NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
December 2020

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

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The Second Department, reversing Supreme Court, determined the court should not have dismissed plaintiff's foreclosure action, sua sponte, as abandoned pursuant to 22 NYCRR 202.48. Supreme Court, after plaintiff's unopposed motion for a judgment of foreclosure and sale, directed the plaintiff to "submit judgment." When plaintiff submitted a proposed judgment for signature, Supreme Court dismissed the action because the proposed judgment was not submitted within 60 days. The 60-day time limit only applies when a party is directed to submit the judgment "on notice:"

Pursuant to 22 NYCRR 202.48, an order or judgment which is directed to be settled or submitted on notice must be submitted for signature within 60 days after the signing and filing of the decision directing that the order or judgment be settled or submitted. A party who fails to submit the order or judgment within the 60-day time period will be deemed to have abandoned the action or motion, absent good cause shown … . In this case, when the Supreme Court initially granted the plaintiff's motion, inter alia, for a judgment of foreclosure and sale, it did not direct that the proposed judgment had to be settled or submitted on notice. 22 NYCRR 202.48 does not apply where, as here, the court merely directs a party to submit an order or judgment without expressly directing that the order or judgment be submitted on notice … . James B. Nutter & Co. v McLaughlin, 2020 NY Slip Op 07178, Second Dept 12-2-20

Practice Point: If a judge directs that an order or judgment be submitted for signature "on notice," the 60-day time-limit in 22 NYCRR 202,48 applies and the order or judgment will be deemed abandoned if the 60-day deadline is not met. But if, as here, the direction to submit the order or judgment for signature does not specify that it be submitted "on notice," the 60-day time-limit does not apply.

APPEALS, RETRIAL AFTER REMITTAL.

THE DECRETAL PARAGRAPH OF THE APPELLATE DECISION REMITTING THE MATTER FOR RETRIAL DID NOT IMPOSE THE CONDITIONS ON RETRIAL WHICH WERE IMPOSED BY SUPREME COURT; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the decretal paragraph in the appellate decision remitting the matter to Supreme Court did not impose restrictions on the issues to be retried:

"'A trial court, upon remittitur, lacks the power to deviate from the mandate of the higher court'' … . "An order or judgment entered by the lower court on a remittitur 'must conform strictly to the remittitur'" … . The language in the decretal paragraph controls the extent of the remittitur … .

Here, there is no limiting language in the decretal paragraph of our prior decision and order that would indicate that the new trial would be on issues of apportionment of liability among the defendants. Further, there is no language in that decretal paragraph indicating that the damages awards remain undisturbed. Accordingly, the Supreme Court should not have limited the new trial to issues of apportionment of liability among the defendants. Daniele v Pain Mgt. Ctr. of Long Is., 2020 NY Slip Op 07860, Second Dept 12-23-20

Practice Point: When a matter is remitted for retrial after an appeal, the trial court cannot impose restrictions on the retrial which were not imposed by the appellate court. Here the trial court improperly limited the retrial to the apportionment of damages which effectively precluded reconsideration of the amount of damages.

ARTICLE 78, WRIT OF PROHIBITION, CRIMINAL LAW.

ALTHOUGH THE TWO INDICTMENTS ALLEGED THE SAME MODUS OPERANDI FOR MEDICAID FRAUD, THE CHARGES INVOLVED DIFFERENT PARTIES AND TIME PERIODS; THE WRIT OF PROHIBITION SEEKING TO PRECLUDE PROSECUTION ON DOUBLE JEOPARDY GROUNDS DENIED OVER A DISSENT (FIRST DEPT).

The First Department, over a dissent, denied the writ of prohibition seeking to preclude a second prosecution for medicaid fraud on double jeopardy grounds. Although the alleged scheme to defraud was the same, the two indictments involved different parties and different time periods:

In essence, the wrongdoing charged in each indictment is the filing of fraudulent Medicaid reimbursement claims and related misconduct, such as payment of kickbacks. However, the indictments charge different specific criminal acts, which were perpetrated on different dates and over different time periods. Moreover, the indictments do not allege fraudulent billing of any of the same managed care organizations. While it appears that the different fraudulent acts charged in the two indictments had a similar modus operandi and were part of a common plan, this alone does not suffice to render them part of the same "criminal transaction" under CPL 40.10(2)(b) … . Matter of Dieffenbacher v Jackson, 2020 NY Slip Op 08015, First Dept 12-29-20

Practice Point: An Article 78 proceeding seeking a writ of prohibition is a proper vehicle for contesting the trial judge's ruling that a second prosecution was not precluded by the double jeopardy prohibition. Here there were two indictments charging Medicaid fraud. Although the modus operandi was the same in the two indictments, the parties and time periods were different.

ARTICLE 78.

THE PETITIONER, A PROBATIONARY POLICE OFFICER CHALLENGING HIS TERMINATION, RAISED QUESTIONS OF FACT IN THIS ARTICLE 78 PROCEEDING; THEREFORE THE SUMMARY DETERMINATION PURSUANT TO CPLR 409 WAS NOT AVAILABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined this Article 78 proceeding reviewing the termination of a probationary police officer (Lake) involved questions of fact rendering a summary determination pursuant to CPLR 409(b) improper:

Since Lake submitted sufficient evidence to raise a triable issue of fact as to whether the reasons put forth by the Town were pretextual, the Town was not entitled to a summary determination on the petition (see CPLR 409[b] …). To the contrary, the record presented triable issues of fact as to whether Lake's employment was terminated in bad faith for reasons unrelated to his job performance … . Under the these circumstances, the matter should be remitted to the Supreme Court, Suffolk County, for an immediate trial … . Matter of Lake v Town of Southold, 2020 NY Slip Op 08064, Second Dept 12-30-20

Practice Point: Where there are contested questions of fact in an Article 78 proceeding, a summary determination pursuant to CPLR 409 is not available.

ATTACHMENT.

THE CRITERIA FOR THE HARSH REMEDY OF ATTACHMENT WERE NOT MET (SECOND DEPT).

The Second Department determined the criteria for an order of attachment were not met. The court noted that suspicion of an intent to defraud and the removal, assignment or disposition of property is not enough to warrant the harsh remedy of attachment:

CPLR 6212(a) provides that, on a motion for an order of attachment, "the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff."

"Attachment is considered a harsh remedy and CPLR 6201 is strictly construed in favor of those against whom it may be employed" … .

The plaintiffs failed to make an adequate evidentiary showing that each of the defendants is a nondomiciliary residing without the state (see CPLR 6201[1]; see also General Construction Law § 35). Moreover, the plaintiffs' contention that the defendants were attempting to defraud creditors or frustrate enforcement of a possible judgment against them (see CPLR 6201[3]) "was devoid of evidentiary support" … . "The fact that the affidavits in support of an attachment contain allegations raising a suspicion of an intent to defraud is not enough. It must appear that such fraudulent intent really existed in the defendant's mind" … , and "the mere removal, assignment or other disposition of property is not grounds for attachment" … . 651 Bay St., LLC v Discenza, 2020 NY Slip Op 07331, Second Dept 12-9-20

Practice Point: Attachment is considered a harsh remedy and requires a strong evidentiary showing of one or more of the grounds in CPLR 6201. Here the suspicion of an intent to defraud on defendant's part and the removal or assignment of property was not enough.

DEFAULT.

ALTHOUGH DEFENDANT NEVER ANSWERED THE COMPLAINT, HE APPEARED BY MAKING A MOTION TO DISMISS AND PARTICIPATED IN THE LITIGATION, THEREFORE DEFENDANT'S MOTION TO VACATE THE DEFAULT SHOULD HAVE BEEN GRANTED; DISMISSAL OF THE ACTION FOR FAILURE TO INCLUDE A NECESSARY PARTY OR THE FAILURE TO JOIN OR SUBSTITUTE A PARTY WAS NOT WARRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate the default should have been granted. Although defendant did not submit an answer, he did move to dismiss the complaint, which extended his time to answer, and thereafter participated in the litigation. Supreme Court properly denied defendant's motion to dismiss on the ground a necessary party was not included in the suit, and on the ground a party should have been substituted or joined:

We disagree with the Supreme Court's determination to deny that branch of the defendant's motion which was to vacate his default in answering the complaint. "CPLR 320(a) provides that a defendant may appear in an action in one of three ways: (1) by serving an answer, (2) by serving a notice of appearance, or (3) making a motion which has the effect of extending the time to answer" … . Here, the defendant appeared in the action in May 2008, when he, among others, moved pursuant to CPLR 3211(a) to dismiss the complaint, which extended his time to serve an answer (see CPLR 320[a]; 3211[f]). Although the defendant did not serve an answer to the complaint following the denial of his motion, the record demonstrates that the defendant actively participated in the litigation during the ensuing years and that the plaintiffs never moved for leave to enter a default judgment against him. …

"CPLR 1001(a) provides that '[p]ersons . . . who might be inequitably affected by a judgment in the action' are necessary parties whose joinder is required" … . "'When a person who should be joined under [CPLR 1001(a)] has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned'"…. . However, "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action" (CPLR 1018). "The determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court" … . Contrary to the defendant's contention, the Supreme Court did not improvidently exercise its discretion in permitting the plaintiffs to continue this action against the original defendants, despite any alleged changes to the composition of the purported board of trustees … over the course of this 16-year litigation, in order to avoid any further unnecessary delay … . Kelley v Garuda, 2020 NY Slip Op 07180, Second Dept 12-2-20

Practice Point: Although the defendant did not answer the complaint, he did move to dismiss the complaint, which extended the time to submit an answer, and he participated in the litigation. He therefore appeared in the action within the meaning of CPLR 302(a) and his motion to vacate the default judgment should have been granted.

FAILURE TO PROSECUTE.

THE ACTION SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO CPLR 3216 FOR FAILURE TO PROSECUTE; ISSUE HAD NOT BEEN JOINED AND OTHER CONDITIONS PRECEDENT TO DISMISSAL WERE NOT MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate the conditional order dismissing the action for failure to prosecute pursuant to CPLR 3216:

The conditional order constituted a defective 90-day notice pursuant to CPLR 3216. The court was without authority to issue a 90-day notice since issue was not joined in the action (see CPLR 3216[b][1] …). Moreover, the conditional order failed to state that the plaintiff's failure to comply "will serve as a basis for a motion" by the court to dismiss the action for failure to prosecute … . The purported dismissal was not properly effectuated since the court never directed the parties to show cause why the action should not be dismissed, and failed to issue a formal order of dismissal on notice to the parties as required by CPLR 3216 … . Moreover, the conditional order was erroneous since it directed the plaintiff to move for an order of reference, even though the plaintiff had already moved for an order of reference. Accordingly, we grant the plaintiff's motion to vacate the conditional order and restore the action to the active calendar. U.S. Bank N.A. v Thompson, 2020 NY Slip Op 08098, Second Dept 12-30-20

Practice Point: Where, as here, issue has not been joined, the action cannot be dismissed for failure to prosecute pursuant to CPLR 3216.

FAILURE TO PROSECUTE.

THE CONDITIONAL ORDER OF DISMISSAL FOR FAILURE TO PROSECUTE DID NOT MEET THE CRITERIA OF CPLR 3216; THEREFORE THE MATTER SHOULD NOT HAVE BEEN ADMINISTRATIVELY DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's motion to vacate the conditional order of dismissal should have been granted because the conditions in CPLR 3216 were not met by the order:

"CPLR 3216 permits a court, on its own initiative, to dismiss an action for want of prosecution where certain conditions precedent have been complied with" … . As relevant here, an action cannot be dismissed pursuant to CPLR 3216(a) unless a written demand is served upon the party against whom such relief is sought in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed … . "While a conditional order of dismissal may have the same effect as a valid 90-day notice pursuant to CPLR 3216" … , the conditional order of dismissal here "'was defective in that it failed to state that the plaintiff's failure to comply with the notice "will serve as a basis for a motion" by the court to dismiss the action for failure to prosecute'" … . The Supreme Court should not have administratively dismissed the action without further notice to the parties and without benefit of further judicial review … . Deutsche Bank Natl. Trust Co. v Henry, 2020 NY Slip Op 07863, Second Dept 12-23-20

Practice Point: The criteria in CPLR 3216 for the dismissal of an action for failure to prosecute are strictly construed. Here the order did not inform plaintiff that the failure to file a note of issue within 90 days will serve as a basis for a motion by the court to dismiss for failure to prosecute. Therefore the action should not have been administratively dismissed.

JUDGES, SUA SPONTE, FORECLOSURE, NOTICE, AFFIRMATIVE DEFENSES.

THE DEFENDANTS DEFAULTED IN THIS FORECLOSURE ACTION; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT BASED ON THE BANK'S ALLEGED FAILURE TO COMPLY WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, WHICH IS NOT A JURISDICTIONAL DEFECT AND THEREFORE MUST BE RAISED AS A DEFENSE (SECOND DEPT).

The Second Department determined the judge should have, sua sponte, dismissed the complaint in this foreclosure action on the ground the bank did not comply with the notice requirements of RPAL 1304. The defendants defaulted and failure to comply with RPAPL 1304 is not a jurisdictional defect. Therefore it must be raised as a defense before a judge can rule on it:

In this action to foreclose a mortgage, in which the defendants failed to appear or answer the complaint, the Supreme Court should have granted the plaintiff's motion for leave to enter a default judgment and for an order of reference, and should not have, sua sponte, directed dismissal of the complaint based on its determination that the plaintiff failed to establish that it complied with RPAPL 1304 … . Therefore, a plaintiff is not required to disprove the defense unless it is raised by defendants, and in this case the defendants failed to appear in the action or answer the complaint … . Chase Home Fin., LLC v Guido, 2020 NY Slip Op 07854, Second Dept 12-23-20

Practice Point: In a foreclosure action the failure to comply with the notice requirements of the Real Property Actions and Proceedings Law is not a jurisdictional defect. Therefore any alleged failure to comply must be raised as an affirmative defense. Here the defendant defaulted so the issue was not before the court and should not have been ruled on.

JUDGES, SUA SPONTE.

THE JUDGE SHOULD NOT HAVE, SUA SPONTE, IMPOSED AN INJUNCTION AND DETERMINED ISSUES OF FACT; NO MOTION WAS BEFORE THE COURT AND NO HEARING WAS HELD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, imposed an injunction on defendant and determined issues of fact without a motion before the court and without holding a hearing:

The Supreme Court, after a status conference … , issued an order, sua sponte, … which, … directed the defendant … to take all steps necessary to obtain a permit from the Department of Buildings to complete the work on one of the subject properties and expedite repairs to that property, including the submission of new plans by the defendant … .

Since no motion was pending before it, the Supreme Court should not have, sua sponte, and without a hearing, imposed an injunction on the defendant and determined issues of fact … . "A court is generally limited to noticed issues that are the subject of the motion before it" … . … The plaintiffs did not move for an injunction … and the court did not hold

a hearing … . City of New York v Quadrozzi, 2020 NY Slip Op 07857, Second Dept 12-23-20

Practice Point: Where there is no motion before the court, no rulings or findings of fact can be made.

MUNICIPAL LAW.

A GENERAL BUSINESS LAW 349 DECEPTIVE BUSINESS PRACTICE ACTION AGAINST THE CITY SOUNDS IN TORT TRIGGERING THE NOTICE OF CLAIM REQUIREMENT (SECOND DEPT).

The Second Department noted that a deceptive business practice cause of action pursuant to General Business Law 349 sounds in tort. The GBL 349 cause of action against the city not state a cause of action because no notice of claim was filed:

Administrative Code of the City of New York § 7-201 and General Municipal Law § 50-e together require a plaintiff, in order to bring an action sounding in tort against the City of New York, to serve a notice of claim within ninety days after the date the claim arises … . Failure to comply with a statutory notice of claim requirement is a ground for dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action … .

General Business Law § 349(a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" … . We agree with the Supreme Court's determination that the plaintiffs' first cause of action, which sought to recover damages for violations of General Business Law § 349, was a claim sounding in tort, and therefore was subject to the requirements of General Municipal Law § 50-e, as a cause of action sounding in fraud … . Accordingly, we agree with the court's determination granting that branch of the defendants' motion which was to dismiss the first cause of action due to the plaintiffs' failure to serve a notice of claim within 90 days after the claim arose … . Singh v City of New York, 2020 NY Slip Op 08123, Second Dept 12-30-20

Practice Point. A deceptive business practice action pursuant to General Business Law 349 against a municipality sounds tort and therefore triggers the Notice of Claim requirement as a condition precedent to filing suit.

NECESSARY PARTIES, FORECLOSURE, TRUSTS AND ESTATES.

THE ESTATE WAS A NECESSARY PARTY IN THIS FORECLOSURE ACTION BECAUSE OF THE POTENTIAL FOR A DEFICIENCY JUDGMENT AGAINST THE DECEDENT; DEFENDANT'S CROSS MOTION FOR LEAVE TO SUBSTITUTE HERSELF AS ADMINISTRATOR OF THE ESTATE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined decedent's estate was a necessary party in this foreclosure action and defendant's cross motion pursuant to CPLR 1015 for leave to substitute herself as administrator should have been granted:

In a mortgage foreclosure action, "[t]he rule is that a mortgagor who has made an absolute conveyance of all his [or her] interest in the mortgaged premises, including his equity of redemption, is not a necessary party to foreclosure, unless a deficiency judgment is sought" … . Here, the judgment of foreclosure and sale contains language providing for a potential deficiency judgment against the decedent if the sale of the property does not cover the amount due to the plaintiff. Consequently, the decedent's estate was a necessary party to the action … . Specialized Loan Servicing, LLC v Kalinin, 2020 NY Slip Op 07417, Second Dept 12-9-20

Practice Point: In a foreclosure action, if there is the possibility of a deficiency judgment against a decedent, the estate is a necessary party.

NECESSARY PARTIES, FORECLOSURE.

THE PROPERTY TRANSFERRED TO THE DEFENDANT BY WILL UPON THE DEATH OF THE PROPERTY OWNER; THEREFORE THE ESTATE WAS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the estate was not a necessary party in this foreclosure action because the property transferred upon the property owner's death by operation of the will:

Pursuant to a deed dated March 27, 1991, Marjorie Colwell became the owner of certain real property located in Brooklyn (hereinafter the subject property). Colwell died on November 8, 2004. Colwell's will bequeathed the subject property to the defendant Sonia Gaines, and also named Gaines as the executrix of the estate. …

We disagree with the Supreme Court's determination that the estate was a necessary party to this action, and that the failure to join the estate warranted vacatur of the order of reference and the judgment of foreclosure and sale and dismissal of the complaint insofar as asserted against Gaines … . Pursuant to RPAPL 1311(1), "necessary defendants" in a mortgage foreclosure action include, among others, "[e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein." Under the circumstances of this case, the estate was not a necessary party to this mortgage foreclosure action. "Generally, title to real property devised under the will of a decedent vests in the beneficiary at the moment of the testator's death and not at the time of probate" … . US Bank Trust, N.A. v Gaines,2020 NY Slip Op 07623, Second Dept 12-16-20

Practice Point: In this foreclosure action, the property transferred by will to the beneficiaries upon death. Therefore the estate was not a necessary party.

PIERCING THE CORPORATE VEIL.

THE PROOF WAS NOT SUFFICIENT TO SUPPORT PIERCING THE CORPORATE VEIL AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED ON THAT ISSUE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the proof was not sufficient to support piercing the corporate veil and summary judgment should have been granted on that issue:

"Generally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" … .

"Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer … personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in 'bad faith' while representing the corporation." … Instead, "[t]he party seeking to pierce the corporate veil must establish that the owners [of the corporation], through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" … .

Here, … the complaint … does not sufficiently allege injury to plaintiff. …

[Plaintiff] "failed to produce evidence that the individual defendants took steps to render the corporate defendant insolvent in order to avoid plaintiffs' claim for damages or otherwise defraud plaintiffs" … . Sutton 58 Assocs. LLC v Pilevsky, 2020 NY Slip Op 08020, First Dept 12-29-20

PLEADINGS, AMEND COMPLAINT.

PLAINTIFF WAS INJURED WHEN A WHEEL ON THE CONTAINER HE WAS PUSHING GOT STUCK IN A GAP IN THE FLOOR AFTER THE PLYWOOD COVERING THE GAP BROKE; PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO ADD THE RELEVANT INDUSTRIAL CODE PROVISION SHOULD HAVE BEEN GRANTED; THE LABOR LAW 241(6), LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's Labor Law 241(6), Labor Law 200 and Negligence causes of action should not have been dismissed. Plaintiff was pushing a container of cinderblocks when plywood covering a gap in the floor broke and a wheel got stuck, causing plaintiff to be propelled head over heels and land on his back. The Second Department further held plaintiff should have been allowed to amend the complaint by adding the relevant Industrial Code provision, despite the 3 1/2 delay in bringing the motion to amend. Defendant was not prejudiced by the amendment:

As Industrial Code (12 NYCRR) § 23-1.7(e)(1) is applicable to these facts and defendant failed to show that it would be prejudiced by an amendment of the bill of particulars to assert a violation of this provision as a predicate to the Labor Law § 241(6) claim, plaintiff's motion to amend should be granted (see CPLR 3025[b] …). In view of the absence of

prejudice to defendant, plaintiff was not required to explain his 3½-year delay in bringing this motion … . …

… [A]n inadequately protected gap in the floor of a passageway at a construction site that causes a container, dumpster, or the like to become stuck or otherwise lose its balance and trip, slip, or fall violates Industrial Code (12 NYCRR) § 23-1.7(e)(1) and can serve as a predicate for a Labor Law § 241(6) claim. …

Defendant failed to establish prima facie that it neither created nor had notice of the dangerous condition of the hallway floor … . Trinidad v Turner Constr. Co., 2020 NY Slip Op 07519, First Dept 12-15-20

PLEADINGS, AMEND COMPLAINT.

THE QUI TAM COMPLAINT ALLEGING INSURERS FAILED TO ACCURATELY REPORT UNCLAIMED LIFE INSURANCE PROCEEDS, TO WHICH THE STATE IS ENTITLED, IN VIOLATION OF THE NEW YORK FALSE CLAIMS ACT SHOULD NOT HAVE BEEN DISMISSED AND THE MOTION TO AMEND THE COMPLAINT TO SPECIFY THE FRAUD ALLEGATIONS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff in this qui tam action should have been allowed to amend the complaint to specify the allegations of fraud against the defendant insurance companies. Unclaimed life insurance proceeds are supposed to escheat to the state. The lawsuit alleged the insurance companies had submitted false statements to the state to conceal the existence of life insurance proceeds to which the state is entitled, a violation of the New York False Claims Act (NYFCA). The First Department, in allowing the complaint to be amended to specify the fraud allegations, held that the 10-year statute of limitations applied to the filing of the alleged false reports:

… [P]laintiff adequately alleged that defendants knowingly filed false reports with the State which failed to identify escheatable life insurance proceeds. The complaint alleges that defendants' recordkeeping was so haphazard — such as listing incorrect names, dates of birth, and Social Security numbers, or omitting one or more of those pieces of information altogether — that it amounted to reckless disregard for the truth or falsity of

the reports that they submitted to the State (see State Finance Law § 188[3][a][iii]). In other circumstances, according to the complaint, defendants had actual knowledge that a policyholder was deceased, as evidenced by returned mail, customer call service logs, or demutualization payments separately escheated to the State, yet defendants nevertheless failed to disclose or escheat the deceased policyholder's life insurance proceeds to the State (see State Finance Law § 188[3][a][i]). These allegations, if true, demonstrate that defendants "deliberately turn[ed] a blind eye to reporting errors and then attest[ed] that, to [their] knowledge, they d[id] not exist" … . Total Asset Recovery Servs. LLC v Metlife, Inc., 2020 NY Slip Op 07480, First Dept 12-10-20

PLEADINGS, AMEND COMPLAINT. PLAINTIFF'S MOTION TO AMEND THE COMPLAINT TO CORRECTLY NAME THE DEFENDANT PURSUANT TO CPLR 305(C) AFTER THE STATUTE OF LIMITATIONS HAD RUN SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff's motion to amend to complaint to reflect the correct name of the defendant should have been granted:

In September 2016, plaintiff allegedly slipped and fell in the bathroom of a McDonald's restaurant located in the Town of Williamson, Wayne County. In August 2019, plaintiff commenced this action against defendant to recover for the injuries that he sustained. Defendant answered, asserting, among other affirmative defenses, a lack of personal jurisdiction and that she is not a proper party because she does not own, operate, maintain or control the business in which plaintiff was allegedly injured. Defendant subsequently moved to dismiss the complaint on the same grounds, contending that "Nancyone, Inc.," a New York corporation for which defendant is a corporate officer, owned and operated the subject McDonald's restaurant and that it had not been properly served with the summons and complaint prior to the expiration of the statute of limitations. …

Plaintiff contends that Supreme Court erred in denying that part of his cross motion that sought leave to amend his complaint pursuant to CPLR 305 (c). We agree. As relevant here, "[i]f a defendant has been misnamed in the caption of the summons and complaint, but has nonetheless been properly served within the limitations period, amendment of the summons and complaint should be allowed in the absence of demonstrated prejudice to

a substantial right" … . Kachadourian v Wilkes, 2020 NY Slip Op 07972, Third Dept 12-24-20

Practice Point: If a party was misnamed in the complaint, but was nonetheless timely served within the limitations period, amendment of the summons and complaint should be allowed.

PLEADINGS, FORECLOSURE, NOTICE REQUIREMENTS.

PLAINTIFF'S MOTION TO RESTORE THE FORECLOSURE ACTION TO THE CALENDAR SHOULD HAVE BEEN GRANTED; ABSENT SPECIFIC AFFIRMATIVE DEFENSES PLAINTIFF BANK NEED NOT PROVE COMPLIANCE WITH STATUTORY AND CONTRACTUAL NOTICE REQUIREMENTS (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff's motion to restore the matter to the calendar should have been granted and plaintiff's motion for summary judgment should have been granted. The court noted that defendant had not waived the defense of standing but plaintiff submitted sufficient proof of standing and held plaintiff, in the absence of specific affirmative defenses, need not present proof of compliance with statutory and contractual notice requirements:

The defendant's contention that the plaintiff was required to demonstrate its compliance with statutory and/or contractual notice requirements in order to establish its entitlement to judgment as a matter of law is without merit … . Specifically, the defendant's sixth affirmative defense generally and conclusorily alleged that the "plaintiff has failed to comply with all conditions precedent to commencement of this action." This Court has held such language to be insufficient to raise the issue of the plaintiff's compliance with either statutory or contractual notice requirements (… CPLR 3013). Absent there being a cognizable affirmative defense alleging non-compliance with statutory or contractual notice requirements, the plaintiff was not required to address those issues as part of its prima facie burden in moving for summary judgment … . In opposition, the defendant failed to raise a question of fact that the plaintiff failed to comply with statutory or contractual notice requirements. One W. Bank, FSB v Rosenberg, 2020 NY Slip Op 08070, Second Dept 12-30-20

SERVICE OF PROCESS, FOREIGN CORPORATIONS.

SERVICE ON AN UNAUTHORIZED FOREIGN CORPORATION DID NOT COMPLY WITH BUSINESS CORPORATION LAW 307, A JURISDICTIONAL DEFECT (SECOND DEPT).

The Second Department determined service on an unauthorized foreign (Paraguayan) corporation (Dahava) did not comply with Business Corporation Law 307 which is a jurisdictional defect:

Business Corporation Law § 307 provides for service of process on unauthorized foreign corporations. Process against a foreign corporation not authorized to do business in New York may be served upon the Secretary of State as its agent (see Business Corporation Law § 307[a]). "Such service shall be sufficient if notice therefor and a copy of the process are" delivered personally to the foreign corporation in the manner by which service of process is authorized by the law of the jurisdiction where the service is made, or "[s]ent by . . . registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official . . . in the jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last address . . . known to the plaintiff" … .

Here, the plaintiff failed to establish that he properly served Dahava, a foreign corporation not authorized to do business in New York, pursuant to Business Corporation Law § 307 … . An affidavit of service indicated that Dahava was served on June 5, 2015, by delivery of the summons and complaint on the Secretary of State. A separate affidavit of service stated that on June 11, 2015, a copy of the summons and complaint was sent by registered mail, return receipt requested, to Dahava at the address listed at the top of the [investment] agreement [between the parties]. The plaintiff, however, did not establish that he attempted to ascertain whether an address was on file with the Paraguayan equivalent of the Secretary of State before resorting to mailing the summons and complaint to Dahava's last known address set forth in the October 2012 agreement … . Friedman v Goldstein, 2020 NY Slip Op 07548, Second Dept 12-16-20

Practice Point: Business Corporation Law 307 governs service of process on a foreign corporation not authorized to do business in New York. Here service was invalid because the plaintiff did not ascertain the address of the corporation on file in the appropriate

government agency or office in Paraguay before mailing the summons and complaint to the last known address.

SERVICE OF PROCESS.

SURROGATE'S COURT HAD THE AUTHORITY TO APPROVE, NUNC PRO TUNC, A METHOD OF SERVICE ON AN OUT-OF-STATE PARTY ACCOMPLISHED WITHOUT PRIOR COURT APPROVAL (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Duffy, in a matter of first impression, determined Surrogate's Court had the authority to approve, nunc pro tunc, service upon an out-of-state party by a method which was not in compliance with the Surrogate's Court Procedure Act (SCPA). Here the attempts at service which complied with the SCPA were unsuccessful. Without procuring permission from court, the executor served the party by first class mail and the letter was not returned. Surrogate's court approved the service by mail nunc pro tunc:

… [S]ince we find that the Surrogate's Court had the authority to deem service on the appellant complete, nunc pro tunc, pursuant to SCPA 307(3)(b), which allows for substituted service such as regular first-class mail, the remaining issue to address is whether the court properly determined that such substituted service was valid; to wit, whether service on the appellant by regular first-class mail met the requirements of due process such that personal jurisdiction over the appellant was established … . * * *

… [T]he Executor undertook diligent but unsuccessful attempts to serve the appellant pursuant to SCPA 307(2) before regular first-class mail service was undertaken. Moreover, this is not a circumstance where the appellant had no knowledge of the proceeding that was taking place. Here, the appellant acknowledged that she (1) received a copy of the notice of probate at the time of the commencement of the probate proceeding, (2) immediately retained an attorney to represent her interests in the probate proceeding, and (3) subsequently received a copy of the will. The appellant was also aware of the scheduled hearing on July 12, 2017, in advance of that date, and neither she nor her attorney at that time chose to attend the proceeding. Thus, we find that the substituted service on the appellant by regular first-class mail satisfied the requirements of due process … . Matter of Pollina, 2020 NY Slip Op 08068, Second Dept 12-30-20

Practice Point: The Second Department held that Surrogate's Court Procedure Act (SCPA) 307 gives the court the authority to deem valid a method of service that is not in compliance with the statute after service had been made. Here the executor made several unsuccessful attempts at service before successfully using first-class mail. There was no question that the party was served and was aware of the scheduled hearing.

STANDING, FAMILY LAW, CUSTODY.

MOTHER HAD FLED TO ARGENTINA WITH THE CHILD WHILE CUSTODY PROCEEDINGS WERE PENDING; FAMILY COURT SHOULD NOT HAVE DENIED THE MATERNAL GRANDMOTHER'S PETITION SEEKING VISITATION ON THE GROUND SHE DID NOT HAVE STANDING; MATTER REMITTED FOR A BEST INTERESTS HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined the court erred in finding the maternal grandmother did not have standing to seek visitation and remitted the matter for a best interests hearing. Mother had fled to Argentina with the child when custody proceedings were pending:

"When a grandparent seeks visitation pursuant to Domestic Relations Law § 72(1), the court must make a two-part inquiry" … . The court must first determine if the grandparent has standing, based on death or equitable circumstances, and if it determines that the grandparent has established standing, it must then determine whether visitation is in the best interests of the child (see Domestic Relations Law § 72[1] …).

"Standing [based upon equitable circumstances] should be conferred by the court, in its discretion, only after it has examined all the relevant facts" … . "[A]n essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship" … . "It is not sufficient that the grandparents allege love and affection for their grandchild" … . "They must establish a sufficient existing relationship with their grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one, so that the court perceives it as one deserving the court's intervention" … .

Here, the Family Court's determination that the grandmother lacked standing to seek visitation was not supported by a sound and substantial basis in the record … . The evidence demonstrated that the grandmother developed a relationship with the child early

on in his life and thereafter made repeated efforts to continue that relationship … . Matter of Noguera v Busto, 2020 NY Slip Op 07385, Second Dept 12-9-20

STANDING, FORECLOSURE.

ALTHOUGH RPAPL 1320-a, ENACTED WHILE THIS APPEAL WAS PENDING, HAS CHANGED THINGS, THE DEFENDANTS' LACK-OF-STANDING DEFENSE WAS WAIVED BECAUSE IT WAS NOT RAISED IN THEIR ANSWERS OR PRE-ANSWER MOTIONS; THE BANK'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED (CT APP).

The Court of Appeals, in a brief memorandum with an extensive concurring opinion, determined the defendants in the foreclosure action had waived the lack-of-standing defense by not raising it in their answers or pre-answer motions. The court noted that Real Property Actions and Proceedings Law (RPAPL) 1320-a, which was enacted when this appeal was pending, may allow standing to be raised "at this stage of the litigation:"

… Supreme Court did not err in granting plaintiff's motions for summary judgment and for a judgment of foreclosure and sale. Defendants failed to raise standing in their answers or in pre-answer motions as required by CPLR 3211 (e) and accordingly, under the law in effect at the time of the orders appealed from, the defense was waived … . Defendants' argument that ownership is an essential element of a foreclosure action, raised for the first time in support of their motion for reargument at the Appellate Division, is unpreserved for our review. We do not reach the issue of whether RPAPL 1302-a, enacted while this appeal was pending, affords defendants an opportunity to raise standing at this stage of the litigation. Defendants are free to apply to the trial court for any relief that may be available to them under that statute. JPMorgan Chase Bank, N.A. v Caliguri, 2020 NY Slip Op 07660, CtApp 12-17-20

Practice Point: Newly enacted Real Property Actions and Proceedings Law 1320-a allows the lack-of-standing defense to a foreclosure action to be raised even if not included in the answer. Failure to raise the defense in the answer no longer waives the defense.

STANDING, FORECLOSURE.

THE BANK FAILED TO DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION WITH ADMISSIBLE EVIDENCE; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action. The bank's motion for summary judgment should not have been granted:

The plaintiff failed to present admissible evidence establishing that the plaintiff or its counsel was in possession of the note at the time of commencement of the action. In support of its motion, the plaintiff submitted the affidavit of Howard R. Handville, a senior loan analyst at Ocwen Financial Corporation whose indirect subsidiary is Ocwen Loan Servicing, LLC (hereinafter Ocwen), the plaintiff's loan servicer. Handville attested that he reviewed the servicing records maintained by Ocwen in its ordinary course of business, that prior servicers' records were integrated into Ocwen's records and relied upon by Ocwen and that "[b]ased on [his] review of the Servicing Records, the original Note and Mortgage for the Loan were physically delivered to Plaintiff's custodian on April 25, 2007, prior to the commencement of this foreclosure action." Handville further averred that "[s]ince that date, the original Note and Mortgage have remained in the physical possession of Plaintiff or its counsel." Even if Handville's affidavit was sufficient to lay a proper foundation for the admission of the "Servicing Records," the affidavit was insufficient to establish standing because the records themselves were not submitted by the plaintiff. "'[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted' … , and 'a witness's description of a document not admitted into evidence is hearsay' … . Deutsche Bank Natl. Trust Co. v Schmelzinger, 2020 NY Slip Op 07543, Second Dept 12-16-20

STANDING, FORECLOSURE.

THE BANK PRESENTED INADMISSIBLE EVIDENCE OF STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not submit admissible evidence of standing to bring the foreclosure action:

While a witness may always testify as to matters within his or her personal knowledge through personal observation … , here, Klein [plaintiff's counsel] did not provide any factual details concerning when Cohn & Roth [Klein's lawfirm] came into physical possession of the consolidated note and allonges … . Modlin's [an authorized signatory's] affidavit was similarly deficient inasmuch as she failed to identify the documents reviewed or any basis for the conclusion that the consolidated note and allonges had been in the plaintiff's possession and were sent to Cohn & Roth prior to the commencement of the action. Under these circumstances, the statements made by Klein and Modlin constituted inadmissible hearsay and lacked probative value … . U.S. Bank Trust N.A. v Auxila, 2020 NY Slip Op 07945, Second Dept 12-23-20

STANDING, NOTICE REQUIREMENTS, FORECLOSURE.

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 OR THE MORTGAGE AND DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. The bank failed to demonstrate compliance with the notice requirements of RPAPL 1304, the notice of default requirements of the mortgage, and standing to bring the action. Evidence submitted in replay papers should not have been considered:

… [T]he plaintiff submitted the affidavit of DiMario Abrams, a vice president for the plaintiff's loan servicer, as well as copies of the notices and the envelopes in which the notices were allegedly mailed. Abrams did not purport to have personal knowledge of the actual mailing of the notices pursuant to RPAPL 1304, he did not purport to have personal knowledge of the mailing procedures utilized by the plaintiff's loan servicer, and he did not lay a proper foundation under the business records exception to the hearsay rule with respect to the notices and envelopes attached to his affidavit … . * * *

The plaintiff submitted a lost note affidavit prepared by Dereje D. Badada, a vice president for its loan servicer. According to that affidavit, the note had "been inadvertently lost, misplaced or destroyed," and the loan servicer had "not pledged, assigned, transferred, hypothecated or otherwise disposed of the note." There was no allegation in the lost note

affidavit that the note had ever been delivered or assigned to the plaintiff, nor were there any details regarding when or how the note was lost, who searched for the note, or when they searched for the note. Therefore, the lost note affidavit did not establish the plaintiff's ownership of the note or the facts preventing it from producing the note (see UCC 3-804 …). U.S. Bank N.A. v Kohanov, 2020 NY Slip Op 07242, Second Dept 12-2-20

Practice Point: This decision is another in a line of hundreds of similar decisions over the past few years holding that the bank in a foreclosure action did not present admissible evidence of compliance with the notice requirements of Real Property Actions and Proceedings Law 1304, as well as sufficient evidence of standing to bring the action. Here, in addition to the usual failure to submit sufficient evidence of the mailing of the notice and the failure to satisfy the business records exception to the hearsay rule, the bank did not present sufficient evidence that the original note had been lost.

STATUTE OF LIMITATIONS, ADMINISTRATIVE LAW.

THE RECEIPT OF THE LETTER BY CERTIFIED MAIL, NOT THE PRIOR RECEIPT OF AN EMAIL WITH THE LETTER ATTACHED, TRIGGERED THE FOUR-MONTH STATUTE OF LIMITATIONS FOR BRINGING AN ARTICLE 78 PROCEEDING; THE OMISSION OF THE REQUIREMENT THAT THE RESPONDENTS BE SERVED WITH THE ORDER TO SHOW CAUSE COULD BE REMEDIED BY AN EXTENSION OF THE TIME TO EFFECT SERVICE PURSUANT TO CPLR 306-B (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the receipt of a letter by certified mail on January 22, not the receipt of the email with the letter attached on January 17, started the four-month statute of limitations for the Article 78 action. The letter was the final determination of the respondent Department of Health, denying petitioner's application to open an assisted living facility. In addition, the Third Department determined a mistake made in the order to show cause, which did not require service upon the respondents, could be remedied. Therefore petitioners should be granted an extension of time to serve respondents pursuant to CPLR 306-b:

There is no dispute that the January 17 letter constituted a final and binding determination. At issue is whether counsel's receipt of the January 17 email or counsel's receipt of the January 17 letter by certified mail on January 22, 2019 provided the notice necessary to trigger the running of the statute of limitations. …

We recognize that there is only one letter, the January 17 letter, a copy of which was attached to the January 17 email and the original was delivered by certified mail on January 22, 2019. That said, even though an email delivery could have sufficed, respondents opted to effect delivery of the January 17 letter through the more formal certified mailing process, by which actual delivery and receipt are confirmed with the recipient's signature. Given that format, it was not necessarily unreasonable for petitioners to have assumed that receipt of the January 17 letter on January 22, 2017 triggered the limitations period or, at least, an ambiguity was created as to whether to measure the time period from that date. As such, we conclude that Supreme Court erred in granting respondents' motion to dismiss the petition as untimely … . …

Petitioners submitted, and Supreme Court signed, a proposed order to show cause providing for service upon respondents by service on the Attorney General. Petitioners complied with the terms of that order, but such service was manifestly defective because petitioners were also statutorily required to effect service upon respondents (see CPLR 307, 7804 [c]). In their cross motion, petitioners promptly sought permission to correct this error, and it is evident that respondents were in no way prejudiced. Not to be overlooked is the looming expiration of the statute of limitations. Under such circumstances, rather than dismissing a proceeding, a court is authorized to extend the time for service "upon good cause shown or in the interest of justice" (CPLR 306-b …). Matter of Park Beach Assisted Living, LLC v Zucker, 2020 NY Slip Op 07264, Third Dept 12-3-20

Practice Point: Here the issue was whether the four-month statute of limitations rendered the Article 78 action untimely. The Department of Health's decision denying the application to open an assisted living facility was emailed to the petitioner and subsequently sent by certified mail. If the statute was triggered by the email the action was untimely. The court held the statute was triggered by the subsequent letter sent by certified mail.

STATUTE OF LIMITATIONS, CONTRACT LAW.

THERE WAS A QUESTION OF FACT WHETHER THE ONE-YEAR STATUTE OF LIMITATIONS IN THE CONTRACT WITH DEFENDANT SUBCONTRACTOR WAS REASONABLE BECAUSE THE RUNNING OF THE STATUTE COULD BE TRIGGERED BY A PARTY OVER WHICH DEFENDANT HAD NO CONTROL (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, reversing Supreme Court, determined the counterclaims by defendant subcontractor, Nastasi, in this breach of a construction contract action, should not have been dismissed. The central issue was whether the one-year contractual statute of limitations was enforceable. Because the statute could be triggered by the failure of the owner to pay the plaintiff general contractor, Turner, a circumstance over which the defendant subcontractor, Nastasi, had no control, there was a question of fact whether the one-year limitations period was reasonable:

The relevant question when deciding whether a limitations period is enforceable is whether and when the damages were objectively ascertainable … . A contractual limitations period is unenforceable without a concrete determination of damages accrual … .

Here, the provisions setting a one-year limitation period for claims arising out of the contracts between Turner and Nastasi are reasonable on their face. However, the contracts also provide that payments by the owner are conditions precedent to any sums owed by Turner to Nastasi. As observed in D&S Restoration, it was neither fair nor reasonable to impose such a condition precedent, which was not within Nastasi's control, but had the capability of nullifying its claim (D&S Restoration, 160 AD3d at 926).

… [T]he intent of the owner should not govern the interplay of the two provisions. Such a holding will unreasonably permit a party to choose to stay silent on the issue of owner payment unless it suited them, and unilaterally set the accrual date for the claim. Turner Constr. Co. v Nastasi & Assoc., Inc., 2020 NY Slip Op 08024, First Dept 12-29-20

Practice Point: The one-year statute of limitations in the contract could be triggered by a party over which the defendant had no control, raising a question of fact whether the contractual limitations period was reasonable.

STATUTE OF LIMITATIONS, FORECLOSURE.

CPLR 204(A) IN CONJUNCTION WITH RPAPL 1301(3) TOLLED THE STATUTE OF LIMITATIONS WHILE THE FIRST FORECLOSURE ACTION WAS PENDING, FROM 2010 TO 2013, RENDERING THE SECOND FORECLOSURE ACTION IN 2017 TIMELY (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Mulvey, reversing Supreme Court, determined the instant foreclosure action was not time barred because CPLR 204(a) in conjunction with Real Property Actions and Proceedings Law (RPAPL) 1301(3) prohibited bringing the instant action while the first action was pending:

In September 2003, defendant, in exchange for a loan to purchase a residence, executed a note secured by a mortgage on that real property. The note and mortgage were later assigned to plaintiff. After defendant failed to make some payments, on May 5, 2010 plaintiff commenced a foreclosure action against defendant, which Supreme Court (Drago, J.) dismissed on October 30, 2013 for failure to prosecute. In April 2015, Supreme Court (Buchannan, J.) denied plaintiff's motion to vacate the dismissal. In 2017, plaintiff commenced a second foreclosure action. * * *

CPLR 204 (a) provides that, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." * * *

The statute that plaintiff relies on, in conjunction with CPLR 204 (a), is RPAPL 1301 (3), which provides that, while an action for a mortgage debt "is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." The purpose of RPAPL 1301 (3) is "to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt … . … [P]laintiff established that the statute was tolled during the pendency of the first foreclosure action, from May 2010 to October 2013. Citimortgage, Inc. v Ramirez, 2020 NY Slip Op 07970, Third Dept 12-24-20

Practice Point: CPLR 204 in conjunction with Real Property Actions and Proceedings Law (RPAPL) 1301 tolled the statute of limitations in this foreclosure action. RPAPL 1301 prohibits filing a second foreclosure action while the first is still pending, tolling the statute of limitations until the first action is terminated.

STATUTE OF LIMITATIONS, FORECLOSURE.

PURPORTED MORTGAGE PAYMENTS MADE AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION DID NOT REVIVE THE STATUTE OF LIMITATIONS FOR THE PURCHASERS OF THE ENCUMBERED PROPERTY OR THE BANK WHICH ISSUED A MORTGAGE SECURED BY THE ENCUMBERED PROPERTY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined mortgage payments allegedly made after the expiration of the statute of limitations for a foreclosure action did not revive the statute of limitations as against defendants, who purchased the encumbered property, and defendant bank which issued a mortgage secured by the property:

… [T]he tolling or revival effect of partial payments differs as between the payor — the Gureckis — and subsequent purchasers — defendants (see General Obligations Law § 17-107 [2]). [A] qualifying partial payment that is made before the expiration of the statute of limitations will renew the statute of limitations against any subsequent purchaser (see General Obligations Law § 17-107 [2] [2d par] ..). In contrast, a qualifying partial payment that is made after the expiration of the statute of limitations will only revive the statute of limitations as to a subsequent purchaser who did not give value or who had actual notice of the making of the payment … . Here, … at the time that [the payments] were made the statute of limitations had expired. Given that the record is clear that defendants are purchasers for value and plaintiff put forth no evidence that defendants had actual notice of the … payments, the payments did not have the effect of reviving the statute of limitations as to defendants (see General Obligations Law § 17-107 [2] …). Gurecki v Gurecki, 2020 NY Slip Op 07257, Third Dept 12-3-20

STATUTE OF LIMITATIONS, FORECLOSURE.

THE FORECLOSURE ACTION WAS TIME-BARRED; THE DISCONTINUANCE DID NOT DE-ACCELERATE THE DEBT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this foreclosure action should have been granted. The action was time-barred. The debt was accelerated when the foreclosure action was started and the discontinuance did not de-accelerate the debt:

Plaintiff's … contention—that the stipulation of discontinuance in the 2007 action revoked the acceleration of the debt—is likewise without merit. … Here, the stipulation of discontinuance in the 2007 action is silent on the issue of the revocation of the election to accelerate and does not otherwise indicate that the plaintiff would accept installment payments from the defendant and thus did not constitute an affirmative act revoking acceleration … . Deutsche Bank Natl. Trust Co. v Ebanks, 2020 NY Slip Op 08035, Second Dept 12-30-20

Practice Point: The statute of limitations is triggered by the filing of a foreclosure action, which accelerates the debt. A subsequent discontinuance which is silent on the subject does not de-accelerate the debt.

SUBPOENAS.

IN THIS ACTION SEEKING TO ENFORCE AFFIDAVITS OF CONFESSION OF JUDGMENT, INFORMATION SUBPOENAS ISSUED BY PLAINTIFFS SHOULD NOT HAVE BEEN QUASHED (SECOND DEPT).

The Second Department, reversing Supreme Court, in an action seeking to enforce affidavits of confession of judgment, determined the motion to quash information subpoenas should not have been granted:

… Supreme Court improvidently exercised its discretion in granting the defendants' motion to quash the information subpoenas. CPLR 5223 compels disclosure of "all matter relevant to the satisfaction of the judgment." A judgment creditor is entitled to discovery from either the judgment debtor or a third party in order "to determine whether the

judgment debtor[ ] concealed any assets or transferred any assets so as to defraud the judgment creditor or improperly prevented the collection of the underlying judgment" … . …

… [A] party moving to quash a subpoena has the initial burden of establishing either that the requested disclosure "is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious" … . Contrary to the defendants' contention, the fact that they are seeking to rescind the judgment by confession in a separate action against the plaintiffs, without more, does not preclude enforcement of the judgment in favor of the plaintiffs and against the defendants … . Furthermore, the defendants failed to proffer any evidence that the requested disclosure is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious. Lisogor v Nature's Delight, Inc., 2020 NY Slip Op 07879, Second Dept 12-23-20

SUBSTITUTE A PARTY, BANKRUPTCY.

IN THE ABSENCE OF AN ORDER SUBSTITUTING THE BANKRUPTCY TRUSTEE FOR THE PLAINTIFF-DEBTOR, THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT SHOULD HAVE BEEN GRANTED; SUPREME COURT SHOULD NOT HAVE DENIED DEFENDANTS' MOTION AND DIRECTED PLAINTIFF TO SEEK RELIEF FROM THE BANKRUPTCY COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that, as a matter of comity, based upon an order in bankruptcy court, a New York court will substitute the bankruptcy trustee as a party in a suit involving the plaintiff/debtor. Here there was no such order and the defendants' motion to dismiss the complaint should have been granted:

"'[T]he integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets'" … . "By failing to list causes of action on bankruptcy schedules of assets, the debtor represents that it has no such claims" … .

"[O]nce a bankruptcy proceeding is commenced, all legal or equitable interests of the debtor become part of the bankruptcy estate, including any causes of action (… see 11 USC § 541[a][1]). Accordingly, where a debtor has sought chapter 7 bankruptcy protection, "the causes of action formerly belonging to the debtor . . . [vest] in the trustee

for the benefit of the estate . . . [and] [t]he debtor has no standing to pursue such causes of action" … .

In cases where a plaintiff-debtor has successfully petitioned the bankruptcy court to reopen the bankruptcy to include a pending action, this Court has invoked the doctrine of comity to permit substitution of the bankruptcy trustee as a plaintiff … . Here, however, the Supreme Court went further, directing [plaintiff] to seek such relief from the bankruptcy court and denying the defendants' motion to dismiss the complaint … . …

Under these circumstances, the court should have granted that branch of the defendants' motion which was to dismiss the complaint … . Nevertheless, the trustee, if he or she should chose to re-commence the case in his or her own name, will enjoy the protection offered by CPLR 205 … . Turner v Owens Funeral Home, Inc., 2020 NY Slip Op 07238, Second Dept 12-2-20

Practice Point: Once a bankruptcy proceeding is started, any cause of action of the debtor vests in the bankruptcy trustee. Here the action should have been dismissed because the bankruptcy trustee had not been substituted for the plaintiff-debtor.

SUBSTITUTE A PARTY, DECEASED DEFENDANT.

PLAINTIFF'S REQUEST FOR A 30-DAY ADJOURNMENT TO SEEK THE APPOINTMENT OF THE PUBLIC ADMINISTRATOR TO REPRESENT A DECEASED DEFENDANT SHOULD HAVE BEEN GRANTED; THE MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO SUBSTITUTE A REPRESENTATIVE SHOULD HAVE BEEN DENIED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's request for a 30-day adjournment to petition or move to have the public administrator appointed for a deceased defendant's (Conrad's) estate should have been granted. Supreme Court had granted the motion to dismiss the complaint for failure to substitute a representative of the deceased defendant pursuant to CPLR 1021:

A motion to substitute a party "may be made by the successors or representatives of a party or by any party" and is to be made within a reasonable time after the death of the party (CPLR 1021). "[I]f the event requiring substitution is the death of a party and timely substitution has not been made, the court, before proceeding further, shall, on such notice

as it may in its discretion direct, order the persons interested in the decedent's estate to show cause why the action or appeal should not be dismissed." (id).

CPLR 1015(a) provides that "[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." … . Moreover, "[i]t is well settled that the death of a party divests the court of jurisdiction to render a judgment until a proper substitution has been made, so that any step taken without it may be deemed void, including an appellate decision" … . …

In light of the relatively short passage of time between Conrad's death and the time defendants' motion was made, the allegation in plaintiff's complaint that the reverse mortgage upon which this case is premised was obtained fraudulently and is null and void, and the fact that the defendant banks had not even moved for substitution in the related foreclosure action, it was an abuse of discretion for the motion court not to allow plaintiff, at a minimum, the additional 30 days requested to seek to have the public administrator appointed so that the case could move forward and be decided on the merits. Dugger v Conrad, 2020 NY Slip Op 07313, First Dept 12-8-20

SUCCESSIVE MOTIONS, SUMMARY JUDGMENT.

THE SECOND MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED; SUCCESSIVE SUMMARY JUDGMENT MOTIONS ARE GENERALLY PROHIBITED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the prohibition against successive summary judgment motions applied and the second motion should have been denied:

"Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause" … . "Evidence is not newly discovered simply because it was not submitted on the previous motion" … . "Rather, the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means" … . "Successive motions for summary judgment should not be made based upon facts or arguments which could have been

submitted on the original motion for summary judgment" … . Wells Fargo Bank, NA v Carpenter, 2020 NY Slip Op 07426, Second Dept 12-9-20