE MOVING DEFENDANT, THE JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED THE SAME RELIEF TO DEFENDANTS WHO DID NOT SO MOVE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, noted that the judge should not have, sua sponte, vacated the judgment of foreclosure as against those defendants who did not move for that relief:

"A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" … . "[T]he defense of lack of jurisdiction based on improper service is personal in nature and may only be raised by the party improperly served'" … . Here, Hickson was the only defendant who moved to vacate the judgment of foreclosure and sale and to dismiss the complaint for lack of personal jurisdiction. Accordingly, under the circumstances of this case, the Supreme Court had no basis to, sua sponte, vacate so much of the judgment of foreclosure and sale as was against the defendants other than Hickson and to direct the dismissal of the complaint insofar as asserted against those defendants for lack personal jurisdiction. Lehman Bros. Bank v Hickson, 2020 NY Slip Op 04932, Second Dept 9-16-20

FORECLOSURE, STATUTE OF LIMITATIONS.

A 2009 AMENDED COMPLAINT SERVED WITHOUT THE REQUIRED LEAVE OF COURT, ALTHOUGH INVALID AS A PLEADING, RE-ACCELERATED THE MORTGAGE DEBT IN THIS FORECLOSURE ACTION, RENDERING THE ACTION TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the mortgage debt had been re-accelerated by an amended complaint in 2009, rendering the instant foreclosure action time-barred:

… [T]he defendants also submitted the supplemental summons and amended complaint filed on July 13, 2009, in the 2005 action. In the amended complaint, PCG elected to re-accelerate the debt, which started the running of a new six-year period.

The supplemental summons and amended complaint were filed without the required leave of court (see CPLR 3025[b]). However, PCG's counsel, in an affirmation dated October 9, 2013, submitted with a stipulation to discontinue the 2005 action and a stipulation cancelling the notice of pendency, agreed that the amended complaint, "while arguably insufficient as a pleading, provided that the loan was again accelerated," and stated that "[t]hus, the loan remains accelerated from July 22, 2009, the date the amended complaint was served up and delivered to [the defendants], as per the corresponding affidavits of service."

By the submission of these documents, the defendants established that the time in which to sue expired on July 22, 2015, six years after the service of the supplemental summons and amended complaint (see CPLR 213[4]), PCG's counsel having conceded that the loan was accelerated as of that time. Goshen Mtge., LLC v DePalma, 2020 NY Slip Op 04830, Second Dept 9-2-20

FORECLOSURE, STATUTE OF LIMITATIONS.

THE STIPULATION OF DISCONTINUANCE DID NOT DEMONSTRATE THE MORTGAGE DEBT WAS DE-ACCELERATED WITHIN THE SIX-YEAR STATUTE OF LIMITATIONS PERIOD IN THIS FORECLOSURE ACTION; THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED (SECOND DEPT).

The Second Department determined plaintiff bank did not prove the debt had been acceleration and therefore did not demonstrate the foreclosure action was time-barred. It was not demonstrated that the stipulation of discontinuance affirmatively revoked the initial acceleration of the debt:

"A lender may revoke its election to accelerate the mortgage, but 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, there is no evidence in the record of any affirmative act of revocation occurring during the six-year statute of limitations period following the initiation of the 2008 foreclosure action … . The only evidence submitted by the plaintiff to establish its affirmative act of revocation was a printout of the Queens County Clerk Minutes, showing that a stipulation of discontinuance and a consent to cancel the lis pendens were filed in the 2008 foreclosure action on July 1, 2013. The plaintiff did not submit a copy of the stipulation of discontinuance. A stipulation of discontinuance will not, by itself, constitute an affirmative act of revocation where the stipulation

is silent on the issue of the election to accelerate, and does not otherwise indicate that the plaintiff would accept installment payments from the defendant … . Wells Fargo Bank, N.A. v Hussain, 2020 NY Slip Op 04997, Second Dept 9-16-20

FORECLOSURE, REPLY PAPERS.

EVIDENCE SUBMITTED IN PLAINTIFF BANK'S REPLY PAPERS PROPERLY CONSIDERED; THE BANK'S PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE MORTGAGE AGREEMENT WAS INSUFFICIENT; THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank's reply papers were properly considered but plaintiff did not submit sufficient proof that a condition precedent in the mortgage agreement, re: notice of default, was complied with:

… [T]he Supreme Court providently exercised its discretion in considering the affidavit of the plaintiff's employee Jeremiah Herberg, which was submitted with the plaintiff's papers in opposition to the defendant's cross motion and in further support of its motion … . Although "'[a] party moving for summary judgment generally cannot meet its prima facie burden by submitting evidence for the first time in reply . . . , there are exceptions to the general rule, including . . . when the other party is given an opportunity to respond to the reply papers'" … . Here, the defendant had the opportunity to address the Herberg affidavit in her reply papers in further support of her own cross motion.

However, the plaintiff failed to establish, prima facie, that it complied with the condition precedent contained in section 22 of the mortgage agreement regarding the notice of default. The plaintiff's submissions did not establish that the notice was sent by first class mail or actually delivered to the notice address, as required by the terms of the mortgage agreement … . Furthermore, Herberg's affidavit failed to lay a proper foundation for the admission of records concerning the plaintiff's mailing of the notices of default (see CPLR 4518[a] …). Wells Fargo Bank, N.A. v McKenzie, 2020 NY Slip Op 05086, Second Dept 9-23-20

FORECLOSURE, VACATE DISMISSAL.

LAW OFFICE FAILURE WARRANTED VACATING THE DISMISSAL OF THE FORECLOSURE ACTION STEMMING FROM PLAINTIFF BANK'S FAILURE TO APPEAR AT A SCHEDULED CONFERENCE (THIRD DEPT).

The Third Department determined Supreme Court properly exercised its discretion and vacated the dismissal of this foreclosure action for plaintiff bank's failure to appear at a scheduled conference (22 NYCRR 202.27):

"22 NYCRR 202.27 gives a court the discretion to dismiss an action where [a] plaintiff fails to appear at any scheduled call of a calendar or at any conference" … . "To vacate a dismissal under 22 NYCRR 202.27, it [is] incumbent upon [a] plaintiff to provide a reasonable excuse for his [or her] failure to appear and to demonstrate a potentially meritorious cause of action" … . "A motion to vacate a prior judgment or order is addressed to the court's sound discretion, subject to reversal only where there has been a clear abuse of that discretion" … .

Here, plaintiff's counsel explained that, due to a scheduling error, the assigned attorney actually appeared in court on the conference date but missed the calendar call. Law office failure may constitute a reasonable excuse for an appearance default … Given the isolated nature of this nonappearance, we find that Supreme Court acted within its discretion in reconsidering and vacating the default dismissal … . Notably, plaintiff supported its vacatur motion with a duly executed affidavit of merit from its representative. We further recognize that plaintiff has a meritorious cause of action, as we affirmed the award of summary judgment in plaintiff's favor … . Under the circumstances presented, we conclude that the court acted within its discretion in granting the motion to vacate. Onewest Bank, F.S.B. v Mazzone, 2020 NY Slip Op 05011, Third Dept 9-17-20

FORECLOSURE, STANDING.

LOST NOTE AFFIDAVIT INSUFFICIENT TO ESTABLISH STANDING; PROOF OF COMPLIANCE WITH RPAPL 1304 INSUFFICIENT; OUT OF STATE AFFIDAVIT LACKED A CERTIFICATE OF CONFORMITY; NEITHER PLAINTIFF NOR DEFENDANT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-bank's motion for summary judgment in this foreclosure action should not have been granted. The lost note affidavit was insufficient to establish standing the proof of compliance with the notice requirements of RPAPL 1304 was insufficient and the out of state affidavit lacked a certificate of conformity. Defendants' cross-motion for summary judgment, however, was properly denied:

… [T]he plaintiff failed to proffer evidence establishing that the note was assigned to it, and the affidavit of lost note submitted in support of its motion failed to establish the facts that prevented the plaintiff from producing the original note (see UCC 3-804 …). We also note that the out-of-state affidavit from the vice president of loan documentation for Wells Fargo lacked a certificate of conformity as required by CPLR 2309(c), although such defect by itself would not be fatal to the plaintiff's motion ,,, ,

… [A]lthough the plaintiff submitted a copy of the 90-day notice purportedly sent to the defendants, it failed to submit an affidavit of service or other proof of mailing establishing that it properly served them by registered or certified mail and first-class mail in accordance with RPAPL 1304 … . …

The defendants' bare denial of receipt of the RPAPL 1304 notice, without more, was insufficient to establish their prima facie entitlement to judgment as a matter of law … . Trust v Moneta, 2020 NY Slip Op 05181, Second Dept 9-30-20

FORECLOSURE, REFEREE'S REPORT.

THE REFEREE'S REPORT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN CONFIRMED; THE REFEREE RELIED ON HEARSAY AND FAILED TO CONDUCT A HEARING ON NOTICE AS REQUIRED BY THE CPLR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report should not have been confirmed. The evidence of default presented to the referee was hearsay and the referee did not hold a hearing on notice as required by CPLR 4320:

… [W]ith respect to the amount due to the plaintiff, the referee based his findings on the affidavit of Nicholas J. Raab, an employee of Specialized Loan Servicing, LLC, the plaintiff's loan servicing agent for the subject loan. While Raab provided a proper foundation for the admission of business records made by a prior servicer … , he failed to attach the business records themselves to his affidavit. Accordingly, Raab's assertions regarding the

date of the defendant's default in making her mortgage payments, the total sum due to the plaintiff, which included the amount of accrued interest calculated from the date of default, and amounts purportedly paid in an escrow advance and for property preservation, without the business records themselves, constituted inadmissible hearsay … .

… [T]he referee should not have computed the amount due to the plaintiff without holding a hearing on notice to the defendant (see CPLR 4313 …). "While [the] Supreme Court has the authority to engage a Referee to compute and report the amount due under a mortgage (see, RPAPL 1321[1]), and can, in its order of reference, define the scope of the reference and delineate the Referee's powers and duties thereunder (CPLR 4311), absent any specified restrictions the Referee has those powers and duties delineated in CPLR article 43 and also must comply with the procedures specified therein … . One of the specified procedures is the conducting of a hearing (CPLR 4320[a]), upon notice (CPLR 4313)" … . Wells Fargo Bank, N.A. v Yesmin, 2020 NY Slip Op 05257, Second Dept 9-30-20

INMATES, ACCESS TO COURTS.

PRISON INMATE'S COMPLAINT ALLEGING DENIAL OF ACCESS TO THE COURTS IN VIOLATION OF 42 USC 1983 DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION; PLAINTIFF ALLEGED THE FAILURE TO PRESERVE CERTAIN VIDEO RECORDINGS BUT DID NOT ALLEGE HOW SAID FAILURE HINDERED HIS ACCESS TO THE COURTS (THIRD DEPT).

The Third Department determined plaintiff, a prison inmate, did not state a cause of action under 42 USC 1983 alleging denial of his right to access to the courts. Defendant had requested video recordings concerning the law library and the delivery of legal mail:

"In order to establish a violation of a right of access to courts, a plaintiff must demonstrate that a defendant caused 'actual injury,' . . . i.e., took or was responsible for actions that 'hindered [a plaintiff's] efforts to pursue a legal claim'" … . In his complaint, plaintiff merely alleges that defendant refused to preserve video recordings of the facility law library on May 2, 2015 and of the mail delivery on May 18, 2015. Plaintiff does not describe what the recordings would show, what legal mail was involved or how defendant's alleged actions in preventing the preservation of the videos from those two days hindered his opportunity to pursue a legal claim. In light of defendant's vague and conclusory allegations regarding any actual injury, he has failed to state a cause of action

for being denied access to the courts and dismissal of his claim on this ground is proper … . Johnson v Bernier, 2020 NY Slip Op 04894, Third Dept 9-3-20

INQUEST ON DAMAGES.

PLAINTIFF'S TREATING PHYSICIAN SHOULD HAVE BEEN MADE AVAILABLE FOR CROSS-EXAMINATION BY THE DEFENDANT IN THIS INQUEST ON DAMAGES; ALTHOUGH DEFENDANT DEFAULTED ON LIABILITY IN THIS PERSONAL INJURY ACTION, DEFENDANT APPEARED FOR THE INQUEST (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the injured plaintiff's (Castaldini's) treating physician should have been made available for cross-examination by defendant at the inquest on damages. Defendant had defaulted on liability but appeared at the inquest. Supreme Court accepted an affidavit from the doctor to prove damages. The court noted that causation of the damages is not considered in an inquest:

… [W]e disagree with the Supreme Court's determination to admit into evidence the written sworn statement of Castaldini's treating physician without making the physician available for cross-examination. At an inquest to ascertain damages upon a defendant's default, the plaintiff may submit proof by written sworn statements of the witnesses (see CPLR 3215[b]; 22 NYCRR 202.46[b]). However, where, as here, the defaulting defendant gives notice that he or she will appear at the inquest, the plaintiff must make the witnesses available for cross-examination (see CPLR 3215[b] …). Since Walsh did not make the physician available for cross-examination, the court should not have admitted into evidence the physician's written sworn statement over Walsh's objection. Further, since the court relied on the physician's statement in making its findings of fact on damages, we remit the matter to the Supreme Court, Suffolk County, for a new inquest on the issue of damages … . Castaldini v Walsh, 2020 NY Slip Op 04822, First Dept 9-2-20

JUDGMENTS, LATE SUBMISSION.

A JUDGMENT SUBMITTED AFTER THE 60-DAY DEADLINE IMPOSED BY 22 NYCRR 202.48 (WHERE THE DECISION DIRECTS SUBMISSION OF THE JUDGMENT) CAN BE ACCEPTED BY THE COURT IN THE EXERCISE OF DISCRETION (SECOND DEPT).

The Second Department determined Supreme Court properly accepted a judgment submitted after the 60-day deadline, rather than deeming the judgment abandoned:

22 NYCRR 202.48 requires, inter alia, that a judgment be submitted within 60 days after the filing of the decision directing its submission, and failure to timely submit the judgment shall be deemed an abandonment of the proceeding. However, " it is within the sound discretion of the court to accept a belated order or judgment for settlement'" … . "Moreover, a court should not deem an action or judgment abandoned where the result would not bring the repose to court proceedings that 22 NYCRR 202.48 was designed to effectuate, and would waste judicial resources'" … . Here, the Supreme Court providently exercised its discretion in accepting the petitioner's judgment despite its untimely submission, since doing so brought finality to the proceedings and preserved judicial resources … . Matter of Crown Castle NG E., LLC v Town of Hempstead, 2020 NY Slip Op 04940, Second Dept 9-16-20

MORTGAGES.

CANCELLATION AND DISCHARGE OF A MORTGAGE PURSUANT TO RPAPL 1501 (4) MUST BE SOUGHT BY AN ACTION OR COUNTERCLAIM, NOT BY A MOTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the motion to cancel and discharge the mortgage pursuant to RPAPL 1501 (4) should not have been granted. That relief must be sought by an action or counterclaim:

Supreme Court should not have granted that branch of the motion which was to cancel and discharge the mortgage pursuant to RPAPL 1501(4), since that relief must be sought in an action or counterclaim and not by motion … . Bank of N.Y. Mellon v 11 Bayberry St., LLC, 2020 NY Slip Op 05175, Second Dept 9-30-20

MUNICIPAL LAW, LATE NOTICE OF CLAIM.

PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM AGAINST THE CITY OF NEW YORK SHOULD NOT HAVE BEEN GRANTED IN THIS LEAD-PAINT EXPOSURE CASE; THE PLAINTIFF WAS EXPOSED TO LEAD IN AN APARTMENT OWNED BY THE NEW YORK CITY HOUSING AUTHORITY (NYCHA), AN ENTITY SEPARATE FROM THE CITY; THEREFORE THE UNDERLYING CLAIM WAS PATENTLY MERITLESS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for leave to file a late notice of claim in this lead-paint exposure case should not have been granted with respect to the defendant City of New York. Plaintiff alleged exposure to lead in an apartment owned by the New York City Housing Authority (NYCHA) which is a entity separate from the city:

" Ordinarily, the courts will not delve into the merits of an action on an application for leave to serve and file a late notice of claim' … . However, permission to file a late notice of claim is properly denied where the underlying claim is patently meritless' …".

Here, the Supreme Court should have denied the petition on the ground that the claim, insofar as asserted against the City, is patently meritless. "Liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property" … . It is undisputed that the apartment building in which the infant petitioner resided at the time of his injury was owned and operated by NYCHA, an entity which is separate from the City … . Furthermore, there is no basis for finding that the City owed the infant petitioner a duty based upon a special relationship between them … . Matter of K.G. v City of New York, 2020 NY Slip Op 04943, Second Dept 9-16-20

MUNICIPAL LAW, PREEMPTION.

THE STATE HAS NOT PREEMPTED A MUNICIPALITY'S ABILITY TO REGULATE THE PROCESSING OF WASTE; THEREFORE, EVEN THOUGH THE STATE HAD ISSUED A PERMIT ALLOWING THE PROCESSING OF 500 TONS OF WASTE PER DAY, THE VILLAGE'S ACTION FOR A PERMANENT INJUNCTION REDUCING THE ALLOWED AMOUNT OF WASTE SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the village's request for a preliminary injunction limiting the amount of waste that could be processed by defendant recycling company was properly denied, but the action seeking a permanent injunction should not have been dismissed. The Department of Environmental Conservation (DEC) had issued a temporary emergency permit allowing the defendant to process 1100 tons of waste per day and the defendant applied to make 1100 tons per day permanent. The village sought an injunction imposing the 2008 limit of 370 tons per day. While the preliminary injunction was pending, the DEC issued a permit imposing a daily waste limit of 500 tons per day, which obviated the need for the preliminary injunction. But, because the state has not preempted the ability of a municipality to regulate the amount of waste, the permanent injunction action should not have been dismissed:

… [T]he Supreme Court erred in determining, in effect, that it did not have the authority to issue declaratory or injunctive relief limiting the maximum amount of waste that could be processed at the facility in an amount less than that permitted by the DEC. Indeed, "the State has not preempted local legislation of issues related to municipal solid waste management" … . Thus, the DEC's issuance of the 2016 renewal permit did not per se preclude the court from considering the merits of the causes of action asserted in the Village's complaint. * * *

… [A]s a practical matter, the DEC's issuance of the [500 ton per day] permit largely obviated the need for an order preliminarily enjoining the defendants … . … However, the Supreme Court had an insufficient legal or factual basis, at this preliminary stage, to deny the Village's request for permanent injunctive relief precluding [defendant] from exceeding the 2008 limits. Indeed, if the Village is ultimately able to establish, at trial, that the defendants breached the terms of a prior agreement entered into between the Village and [defendant], or that the facility's operation in excess of the 2008 limits constitutes a nuisance, or that the facility is operating in violation of the Village's zoning code, then the Village may well be entitled to permanent injunctive relief as an appropriate remedy … . Incorporated Vil. of Lindenhurst v One World Recycling, LLC, 2020 NY Slip Op 05037, Second Dept 9-23-20

NECESSARY PARTIES.

INSTEAD OF DISMISSING THE PETITION FOR FAILURE TO INCLUDE A NECESSARY PARTY, SUPREME COURT SHOULD HAVE ORDERED THE PARTY SUMMONED PURSUANT TO CPLR 1001 (b) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition seeking review of the village planning board's decision re: petitioner's application for approval of a subdivision should not have been dismissed. Because the planning board's decision affected another landowner (160 South Ocean, LLC) Supreme Court dismissed the petition for failure to include a necessary party. The Second Department held Supreme Court should have ordered the party summoned pursuant to CPLR 1001 (b):

160 South Ocean, LLC, is a necessary party to this proceeding (see CPLR 1001[a]) subject to the jurisdiction of the court, and therefore, the Supreme Court should have "order[ed] [it] summoned," rather than denying the petition and dismissing the proceeding for failure to join a necessary … party (CPLR 1001[b] …). Accordingly, we reinstate the petition and remit the matter to the Supreme Court, Suffolk County, for further proceedings, including a determination on the merits of the respondents' motion, inter alia, to dismiss the petition … . Matter of Mulford Bay, LLC v Rocco, 2020 NY Slip Op 05050, Second Dept 9-23-30

PENDING ACTION, SAME PARTIES.

A CAUSE OF ACTION MAY BE DISMISSED PURSUANT TO CPLR 3211 (a) (4) BECAUSE IT SEEKS THE SAME RELIEF AS A PENDING ACTION INVOLVING THE SAME PARTIES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a cause of action should have been dismissed pursuant CPLR 3211 (a) (4) because it involved the same parties and sought the same relief as a pending action. The actions involved common charges for condominiums:

Pursuant to CPLR 3211(a)(4), a party may move to dismiss a cause of action on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." "'It is not necessary that the precise legal theories presented in the first action also be presented in the second

action as long as the relief . . . is the same or substantially the same'" … . "'The critical element is that both suits arise out of the same subject matter or series of alleged wrongs'" … .

We disagree with the Supreme Court's exercise of its discretion in denying that branch of [the] cross motion which was for relief pursuant to CPLR 3211(a)(4). The … [actions] arise out of the same events, and involve overlapping questions of law, namely, the authority of the Board to charge … the increased common charges and assessments. The business judgment rule does not shield a condominium board's acts of "bad faith and self-dealing" … . … [T]he resolution of [the] causes of action against the Board, which include, among other things, a request for a judgment declaring that the Board's common charge increases were not valid, may moot the instant action to foreclose upon the common charge liens … . Further, absent relief under CPLR 3211(a)(4), [there would be] duplicative litigation and the prospect of inconsistent results. Board of Mgrs. of the 1835 E. 14th St. Condominium v Singer, 2020 NY Slip Op 05026, Second Dept 9-23-20

RES JUDICATA, COLLATERAL ESTOPPEL, APPEALS.

DESPITE THE ALLEGATION THAT THE DRIVER HAD LOGGED OFF THE UBER APP PRIOR TO THE PEDESTRIAN-VEHICLE ACCIDENT, QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON THE VICARIOUS LIABILITY THEORY; THE UNEMPLOYMENT INSURANCE APPEAL BOARD'S FINDING THAT THE DRIVER WAS EMPLOYED BY UBER WAS NOT ENTITLED TO PRECLUSIVE EFFECT; ISSUE NOT RAISED BELOW PROPERLY CONSIDERED ON APPEAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this pedestrian-vehicle accident case, determined: (1) a ruling by the Unemployment Insurance Appeal Board finding that defendant driver was an employee of defendant Uber was not entitled collateral-estoppel effect pursuant to Labor Law 623(2); (2) although the Labor Law 623(2) argument was not raised below, it raised a question of law which could not have been avoided below and therefore was considered on appeal; (3) the claim that defendant driver had logged off the Uber app at the time of the accident did not warrant summary judgment in favor of Uber on the vicarious liability theory:

An action may be considered to be within the scope of employment, thus rendering an employer vicariously liable for the conduct, when "the employee is engaged generally in the business of the employer, or if the act

may be reasonably said to be necessary or incidental to such employment" … . Whether an employee was acting within the scope of his or her employment is generally a question of fact for the jury … .

Here, contrary to Uber's contention, the averments [that the driver] had logged off of the Uber app 40 minutes before the accident were simply insufficient, without more, to eliminate all questions of fact as to whether Hussein was acting within the scope of his alleged employment with Uber at the time of the incident … . Uy v Hussein, 2020 NY Slip Op 05080, Second Dept 9-23-30

SANCTIONS.

DEFENDANTS' FAILURE TO SERVE A CONFERENCE SCHEDULING ORDER ON PLAINTIFFS, WHICH APPARENTLY RESULTED IN THE PLAINTIFFS NOT ATTENDING THE CONFERENCE, DID NOT JUSTIFY THE DISMISSAL OF DEFENDANTS' FULLY SUBMITTED SUMMARY JUDGMENT MOTION WHICH MUST BE DECIDED ON THE MERITS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have dismissed defendants' summary judgment motion in this car accident case because defendants apparently did not serve an order scheduling a conference on the plaintiffs. Apparently the defendants appeared at the conference but the plaintiffs did not:

22 NYCRR 202.27 governs what a court may do in the event that the plaintiff, the defendant, or both parties fail to appear at a scheduled calendar call or conference. Specifically, where the plaintiff appears but the defendant does not, the court may grant judgment by default or order an inquest … . Where the defendant appears but the plaintiff does not, the court may dismiss the action and order a severance of counterclaims or cross claims … . If no party appears, the court may make such order as appears just … .

Here, since the defendants apparently appeared at the conference … , but the plaintiffs did not appear, the sanction available to the Supreme Court was the dismissal of the action and the severance of any counterclaims or cross claims. Clearly, the denial of the defendants' summary judgment motion as a sanction for not serving the plaintiffs with a copy of the order … , was not a penalty authorized under the plain language of 22 NYCRR 202.27(b). Under the circumstances of this case, where the defendants' motion was fully submitted and ready to be decided several months prior to the court's issuance of the … order scheduling a conference, the court should

not have denied the motion pursuant to 22 NYCRR 202.27 and should have decided the motion on its merits … Indeed, even if neither party had appeared for the scheduled settlement conference, in which case the court, pursuant to 22 NYCRR 202.27(c), was authorized to make "such order as appears just," under the circumstances present here, it would have been an improvident exercise of discretion to sanction the defendants by denying their fully submitted summary judgment motion without regard to an evaluation of its merit … . Charalabidis v Elnagar, 2020 NY Slip Op 04912, Second Dept 9-16-20

SERVICE OF PROCESS, BUSINESS CORPORATION LAW.

THE FAILURE TO COMPLY WITH THE SERVICE OF PROCESS REQUIREMENTS OF BUSINESS CORPORATION LAW 307 IS A JURISDICTIONAL DEFECT AND THE FAILURE TO MAKE DILIGENT EFFORTS TO COMPLY WARRANTED DENIAL OF A MOTION TO EXTEND THE TIME FOR SERVICE PURSUANT TO BUSINESS CORPORATION LAW 306-b (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiffs' failure to make diligent efforts to serve defendant in accordance with Business Corporation Law 307 required dismissal of the complaint:

… [B]ecause the failure to strictly comply with the procedures of Business Corporation Law § 307 constitutes a jurisdictional defect, rather than a mere irregularity, the 30-day time period in Business Corporation Law § 307 (c) (2) is not subject to extension under CPLR 2004 … . * * *

… [P]laintiffs did not make reasonably diligent efforts to comply with the procedures of Business Corporation Law § 307. Although plaintiffs personally delivered the summons with notice to an authorized agent of the Secretary of State and sent a copy of the summons with notice by registered mail, return receipt requested, to the address that PLS had registered with the Bureau of Corporations and Charitable Organizations within Pennsylvania's Department of State … , they made absolutely no effort to thereafter file the affidavit of compliance and the requisite accompanying documents … . Moreover, the excuse provided for plaintiffs' failure to timely serve PLS in accordance with Business Corporation Law § 307 amounts to law office failure, an excuse that has been held to be insufficient to constitute good cause … . Thus, as plaintiffs did not make the requisite showing, they are not entitled to an extension "upon good cause" under CPLR 306-b. Garrow v Pittsburgh Logistics Sys., Inc., 2020 NY Slip Op 05010, Third Dept 9-17-20

STATUTE OF LIMITATIONS, CONTINUING WRONG.

CAUSES OF ACTION FOR UNJUST ENRICHMENT, BREACH OF FIDUCIARY DUTY AND AN ACCOUNTING SHOULD NOT HAVE BEEN DISMISSED; FAILURE TO TRANSFER ASSETS ALLEGED A CONTINUING WRONG AND PAYMENTS WHICH ALLEGEDLY SHOULD HAVE BEEN MADE DURING THE STATUTE OF LIMITATIONS PERIOD WERE ACTIONABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff stated causes of action for unjust enrichment, breach of fiduciary duty and an accounting against her sister (Weisel), the sole manager of A & Z, of which plaintiff is also a member. The court noted that the allegation that Weisel did not transfer assets to A & Z alleged a continuing wrong, so payments allegedly owed to A & Z within the statute of limitations period were actionable:

To state a cause of action for unjust enrichment, the plaintiff must allege that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered … . …

"[A] fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect . . . barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" … . Here, the plaintiff has alleged that Wiesel is the sole manager of A & Z—which, if true, would impose a fiduciary duty on Wiesel arising out of her position as the sole manager of A & Z … . The amended complaint sufficiently alleges that Wiesel is in a fiduciary relationship with the plaintiff, arising out of both her position as sole manager of A & Z and her familial relationship with the plaintiff … . …

A cause of action for accounting requires "the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" … . Greenberg v Wiesel, 2020 NY Slip Op 04927, Second Dept 9-16-20

SUBPOENAS, GOOD FAITH EFFORT TO SETTLE.

MOTIONS TO QUASH SUBPOENAS ISSUED IN SUPPORT OF OBJECTIONS TO AN ACCOUNTING OF A TRUST SHOULD NOT HAVE BEEN GRANTED; COUNSEL'S SUBMISSION OF EMAILS DEMONSTRATING A GOOD FAITH EFFORT TO SETTLE WERE SUFFICIENT (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined the motions to quash subpoenas issued by appellants who objected to an accounting of a trust should not have been granted and the appellants' counsel's submissions demonstrating a good faith effort to settle the matter (22 NYCRR 202.7) were sufficient:

In a proceeding pursuant to article 22 of the Surrogate's Court Procedure Act to settle an account of a trust, a party filing objections is "entitled to all rights granted under article thirty-one of the civil practice law and rules with respect to . . . discovery" (SCPA 2211[2]). CPLR 3101(a), which provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action," is to be liberally construed "to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" … .

A "party or nonparty moving to vacate the subpoena has the initial burden of establishing either that the requested [information] is utterly irrelevant' to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious'" … . Matter of Cheryl LaBella Hoppenstein 2005 Trust, 2020 NY Slip Op 04846, Second Dept 9-2-20

SUMMARY JUDGMENT.

AFTER CONVERTING THE ARTICLE 78 PETITION TO A COMPLAINT THE JUDGE SHOULD NOT HAVE TREATED THE MOTION TO DISMISS AS A SUMMARY JUDGMENT MOTION WITHOUT NOTIFYING THE PARTIES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge, after converting the article 78 petition to a complaint, should not have, sua sponte, dismissed the complaint with notifying the parties:

… [T]he Supreme Court denied the Comptroller's motion to dismiss, and, pursuant to CPLR 103(c), converted the article 78 petition into a complaint asserting a declaratory judgment cause of action. Upon reaching the merits of the plaintiff's complaint, the court sua sponte denied the plaintiff declaratory relief and directed dismissal of the complaint. …

Upon converting the article 78 petition into a complaint, the Supreme Court erred in reaching the merits of the complaint, and directing its dismissal. Having converted the petition to a complaint, the court could only reach the merits by giving the parties adequate notice that it was going to treat the defendant's pre-answer motion to dismiss as one for summary judgment (see CPLR 3211[c] …). The defendant had not served an answer to either the petition or the complaint, and therefore, any motion for summary judgment would have been premature (see CPLR 3212[a]). Moreover, the record does not establish that the parties deliberately charted a summary judgment course … . Under these circumstances, the court's determination on the merits of the complaint was premature. Matter of Gorelick v Suffolk County Comptroller's Off., 2020 NY Slip Op 05048, Second Dept 9-23-20

VERDICT, SET ASIDE.

INSTRUCTING THE JURY ON THE BURDEN OF PROOF IN THIS DAMAGES-ONLY PERSONAL INJURY TRIAL SHIFTED THE BURDEN OF PROOF; $5,500,000 VERDICT SET ASIDE AND NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, ordering a new trial in this personal injury action which had resulted in a $5,500,000 verdict, determined the "burden of proof" jury instruction should not have been given in this damages-only trial:

… [T]he defendants contend … that the verdict and judgment must be set aside on the ground that they were deprived of a fair trial by the Supreme Court's improper jury instruction on the law. Specifically, the defendants contend that the court erroneously charged the jury with respect to the burden of proof.

"A trial court is required to state the law relevant to the particular facts in issue, and a set of instructions that confuses or incompletely conveys the germane legal principles to be applied in a case requires a new trial"… .

Here, we agree with the defendants that under the facts of this case, the Supreme Court's determination to charge Pattern Jury Instructions 1:60 was improper in the context of a trial limited to the issue of damages only and was prejudicial to the defendants in that it shifted the burden of proof. In light of the court's error in the charge,

substantial justice was not done since the jury was not instructed with the germane legal principles to be applied … . Gorokhova v Consolidated Edison of N.Y., Inc., 2020 NY Slip Op 04828, Second Dept 9-2-20