NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
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An Organized Compilation of Summaries of Selected Decisions Addressing Civil Procedure Released in March 2021 by the First, Second, Third and Fourth Departments, as Well as the Court of Appeals. 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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90-DAY DEMAND TO FILE NOTE OF ISSUE, FORECLOSURE.

ALTHOUGH PLAINTIFF BANK IN THIS FORECLOSURE ACTION DID NOT HAVE A JUSTIFIABLE EXCUSE FOR FAILING TO COMPLY WITH THE 90-DAY DEMAND TO FILE A NOTE OF ISSUE PURSUANT TO CPLR 3216, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the complaint in this foreclosure action should not have been dismissed pursuant to CPLR 3216, even though plaintiff's excuse for failure to comply with the 90-day demand to file a note of issue was not justifiable:

Because there was no compliance with the 90-day demand, the party seeking to avoid dismissal had to demonstrate a "justifiable excuse for the delay and a good and meritorious cause of action" … . The opposition to defendant's motion advanced only a conclusory and unsubstantiated claim of law office failure by plaintiff's prior counsel as the justifiable excuse. Although the failure to detail and substantiate a claim of law office failure would justify dismissal of the complaint … , even when presented with an unjustifiable excuse, a court still retains some residual discretion to refuse dismissal of a complaint as a penalty under CPLR 3216 … .

… [S]ome of the delay in this case was not attributable to plaintiff. Taking into account that CPLR 3216 is "extremely forgiving of litigation delay" … , as well as the public policy of resolving disputes on the merits … , defendant's motion, under the particular circumstances of this case, should have been denied to the extent that it sought dismissal of the complaint, and plaintiff's cross motion should have been granted to the extent that it sought an extension of time to file the note of issue … . Chase Home Fin., LLC v Shoumatoff, 2021 NY Slip Op 01537, Third Dept 3-18-21

Practice Point: Even where a party does not have a justifiable excuse for failing to comply with the 90-day demand to file a note of issue, courts still have discretion in fashioning a penalty; dismissal of the complaint is not mandatory pursuant to CPLR 3216.

ANSWER, FAILURE TO REJECT LATE.

THE BANK'S FAILURE TO REJECT THE LATE ANSWER WITHIN 15 DAYS WAIVED THE LATE SERVICE AND DEFAULT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank waived its objection to a late answer by not timely rejecting it within 15 days. Therefore the default was also waived:

The defendant failed to timely appear or answer the complaint. … On April 30, 2018, the defendant served an answer with counterclaims. Seventeen days later, on May 17, 2018, the plaintiff served a notice of rejection in which it rejected the answer as untimely. …

Pursuant to CPLR 2101(f), "[t]he party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections" … . Here, the plaintiff's undisputed failure to reject the defendant's answer within the fifteen-day statutory time frame constituted a waiver of the late service and the default … . U.S. Bank N.A. v Lopez, 2021 NY Slip Op 01440, Second Dept 3-10-21

Practice Point: If a party is served with a late answer, the party has 15 days to return the answer with a statement explaining the reasons for rejecting it. Absent a rejection and return, the party waives the late service and the related default.

ARBITRATION, EMPLOYMENT LAW, SEXUAL HARASSMENT.

CPLR 7515, ENACTED IN 2018, DOES NOT APPLY RETROACTIVELY TO PROHIBIT MANDATORY ARBITRATION OF SEXUAL HARASSMENT CLAIMS (FIRST DEPT).

The First Department, reversing Supreme Court, determined CPLR 7515, enacted in 2018, should not be applied retroactively to prohibit arbitration of a sexual harassment claim:

The provisions of CPLR 7515 relied on by plaintiff are not retroactively applicable to arbitration agreements, like the one at issue, that were entered into preceding the enactment of the law in 2018, so that plaintiff's argument that this law prohibits arbitration of her claims is unavailing … . Newton v LVMH Moet Hennessy Louis Vuitton Inc., 2021 NY Slip Op 01558, First Dept 3-18-21

ARTICLE 78, FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, SUA SPONTE.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IS AN AFFIRMATIVE DEFENSE WHICH CAN BE WAIVED; THE JUDGE, THEREFORE, SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE ARTICLE 78 PETITION ON THAT GROUND; PETITION REINSTATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Article 78 proceeding should not have been dismissed, sua sponte, on the ground petitioner had not exhausted his administrative remedies, which is an affirmative defense to be raised by the respondent, not the judge:

The Supreme Court's sua sponte dismissal of the proceeding for the petitioner's failure to exhaust his administrative remedies was error. "Failure to exhaust administrative remedies is not an element of an article 78 claim for relief, but an affirmative defense which must be raised by respondent either in an answer or by preanswer motion or else be deemed waived" … . Matter of Bobar v Transit Adjudication Bur., 2021 NY Slip Op 01255, Second Dept 3-3-21

Practice Point: In an Article 78 proceeding, the failure to exhaust administrative remedies is an affirmative defense which is waived if not raised in the answer or a preanswer motion. In other words, it is not necessary to affirmatively allege administrative remedies were exhausted in the petition.

ARTICLE 78/DECLARATORY JUDGMENT.

ABSENT A REQUEST FROM A PARTY, SUPREME COURT SHOULD NOT HAVE SUMMARILY DISMISSED THE DECLARATORY JUDGMENT ASPECT OF THIS HYBRID ARTICLE 78/DECLARATORY JUDGMENT ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the court should not have summarily dismissed the declaratory judgment aspect of this hybrid declaratory judgment/Article 78 action. The Second Department found that Supreme Court had properly affirmed the denial of a special use permit for a dog kennel, but the Second Department reinstated the request for a declaratory judgment on the constitutionality of a related local law:

… [T]he Supreme Court should not have summarily dismissed the cause of action for a judgment declaring that Town of Lewisboro Code § 220-23(D)(7) is unconstitutional. "In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those to recover damages and for declaratory relief, on the other hand" … . "The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment" … . "'Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action'" … . Here, since no party made such a request, the court erred in summarily disposing of the cause of action for a judgment declaring that Town of Lewisboro Code § 220-23(D)(7) is unconstitutional. Matter of Muller v Zoning Bd. of Appeals Town of Lewisboro, 2021 NY Slip Op 01416, Second Dept 3-10-21

ARTICLE 78/DECLARATORY JUDGMENT.

ALTHOUGH THE ARTICLE 78 PROCEEDING WAS PROPERLY TRANSFERRED TO THE APPELLATE DIVISION, THE RELATED DECLARATORY JUDGMENT ACTION WAS NOT TRANSFERABLE (FOURTH DEPT).

The Fourth Department determined Supreme Court properly transferred the Article 78 proceeding to the appellate division because there was a quasi-judicial hearing before an administrative law judge at which evidence was taken. The court noted that the aspect of the underlying action which sought a declaratory judgment could not be transferred to the appellate division:

… [A]lthough petitioner also contends that she is entitled to declaratory relief, we do not "have jurisdiction to consider the declaratory judgment action as part of this otherwise properly transferred CPLR article 78 proceeding" … . The transfer of a declaratory judgment action to this Court is not authorized by CPLR 7804 (g) … and we "lack[] jurisdiction to consider a declaratory judgment action in the absence of a proper appeal from a court order or judgment" … . We therefore vacate the order insofar as it transferred the declaratory judgment action, sever the declaratory judgment action and CPLR article 78 proceeding, and remit the declaratory judgment action to Supreme Court for further proceedings … . Matter of Blue v Zucker, 2021 NY Slip Op 01924, Fourth Dept 3-26-21

ATTACHMENT.

THE MOTION FOR AN ORDER OF ATTACHMENT SHOULD NOT HAVE BEEN GRANTED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for an order of attachment should not have been granted:

"In order to be granted an order of attachment under CPLR 6201(3), a plaintiff must demonstrate that the defendant has concealed or is about to conceal property in one or more of several enumerated ways, and has acted or will act with the intent to

defraud creditors, or to frustrate the enforcement of a judgment that might be rendered in favor of the plaintiff" … . "Affidavits containing allegations raising a mere suspicion of an intent to defraud are insufficient. It must appear that such fraudulent intent really existed in the defendant's mind" … . The "mere removal, assignment or other disposition of property is not grounds for attachment" … . Cyngiel v Krigsman, 2021 NY Slip Op 01391, Second Dept 3-10-21

Practice Point: An order of attachment must be supported by strong evidence of an intent to defraud underlying the removal, assignment or other disposition property, a suspicion of fraudulent intent is not enough.

BILL OF PARTICULARS, AMENDMENT.

PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO AMEND THE BILL OF PARTICULARS AFTER DISCOVERY WAS CLOSED TO RAISE A NEW THEORY OF LIABILITY STEMMING FROM FACTS NOT PREVIOUSLY ALLEGED; DEFENDANT OUT-OF-POSSESSION LANDLORD DEMONSTRATED THE LEASE DID NOT REQUIRE THE LANDLORD TO MAINTAIN THE DOOR WHICH PLAINTIFF ALLEGED CLOSED ON HER HAND (SECOND DEPT).

he Second Department, reversing Supreme Court, determined plaintiff's motion to amend the bill of particulars after discovery was complete should not have been granted and defendant out-of-possession landlord's motion for summary judgment should have been granted. Plaintiff alleged the door of a retail store closed on her hand as she was pushing a cart with merchandise through the doorway. She alleged the door was not properly maintained. After discovery she sought to amend her bill of particulars to allege there was a crack in the floor which caused the cart to get stuck as she was attempting to pass through the doorway:

"While leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise" … , "once discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances" … . In such a case, leave may properly be granted "where the

plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant" … . However "where a motion for leave to amend a bill of particulars alleging new theories of liability not raised in the complaint or the original bill is made on the eve of trial, leave of court is required, and judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent, and cautious" … . "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" … .

… [T]he proposed amendment to the bill of particulars raised an entirely new theory of liability well after discovery had been completed, and was advanced only in response to the defendant's motion for summary judgment. Moreover, the plaintiff failed to proffer a reasonable excuse for her delay in seeking the amendment … , and the proposed amendment was prejudicial to the defendant … . * * *

… [T]he defendant [out-of-possession landlord] demonstrated its … entitlement to summary judgment dismissing the complaint by submitting, inter alia, the lease, which established that the tenant enjoyed complete and exclusive possession of the demised premises at the time of the plaintiff's injury and that the defendant was not responsible for maintenance of the door. King v Marwest, LLC, 2021 NY Slip Op 08225, Second Dept 3-17-20

Practice Point: After discovery is complete, the bill of particulars cannot be amended by adding new facts or new theories of liability.

COMPLAINT, DEFECTIVE.

ALTHOUGH THE COMPLAINT WAS DEFECTIVE, AFFIDAVITS AND OTHER EVIDENCE DEMONSTRATE A POTENTIALLY MERITORIOUS CLAIM; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, noted that a defective complaint will survive a motion to dismiss if affidavits or other evidence demonstrate a potentially meritorious claim:

The amended complaint is defective because it merely alleges that the Bluestone defendants participated in fraudulent transfers, without alleging that they were a transferee of the assets or benefited in any way from the transfers … . However, a defective complaint will not be dismissed where affidavits and other evidence amplify inartfully pleaded but potentially meritorious claims … . Plaintiffs rely on evidence submitted by the Goldman defendants in opposition to the Bluestone defendants' motion to dismiss which suggests that the Bluestone defendants may have participated in and benefitted from the alleged fraudulent transfers. This evidence indicates that plaintiffs have potentially meritorious fraudulent conveyance claims against the Bluestone defendants. Ninth Space LLC v Goldman, 2021 NY Slip Op 01853, First Dept 3-25-21

Practice Point: A complaint which does not state a cause of action can be saved by affidavits or other evidence submitted in opposition to the motion to dismiss.

COURT OF CLAIMS, CONTRACT LAW.

THE COURT OF CLAIMS, NOT SUPREME COURT, IS THE PROPER FORUM FOR THIS DECLARATORY JUDGMENT ACTION AGAINST THE STATE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the proper forum for the declaratory judgment cause of action against the state was the Court of Claims.

The request for a declaratory judgment (in this action in Supreme Court) was incidental to the breach of contract action already filed in the Court of Claims:

The Court of Claims has subject matter jurisdiction over claims for breach of contract against the State … . As long as the primary claim is for money damages, the Court of Claims "may [also] apply equitable considerations" and grant incidental equitable relief … . Here, because the relief sought in the complaint arises out of an alleged breach of contract, the proper forum for this action is the Court of Claims … . Rice v New York State Workers' Compensation Bd., 2021 NY Slip Op 01669, Fourth Dept 3-19-21

Practice Point: If the crux of an action against the state is breach of contract seeking money damages, the Court of Claims is the proper forum even if incidental equitable relief, here a declaratory judgment, is also requested.

DIRECTED VERDICT, COURT OF CLAIMS, ATTORNEYS.

DEFENDANTS WERE NOT ENTITLED TO A DIRECTED VERDICT ON THE EMPLOYMENT DISCRIMINATION CAUSE OF ACTION; DEFENSE COUNSEL'S REMARK ABOUT THE FINANCIAL CONSEQUENCES OF A PLAINTIFF'S VERDICT DEPRIVED PLAINTIFF OF A FAIR TRIAL; THE COURT OF CLAIMS HAS EXCLUSIVE JURISDICTION OVER ACTIONS SEEKING MONEY DAMAGES FROM THE STATE, RELEVANT CAUSES OF ACTION PROPERLY DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a dissent, determined defendants' motion for a directed verdict should not have been granted and the defense attorney's remark in summation warranted a new trial. Plaintiff alleged he was denied promotion at the Central New York Psychiatric Center (CNYPC) because the defendants deemed him mentally unstable due to his status as a veteran of the Iraq war. The directed verdict awarded defendants on that issue was reversed. The defense counsel's remark in summation that one of the individual defendants would have to "open up her checkbook and write somebody a check" if plaintiff wins deprived plaintiff of a fair trial (the state is required to indemnify defendants as state officers and employees). This case was brought in Supreme Court. The

Fourth Department noted that the Court of Claims has exclusive jurisdiction over actions against the state for money damages (apparently the relevant causes of action were properly dismissed for that reason):

Plaintiff … contends that the court erred in granting defendants' motion for a directed verdict with respect to plaintiff's cause of action under the New York Human Rights Law alleging discrimination based on military status … . We agree. * * * Based upon the … testimony that plaintiff was not promoted because "[t]here was a question after [plaintiff's] military service about his [mental] stability," the jury could have rationally inferred that defendants refused to promote plaintiff in part because they perceived that combat veterans, such as plaintiff, develop dangerous and disqualifying mental health issues as a result of their military service. Thus, "it cannot be said that 'it would . . . be utterly irrational for a jury to reach [a verdict in favor of plaintiff]' " … . * * *

… [R]emarks about a party's financial status "have been universally condemned by the courts of this State" … . The defense attorney's argument that his clients should not be "forced to open [their] checkbook" likely conveyed that the individual defendants would be required to pay any damages out-of-pocket. That remark was "grossly improper" … . Moreover, it misrepresented the law to the jury. The State has a duty to indemnify its employees for judgments that arise out of actions within the scope of their public duties, although that duty does not arise from injury or damage resulting from intentional wrongdoing on the part of the employee (see Public Officers Law § 17 [3] [a]). Hubbard v New York State Off. of Mental Health, Cent. N.Y. Psychiatric Ctr., 2021 NY Slip Op 01661, Fourth Dept 3-19-21

Practice Point: After a plaintiff's verdict, in order to direct a verdict in favor of defendant the judge must find that the plaintiff's verdict was "utterly irrational," which was not the case here. There was evidence which supported the jury verdict.

FAMILY LAW, DISMISSAL OF PETITION.

FATHER'S PETITION FOR CUSTODY SHOULD NOT HAVE BEEN DISMISSED WITHOUT MAKING A DETERMINATION ON THE MERITS, MATTER REMITTED; THE USUAL PROOF REQUIREMENTS FOR AWARDING CUSTODY TO A NONPARENT DO NOT APPLY TO A TEMPORARY PLACEMENT WITH A NONPARENT (FOURTH DEPT).

The Fourth Department, remitting the matter for a hearing, determined father's petition for modification of custody should not have been dismissed as moot without making a determination of the merits. The court noted that the usual requirements for awarding custody to a nonparent did not apply to the maternal aunt in this case because she did not petition for custody and the children were merely placed with her temporarily:

The father initially filed a petition for modification of custody and visitation against the mother, seeking primary residential custody of their three children. Petitioner Genesee County Department of Social Services then commenced a neglect proceeding against the mother, and the mother consented to the entry of orders finding the subject children to be neglected children. Family Court held a joint hearing regarding the neglect petition and the father's custody petition … , after which the court placed the children with their maternal aunt with the mother's consent but over the father's objection, and dismissed the father's custody petition as moot.

… [W]e agree with the father that the court erred in dismissing his petition for modification of custody and visitation as moot without making a determination on the merits of his petition pursuant to Family Court Act article 6 … . We further agree with the father that, " '[a]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " … . Nevertheless, on the facts of this case, we conclude that the maternal aunt did not have the burden of making a showing of extraordinary circumstances inasmuch as she did not file a petition in this matter and was not awarded custody of the children, but rather the children were placed with her for the pendency of the article 10 proceeding pursuant

to Family Court Act § 1017 … . Matter of Michael J.M. v Lisa M.H., 2021 NY Slip Op 01573, Fourth Dept 3-19-21

FAMILY LAW, FILING OF OBJECTIONS.

FAILURE TO TIMELY FILE THE OBJECTIONS TO THE SUPPORT MAGISTRATE'S DETERMINATION DID NOT WARRANT DISMISSAL OF THE OBJECTIONS (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined that the failure to time file proof of service of respondent's objections to the determination of the Support Magistrate did not warrant dismissal of the objections:

Family Court Act § 439 (e) provides that a party filing objections to the determination of the Support Magistrate must serve those objections upon the opposing party, and that proof of service "shall be filed with the court at the time of filing of objections." Here, the record indicates that respondent timely filed his objections and served a copy of those objections upon petitioner on the same day, but respondent failed to file proof of service with Family Court until two days later.

Under the particular circumstances of this case, we substitute our discretion for that of Family Court and conclude that dismissal of respondent's objections is not warranted … . Although respondent failed to comply with the statutory deadline for filing proof of service, " '[s]trict adherence to this deadline is not required,' " and courts have " 'discretion to overlook a minor failure to comply with the statutory requirement' " … . Here, there is no dispute that petitioner was not prejudiced by the late filing inasmuch as she was served with a copy of respondent's objections within the statutory time period (see Family Ct Act § 439 [e]). Indeed, the record shows that petitioner filed a rebuttal to respondent's objections. Matter of Sigourney v Santaro, 2021 NY Slip Op 01591, Fourth Dept 3-19-21

Practice Point: The failure to file proof of service of objections to a Support Magistrate's determination within two days as required by the Family Court Act does not mandate dismissal of the objections, at least where there is no prejudice to the opposing party.

FAMILY LAW, SERVICE OF PETITION.

PETITIONER DID NOT DEMONSTRATE THE NEGLECT PETITION WAS PROPERLY MAILED TO MOTHER AND MOTHER PRESENTED EVIDENCE REBUTTING THE PROCESS SERVER'S AFFIDAVIT; A HEARING ON WHETHER MOTHER WAS PROPERLY SERVED IS REQUIRED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined a hearing on whether mother was properly served with the neglect petition was necessary:

… [P]etitioner failed in the first instance to establish that the documents were mailed to the mother's " 'last known address' " inasmuch as "[t]he affidavit of service says that the [papers] were mailed [by prepaid, first class mail] . . . , without identifying th[e] address" to which they were mailed … . In any event, even assuming, arguendo, that the process server's affidavit was sufficient to create the presumption of valid service, we conclude that the mother's submissions were sufficient to rebut that presumption.

The mother's attorney submitted an affidavit from his legal assistant establishing that the person who accepted service mistakenly thought the papers were for his daughter, who shared the same first name as the mother. That person also informed the legal assistant that the mother had never resided at that address and that the mother's father, with whom petitioner believed the mother was residing, "had moved out of the home months earlier." We thus conclude that the mother rebutted any presumption that she was properly served at her "actual place of business, dwelling place or usual place of abode so as to satisfy the requirements of CPLR 308 (2) [or (4)]" … . Additionally, we note that petitioner's own submissions in the application for an order of substituted service raise a question whether the mother ever resided at the address listed in the affidavit of service inasmuch as that address was not among the numerous identified addresses for her. Matter of William A. (Jessica F.), 2021 NY Slip Op 01580, Fourth Dept 3-19-21

INSTRUMENT FOR THE PAYMENT OF MONEY ONLY.

THE COMMERCIAL LEASE GUARANTEE MET THE DEFINITION OF AN INSTRUMENT FOR THE PAYMENT OF MONEY; THE COVID-19 RESTRICTIONS ON ENFORCEMENT OF COMMERCIAL LEASE GUARANTEES DO NOT APPLY; THE WARRANTY OF HABITABILITY DEFENSE IS NOT AVAILABLE (FIRST DEPT).

The First Department, reversing Supreme Court, determined: (1) although guarantees generally are not instruments for the payment of money within the meaning of CPLR 3213, the language of the guarantee was unconditional and therefore met the criteria of such an instrument; (2) the COVID-19-related provision of the NYC Administrative Code and executive orders, prohibiting enforcement of commercial lease guarantees, do not apply where the business were not required to cease operations; (3) the warranty of habitability was not available as a defense because of the language of the guarantee; and (4) a commercial tenant cannot assert the warranty of habitability:

While a guarantee of both payment and performance does not qualify as an instrument for the payment of money only under CPLR 3213 … , paragraph 1 of the guaranty signed by defendants includes an unconditional obligation to pay all rent and additional rent owed under the sublease, and therefore does so qualify … ; "it required no additional performance by plaintiff[] as a condition precedent to payment or otherwise made defendant[s'] promise to pay something other than unconditional" … .

While the prohibition on the enforcement of commercial lease guaranties against natural persons under Administrative Code of City of NY § 22-1005 applies to businesses that were required to "cease operation" or "close to members of the public" under executive orders 202.3, 202.6, or 202.7, issued in connection with the COVID-19 pandemic, defendants never asserted that the nonparty subtenant ceased operations or closed to the public as a result of those orders.

Defendants' claim that they properly raised warranty of habitability defenses under the sublease is without merit. Such defenses are not available to defendants because all defenses under the guaranty, with the exception of prior payment, were waived. Moreover, a commercial tenant cannot avail itself of the statutory warranty of

habitability (see Real Property Law § 235-b …). iPayment, Inc. v Silverman, 2021 NY Slip Op 01846, First Dept 3-25-21

Practice Point: Here the guarantee in the lease included an unconditional obligation to pay all rent and therefore qualified as an instrument for the payment of money only which can properly be the basis for a motion for summary judgment in lieu of a complaint.

JUDGMENT ENTERED AFTER PARTY'S DEATH.

A STIPULATION OF SETTLEMENT FOR WHICH A JUDGMENT WAS ENTERED AFTER DECEDENT'S DEATH MAY NOT BE ENTERED IN DECEDENT'S NAME PURSUANT TO CPLR 5016 (d); THEREFORE THE JUDGMENT IS NOT ENTITLED TO PRIORITY IN SETTLING THE ESTATE (THIRD DEPT).

The Third Department, over a dissent, determined a stipulation of settlement in favor of decedent which was the basis of a judgment entered after decedent's death cannot, pursuant to CPLR 5016 (d), be entered in his or her own name, and therefore is not entitled to priority in settling the estate:

An "accepted offer to compromise pursuant to [CPLR] 3221" (CPLR 5016 [d]) refers to a precise mechanism, which allows a party against whom a claim is asserted, 10 days before trial, to "serve upon the claimant a written offer to allow judgment to be taken against him [or her] for a sum or property or to the effect therein specified, with costs then accrued. If within [10] days thereafter the claimant serves a written notice that he [or she] accepts the offer, either party may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly" (CPLR 3221). Here, there was no written offer or written acceptance; rather, the stipulation occurred on the record before Supreme Court, and the filing in the Clerk's Office occurred after petitioner secured the judgment and order from Supreme Court … .

We decline to adopt the broad interpretation of CPLR 5016 (d), as petitioner urges … . The Legislature, in creating CPLR 5016 (d), set forth three distinct situations

where a post-mortem judgment may be entered against the decedent in his or her own name, thus bestowing priority to the creditor. None of these three provisions was met here. Matter of Uccellini, 2021 NY Slip Op 01303, Third Dept 3-4-21

JURISDICTION, INDIAN LAW.

SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER AN ACTION TAKEN BY THE UNKECHAUG INDIAN NATION TO EXCLUDE A MEMBER OF THE NATION FROM A PARCEL OF NATION LAND (SECOND DEPT).

The Second Department determined Supreme Court properly ruled it did not have subject matter jurisdiction over a land-possession dispute within the Unkechaug Indian Nation. The Nation first sought a Supreme Court ruling on the rightful possessor of the land (claimed to be Curtis Treadwell), thereby waiving sovereign immunity on that issue. Then the Nation, pursuant to its own internal Tribal Rules, determined Danielle Treadwell, who occupied a portion of the land, was an "undisirable person" and, based on that finding, could no longer occupy the property. The Supreme Court did not have subject matter jurisdiction over the "undesirable person" action taken by the Nation:

… [B]y bringing the April 2018 determination that Curtis was the rightful possessor of the subject property before the state Supreme Court, and seeking a declaration and enforcement, the Nation waived its sovereign immunity, though only as to that determination and its enforcement … . Accordingly, so long as the Nation relied on the April 2018 determination as its basis for excluding Danielle from the disputed portion of the subject property, the defendants' counterclaims seeking inverse declarations could proceed along with the Nation's action for declaratory relief. However, once the Nation proceeded to take the undesirability vote in September 2019 and issue the tribal resolution and directives based upon the membership's vote, the Nation, pursuant to its own Tribal Rules, created a new and independent basis, under its sovereign authority, for excluding Danielle from the disputed portion of the subject property. The Supreme Court properly recognized that once it was informed of the 2019 undesirability determination, it could not take any action with respect thereto, as this was a sovereign act of the Nation outside the court's subject

matter jurisdiction … . Unkechaug Indian Nation v Treadwell, 2021 NY Slip Op 01286, Second Dept 3-3-21

JURORS, REQUEST TO POLL.

THE REQUEST TO POLL THE JURY SHOULD NOT HAVE BEEN DENIED; THE JUDGE SHOULD NOT HAVE DISCHARGED THE JURY FOREMAN FOR ARGUING WITH ONE OR MORE JURORS WITHOUT INTERVIEWING ALL INVOLVED (FIRST DEPT).

The First Department, ordering a new trial in this personal injury action, determined the trial judge should not have denied plaintiff's request to poll the jury and the jury foreman should not have been discharged for arguing with one or more jurors which interviewing all involved:

It is fundamental error to deny a party's request to poll the jury … . Defendants' argument that the issue was not preserved for appeal is unavailing, as plaintiff's counsel clearly requested that the jury be fully polled … . …

It was also reversible error for the court to discharge the jury foreman, who was alleged to have been in a verbal altercations with another juror during deliberations, without interviewing the jury foreman and the other involved juror or jurors to determine the nature and extent of the disagreement … . That jurors have heated exchanges, does not, without more, form a valid basis for substitution of a juror without the consent of the parties … . Garcia v Rosario, 2021 NY Slip Op 01555, First Dept 3-18-21

Practice Point: It is reversible error to deny a party's request to poll the jury.

MUNCICIPAL LAW, STATUTE OF LIMITATIONS.

THE SEVEN-YEAR STATUTE OF LIMITATIONS IN NYC'S VICTIMS OF GENDER-MOTIVATED VIOLENCE PROTECTION LAW (VGM) IS NOT PREEMPTED BY THE ONE-YEAR OR THREE-YEAR CPLR STATUTES OF LIMITATIONS; ALTHOUGH DEFENDANT AND DEFENDANT S CORPORATION MAY BE ONE AND THE SAME, THERE WAS ENOUGH EVIDENTIARY SUPPORT FOR THE NEGLIGENT HIRING AND SUPERVISION CAUSE OF ACTION TO SURVIVE THE MOTION TO DISMISS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Acosta, reversing Supreme Court, determined the seven-year statute of limitations in NYC's Victims of Gender-Motivated Violence Protection Law (VGM) was not preempted by the one-year statute of limitations for assault in the CPLR and the negligent hiring and supervision cause of action should have survived the motion to dismiss even though the S corporation (PDR) and the defendant (Rofe) may be one and the same. The complaint alleged plaintiffs were subjected to unwanted sexual touching by defendant Rofe during voice-over coaching sessions offered by defendant S corporation (PDR):

… [W]e find that the legislative intent of the VGM was to create a civil rights remedy or cause of action such as in VAWA, rather than to extend the statute of limitations for a particular class of assaults. Since the nature of the claim is for a civil rights violation (providing a remedy for those subjected to violence because of their gender), the seven-year limitations period provided in the Administrative Code is not preempted by the CPLR statute of limitations for assault claims. * * *

To be sure, defendants may be correct that PDR essentially has no corporate structure separate from Rofe. Plaintiffs themselves do not appear to distinguish between Rofe and PDR in their brief. Nevertheless, plaintiffs have sufficiently alleged that Rofe was an employee of PDR and, through the submission of additional evidence in opposition to the motion to dismiss, have also sufficiently alleged that there may have been other employees of PDR who either hired, or supervised Rofe or whom Rofe hired or supervised. The acts of a corporation's agent and the knowledge acquired by the agent are presumptively imputed to the corporation … . Thus, Rofe's knowledge (as an alleged agent of PDR) that an employee was

potentially violent or prone to sexual assaults would normally be imputed to PDR, potentially requiring PDR to supervise that employee, and the cause of action for negligent hiring and supervision should be reinstated as against PDR … . Engelman v Rofe, 2021 NY Slip Op 01321, First Dept 3-2-21

MUNICIPAL LAW, NOTICE OF CLAIM, COUNTY LAW.

ALTHOUGH THIS NON-TORT ACTION AGAINST THE NYC DISTRICT ATTORNEY DID NOT TRIGGER THE NOTICE OF CLAIM REQUIREMENT OF THE GENERAL MUNICIPAL LAW, IT DID TRIGGER THE NOTICE OF CLAIM REQUIREMENT OF THE COUNTY LAW (FIRST DEPT).

The First Department determined County Law 52, not General Municipal Law (GML) 50, applied to a "money had and received" lawsuit against the district attorney of New York County. Although the district attorney is considered a city employee for purposes the General Municipal Law, the district attorney is elected by the citizens of New York County and is subject to the provisions of the County Law. The General Municipal Law notice of claim requirement applies only to tort actions. However, the County Law notice of claim requirement applies to this action for money had and received. No notice of claim was filed:

Defendant falls back on the position that, even if no notice of claim was required under GML section 50-k, one was required under County Law section 52. …

Although this section also refers to GML sections 50-e and 50-i, the Court of Appeals has expressly held that it applies to non-tort claims … . Further, County Law section 52 applies to county employees … . Nevertheless, plaintiffs assert that in arguing for application of the County Law, the District Attorney is trying to have it both ways, since he claims to be a city employee for purposes of the General Municipal Law, but a county employee for purposes of the County Law. It is true that New York City law considers the District Attorney to be a city employee … . However, this is no reason not to apply County Law section 52, since there is no county-level government organization in the City of New York that could be considered the District Attorney's employer for administrative purposes such as

paying his or her salary. Moreover, the District Attorney is elected by the voters of New York County, not New York City. Finally, this Court has cited County Law section 52 in holding that a notice of claim is required before filing an action against the office of a District Attorney in the City of New York … . Slemish Corp. S.A. v Morgenthau, 2021 NY Slip Op 01370, First Dept 3-9-21

Practice Point: The notice of claim requirement in the County Law, unlike its counterpart in the Municipal Law, applies to this non-tort action for money had and received against a county employee.

MUNICIPAL LAW, NOTICE OF CLAIM.

THE COURT LACKED AUTHORITY TO DEEM A NOTICE OF CLAIM TIMELY FILED MORE THAN ONE YEAR AND 90 DAYS AFTER THE CAUSE OF ACTION (SLIP AND FALL) ACCRUED, EVEN THOUGH THE SUMMONS AND COMPLAINT WAS SERVED WITHIN THAT TIME PERIOD; A NOTICE OF CLAIM FILED MORE THAN 90 DAYS AFTER THE CAUSE OF ACTION ACCRUES WITHOUT LEAVE OF COURT IS A NULLITY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the notice of claim served more than 90 after the slip and fall without leave of court was a nullity. The court further determined that the request for an order deeming the notice of claim timely served made more than one year and 90 days after the slip and fall could not be authorized by the court, even where the summons and complaint was served within that time period:

It is well settled that an "application for the extension [of time within which to serve a notice of claim] may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled" .. . Where that time expires before the application for an extension is made, "the court lack[s] the power to authorize late filing of the notice [of claim]" … .

Here, we conclude that "[p]laintiff's service of the summons and complaint within the limitations period does not excuse the failure to serve a notice of claim within

that period," and we further conclude that "plaintiff's earlier service of a notice of claim is a nullity inasmuch as the notice of claim was served more than 90 days after the accident but before leave to serve a late notice of claim was granted" … . Thus, because plaintiff's cross motion seeking an order deeming her notice of claim to be timely filed "was made after the expiration of the maximum period permitted" for seeking such relief, i.e., one year and 90 days, Supreme Court should have denied plaintiff's cross motion, granted defendant's motion, and dismissed the complaint … . Bennett v City of Buffalo Parks & Recreation, 2021 NY Slip Op 01920, Fourth Dept 3-26-21

Practice Point: A notice of claim filed more than 90 days after the claim accrued without leave of court is a nullity. A court does not have the authority to grant leave to file a late notice of claim more than one year and 90 days after the claim accrued.

MUNICIPAL LAW.

THE NYPD IS A DEPARTMENT OF THE CITY AND CANNOT BE SEPARATELY SUED; THE 42 USC 1983 CIVIL RIGHTS VIOLATION CAUSE OF ACTION WAS NOT SUPPORTED BY SUFFICIENT ALLEGATIONS OF AN UNCONSTITUTIONAL CITY CUSTOM OR POLICY; THE OTHER CAUSES OF ACTION AGAINST THE CITY FALL BECAUSE THERE WAS PROBABLE CAUSE FOR PLAINTIFF'S ARREST AND THE FORCE USED BY THE POLICE WAS NOT EXCESSIVE UNDER THE CIRCUMSTANCES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the 42 USC 1983 violation-of-civil rights, negligence, assault and battery, excessive force, false arrest and false imprisonment causes of action against the New York Police Department (NYPD) and New York City (City) should have been dismissed. Plaintiff was shot when, in the midst of a psychotic episode, she approached the police with a knife. She was indicted, tried and found not responsible by reason of mental disease or defect. The court noted that the NYPD is a department of the City and cannot be sued separately. The court also noted the 1983 action against the City failed to state a cause action because no city policy or custom was identified as violating plaintiff's constitutional rights:

To hold a municipality liable under 42 USC § 1983 for the conduct of employees below the policymaking level, a plaintiff must show that the violation of his or her constitutional rights resulted from a municipal custom or policy … . Here, "[a]lthough the complaint alleged as a legal conclusion that the defendants engaged in conduct pursuant to a policy or custom which deprived the plaintiff of certain constitutional rights, it was wholly unsupported by any allegations of fact identifying the nature of that conduct or the policy or custom which the conduct purportedly advanced" … . * * *

The Supreme Court also should have granted that branch of the defendants' motion which was for summary judgment dismissing the false arrest and false imprisonment causes of action insofar as asserted against the City. The existence of probable cause constitutes a complete defense to a cause of action alleging false arrest and false imprisonment … , including causes of action asserted pursuant to 42 USC § 1983 to recover damages for the deprivation of Fourth Amendment rights under color of state law … . Brown v City of New York, 2021 NY Slip Op 01743, Second Dept 3-24-21

Practice Point: In New York City the police department is not properly sued as an entity separate from the city. In other words, the city is the appropriate party for a suit against the police.

NECESSARY PARTIES, FORECLOSURE, DECEASED MORTGAGORS.

IN THIS FORECLOSURE ACTION, THE JUDGE SHOULD HAVE FIRST DETERMINED WHETHER ANY DISTRIBUTEES OF THE DECEASED MORTGAGORS WERE NECESSARY PARTIES [RPAPL 1311 (1)] AND, IF SO, SUMMON THEM PURSUANT TO CPLR 1001 [b]; THE MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact whether any distributees of the deceased mortgagors were necessary parties in this foreclosure action. The motion to dismiss for failure to join necessary parties should not have been granted. The court should have determined whether joinder of any parties was required and then summon them pursuant to CPLR 1001 [b]:

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."

"In certain circumstances, the estate of the mortgagor is not a necessary party to a mortgage foreclosure action" … . In particular, "where a mortgagor/property owner dies intestate and the mortgagee does not seek a deficiency judgment, generally a foreclosure action may be commenced directly against the distributees," in whom title to the real property automatically vests … .

Here, the plaintiff did not seek a deficiency judgment. However, questions of fact existed, which should have been resolved by the Supreme Court, as to whether any distributees of the deceased mortgagors, other than the defendants herein, retained an interest in the property such that they were necessary parties to the foreclosure action. Further, to the extent that there were such necessary parties to the action, dismissal of the complaint was not the proper remedy; rather, the property remedy in such instance is to direct the joinder of those parties (see CPLR 1001[b] … . NRZ Pass-Through Trust IV v Tarantola, 2021 NY Slip Op 01423, Second Dept 3-10-21

Practice Point: If the court can exercise jurisdiction over a necessary party, the court should summon the party pursuant to CPLR 1001 (b) and should not dismiss the action for failure to name a necessary party.

NECESSARY PARTIES, FORECLOSURE.

THE ESTATE OF THE MORTGAGOR WAS NOT A NECESSARY PARTY IN THIS FORECLOSURE ACTION; THE PROPERTY WAS CONVEYED BEFORE HER DEATH AND THE COMPLAINT DOES NOT SEEK A DEFICIENCY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the estate of the mortgagor was not a necessary party in the foreclosure proceeding and the complaint should not have been dismissed on that ground:

The estate of the mortgagor was not a necessary party to this action, as it had no interest in the property at the time this action was commenced, inasmuch as the mortgagor conveyed the property that is subject to the mortgage to the defendant prior to her death, and the complaint does not seek a deficiency judgment against her estate … . U.S. Bank N.A. v Apelbaum, 2021 NY Slip Op 02008, Second Dept 3-31-21

Practice Point: If the property was transferred by the mortgagor prior to the mortgagor's death and the bank is not seeking a deficiency judgment against the estate, the mortgagor's estate is not a necessary party in a foreclosure action.

ORDERS, JUDGMENTS, DECISIONS.

WHERE THERE IS AN INCONSISTENCY BETWEEN AN ORDER OR A JUDGMENT AND THE DECISION UPON WHICH IT IS BASED, THE DECISION CONTROLS (FIRST DEPT).

The First Department noted that where a judgment or order is inconsistent with the decision upon which it is based, the decision controls:

"A written order [or judgment] must conform strictly to the court's decision and in the event of an inconsistency between a judgment and a decision or order upon which it is based, the decision or order controls" … . "Such an inconsistency may be corrected either by way of a motion for resettlement or on appeal" … .

The motion court's decision, amended to grant plaintiff's motion for summary judgment on his first cause of action for breach of the … modified agreement, also found that plaintiff was entitled to a money judgment in his favor for past due amounts owed. Because there is a conflict between the relief the motion court found plaintiff was entitled to in its decision, and the relief granted to plaintiff in the judgment, which made no provision for a money judgment as to plaintiff's first cause of action, the court's decision controls. Schwartzbard v Cogan, 2021 NY Slip Op 01523, First Dept 3-16-21

Practice Point: If there is a discrepancy between an order or a judgment and the related decision, the decision controls.

RECEIVERS.

THE CRITERIA FOR APPOINTMENT OF A TEMPORARY RECEIVER IN THIS PARTITION AND SALE ACTION WERE NOT MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the evidence did not support the appointment of a temporary receiver of a residential building and cooperative apartment that were the subjects of a partition and sale action:

CPLR 6401(a) permits the court, upon a motion by a person with an "apparent interest" in property, to appoint a temporary receiver of that property where "there is danger" that it will be "materially injured or destroyed." However, the appointment of a temporary receiver "is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits" … .Therefore, a motion seeking such an appointment should be granted only where the moving party has made a "clear and convincing" evidentiary showing of "irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" … .

Here, the plaintiff failed to make the requisite showing. In particular, the plaintiff's speculative and conclusory allegations that the defendants failed to repair and maintain the subject properties and commingled income derived from the subject

properties with their personal income were insufficient to demonstrate that there was a danger of irreparable loss or material injury to the subject properties warranting the appointment of a temporary receiver … . Similarly, without more, the defendants' failure to maintain adequate records does not demonstrate that the plaintiff's interest in the subject properties is in imminent danger of irreparable loss or waste … . Cyngiel v Krigsman, 2021 NY Slip Op 01390, Second Dept 3-10-21

REFEREES, ORDER OF REFERENCE.

THE REFEREE DID NOT COMPLY WITH THE ORDER OF REFERENCE; SUPREME COURT'S RULINGS BASED UPON THE REFEREE'S ORDER WERE THEREFORE INVALID (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee did not comply with the order of reference and the referee's order exceeded the scope of authority given by the order of reference. Therefore the grant of summary judgment, which was based on the referee's order, was reversed:

A referee derives his or her authority from an order of reference by the court … , and the scope of the authority is defined by the order of reference (see CPLR 4311 …). A referee who attempts to determine matters not referred to him or her by the order of reference acts beyond and in excess of his or her jurisdiction … .

Here, the order of reference directed the Referee to hear and determine the issue of the preliminary injunction. The Referee's order, however, did not render a determination on the issue of the preliminary injunction. Brighton Leasing Corp. v Brighton Realty Corp., 2021 NY Slip Op 01384 Second Dept 3-10-21

Practice Point: If a referee does not comply with the order of reference, the court cannot base its ultimate ruling on the referee's order.

SERVICE OF PROCESS, HEARING REQUIRED.

ALTHOUGH DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED, DEFENDANT DID RAISE A QUESTION OF FACT ON THE VALIDITY OF THE SERVICE OF PROCESS WHICH REQUIRES A HEARING (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion to vacate the default judgment on the ground defendant had not been properly served with the complaint should not have been granted. The matter was remitted for a hearing to determine the validity of the service of process:

" 'Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served' " … . Although " 'bare and unsubstantiated denials are insufficient to rebut the presumption of service . . . , a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing' " … . Here, the presumption of service was created by the affidavit of plaintiff's process server, but defendant rebutted that presumption by submitting, inter alia, his sworn affidavit in which he averred that he had never been personally served, that since at least 2013 he had rented out the dwelling at the address reflected on the affidavit of the process server, that it had been rented to the individual reflected on the affidavit of service, that defendant "did not live or otherwise reside [at the address] in any form," and instead that he had been living at another address at the time of the purported service. Contrary to plaintiff's contention, defendant's submissions raised " 'a genuine question' " on the issue whether service was properly effected in accordance with CPLR 308 (2) … . Garvey v Global Asset Mgt. Solutions, Inc., 2021 NY Slip Op 01664, Fourth Dept 3-19-21

SERVICE, AFFIDAVIT OF, WARRANT OF EVICTION.

THERE IS NO NEED TO FILE AN AFFIDAVIT OF SERVICE AFTER SERVICE OF A WARRANT AND NOTICE OF EVICTION; THE MATTER WAS CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined that the failure file an affidavit of service after serving the warrant and notice of eviction did not affect the validity of the service of the warrant of eviction which triggers the 14-day waiting period before execution of the warrant. The court noted that the matter was moot because the petitioner was subsequently evicted based on a different warrant, but the matter should be heard on appeal because the circumstance is likely to recur. The two dissenters argued the mootness of the matter precluded appeal:

… [T]he issuance of a warrant is the court's last act in a summary proceeding, as denoted by the phrase, "Upon rendering a final judgment for [the owner], the court shall issue a warrant" (RPAPL 749 [1]). The execution of the warrant terminates the lease … . Likewise, the execution of the warrant terminates the summary proceeding and the jurisdiction of the court … Because the court no longer has jurisdiction, the filing of the affidavit of service is superfluous. This stands in stark contrast to the purpose of the affidavit of service at the commencement of the summary proceeding, where it suffices as proof that the party was properly served pursuant to law, as proper service is required to bring a respondent within the jurisdiction of the court … .

… [W]e find that filing the affidavit of service at the conclusion of service of a warrant of eviction is not required, and the 14-day notice begins the day following the date of service, posting or mailing, whichever is later … . Matter of Dixon v County of Albany, 2021 NY Slip Op 01819, Third Dept 3-25-21

Practice Point: The failure to file an affidavit of service after service of a warrant and notice of eviction does not invalidate the warrant and notice.

STANDING.

THE BANK'S PROOF OF STANDING TO BRING THE FORECLOSURE ACTION WAS INSUFFICIENT (SECOND DEPT),

The Second Department determined the bank's motion for summary judgment in this foreclosure action should have been denied because the proof the bank has standing was insufficient:

… [T]he plaintiff failed to establish, prima facie, that it had standing to commence this action. Although the plaintiff attached to the complaint copies of the note and an undated purported allonge endorsed in blank, the plaintiff did not demonstrate that the purported allonge, which was on a piece of paper completely separate from the note, was "so firmly affixed thereto as to become a part thereof," as required by UCC 3-202(2) … . U.S. Bank, N.A. v Ainsley, 2021 NY Slip Op 02014, Second Dept 3-31-21

Practice Point: In this foreclosure, the bank was not able to demonstrate it had standing to foreclose with a note and allonge endorsed in blank because the allonge was not affixed to the note in the manner required by the applicable version of UCC 3-202 (2).

STATUTE OF LIMITATION, FORECLOSURE, ACCELERATION OF THE DEBT.

THE DEFAULT LETTER, WHICH INDICATED THE MORTGAGE DEBT WOULD BE ACCELERATED AT A SPECIFIC FUTURE DATE IF THE DEFAULT WERE NOT CURED, DID NOT ACCELERATE THE DEBT; THEREFORE THE STATUTE OF LIMITATIONS DID NOT START RUNNING AND THE FORECLOSURE ACTION WAS TIMELY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the mortgage debt was not accelerated by a letter indicating the debt would be accelerated on a specific future date if the arears were not paid:

… [T]he issue is whether the May 2008 default letter was an acceleration event that triggered the statute of limitations. We hold that is was not. Thus, the second action, commenced in October 2014, was timely. To that end, the May 2008 letter provided that, if the default was not cured "on or before June 10, 2008, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time." Since this letter was "'merely an expression of future intent that fell short of an actual acceleration,' which could 'be changed in the interim'" … , it did not accelerate the debt … . "[T]he letter did not seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event, indicating the debt was not accelerated at the time the letter was written" … . Further, the May 2008 letter specifically discussed other non-acceleration options for defendant, including a repayment plan or loan modification, which plaintiff, as the holder of the note, should be able to do "without running the risk of being deemed to have taken the drastic step of accelerating the loan" … . Thus, the statute of limitations was not triggered until the debt was accelerated by the commencement of the first action in February 2009 … , rendering the commencement of the second action, in October 2014, timely as it was within the six-year statute of limitations … . GMAT Legal Tit. Trust 2014-1, Us Bank Natl. Assn. v Wood, 2021 NY Slip Op 01455, Third Dept 3-11-21

Point Point: A letter notifying a borrower that the borrower is in default and that the mortgage debt will be accelerated at some point in the future if the arrears are not paid does not accelerate the debt, meaning that the letter does not trigger the statute of limitations for bringing a foreclosure action.

STATUTE OF LIMITATIONS, FORECLOSURE, ACCELERATION OF THE DEBT.

THE DEFAULT NOTIFICATION LETTER DID NOT ACCELERATE THE DEBT BECAUSE IT DID NOT STATE THE DEBT WAS DUE AND PAYABLE IMMEDIATELY; THE BANK DID NOT DEMONSTRATE THE PROPER MAILING OF THE RPAPL 1304 NOTICE (THIRD DEPT)

The Third Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action. The court held the action had never been dismissed pursuant to CPLR 3216 because no 90-day notice requiring the filing of a note of issue had been given. The foreclosure action was timely because the letter which defendants argued had accelerated the debt did not unambiguously state that the full mortgage debt had become due and payable immediately. However proof of the mailing of the the RPAPL 1304 notice was not sufficient:

The December 28, 2009 letter advised Mausler [defendant] that he was in default and that he could cure this default by making a payment "within thirty days from the date of this letter." The letter further stated that "[i]f you do not cure this default within the specified time period, your obligation for payment of the entire unpaid balance of the loan will be accelerated and become due and payable immediately" … . Additionally, the letter provided that if the amount due was not paid, "foreclosure proceedings may commence to acquire the [p]roperty by foreclosure and sale" … . The Court of Appeals, however, recently explained that such language does not evince an intent by the noteholder to "seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event"… . Accordingly, contrary to defendants' contention, the December 2009 letter did not constitute a valid acceleration of the debt so as to trigger the applicable statute of limitations. …

Plaintiff relies on the affidavit from the loan servicing associate to demonstrate compliance with RPAPL 1304. The associate, however, "did not attest to familiarity with or provide any proof of the mailing procedures utilized by the party that allegedly mailed the RPAPL 1304 notice" … . Wilmington Trust, Natl. Assn. v Mausler, 2021 NY Slip Op 01296, Third Dept 3-4-21

STATUTE OF LIMITATIONS, INFANCY TOLL.

THE INFANCY TOLL OF THE STATUTE OF LIMITATIONS IN CPLR 208 APPLIES TO A WRONGFUL DEATH ACTION WHERE THE SOLE DISTUBUTEES ARE INFANTS; THE TOLL, HOWEVER, DOES NOT APPLY TO A RELATED ASSAULT AND BATTERY ACTION WHICH IS PERSONAL TO THE DECEDENT (FRIST DEPT).

The First Department, in a full-fledged opinion by Justice Kapnick, determined the infancy toll of the statute of limitations in CPLR 208 applies where the unmarried father of two children dies intestate. The statute of limitations for the ensuing wrongful death action is tolled until the appointment of a guardian of the children's property. Father was involved in an altercation with a defendant, suffered fatal injuries and died later that day, September 6, 2012. Plaintiffs, the mothers of the two children, were each appointed guardians of the property of their children in 2015. That is when the statute began running on the wrongful death action, rendering the 2016 complaint timely. A wrongful death action directly compensates the distributees, here the children. The assault and battery action, by contrast, is personal to the decedent. Therefore the infancy toll does not apply to the assault and battery cause of action. The First Department explicitly overruled a decision relied upon by the defendants, Ortiz v Hertz Corp., 212 AD2d 374 (1st Dept 1995). (The opinion is comprehensive and can not be fairly summarized here.):

Today we clarify that Ortiz is not good law, because it was based on an incorrect application and interpretation of Hernandez. Therefore, pursuant to the precedent established in Hernandez [78 NY2d 687] … we hold that when the sole distributees of a decedent's estate are infants, the toll of CPLR 208 applies to a wrongful death claim "until the earliest moment there is a personal representative or potential personal representative who can bring the action whether by appointment of a guardian [of the property of the infant distributee] or majority of [a] distributee, whichever occurs first" … . Machado v Gulf Oil, L.P., 2021 NY Slip Op 01849, First Dept 3-25-21

Practice Point: Where the father's death gives rise to a wrongful death action and the father's only distributees are children, the statute of limitations is tolled until a

guardian of the child's property is appointed or the child reaches the age of majority, whichever occurs first.

STATUTE OF LIMITATIONS, SIX-MONTH EXTENSION, CPLR 205 (a).

THE ORDER DISMISSING THE COMPLAINT FOR FAILURE TO SEEK A DEFAULT JUDGMENT WITHIN ONE YEAR DID NOT INLCUDE SPECIFIC FINDINGS OF A PATTERN OF DELAY; THEREFORE THE "FAILURE TO PROSECUTE" EXCEPTION IN CPLR 205 (A) DID NOT APPLY; PLAINTIFF'S ACTION BROUGHT WITHIN SIX MONTHS OF DISMISSAL WAS NOT TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint was timely pursuant to the six-month extension afforded by CPLR 205 (a). The dismissal of the complaint did not include any specific findings of a general pattern of delay. Therefore the six-month extension was not precluded:

In 2018, Supreme Court granted defendant's motion pursuant to CPLR 3215(c) to dismiss the complaint in the prior, 2010 foreclosure action for plaintiff's failure to seek a default judgment within one year of defendant's default. The dismissal order did not include any findings of specific conduct demonstrating a general pattern of delay in proceeding with the litigation, as required to preclude the application of CPLR 205(a) for failure to prosecute … . Under the circumstances, the court should not have granted defendant's motion to dismiss the complaint in the present action as time-barred, as this action was timely brought within six months after the motion court dismissed plaintiff's first foreclosure action … . U.S. Bank N.A. v Kim, 2021 NY Slip Op 01876, First Dept 3-25-21

Practice Point: Where the plaintiff's action is dismissed for failure to take a default judgment within one year, and the order of dismissal does not make specific findings of a general pattern of delay on plaintiff's part, the plaintiff can take advantage of the six-month extension pursuant to CPLR 205 (a) and file a new action.

STATUTE OF LIMITATIONS, SIX-MONTH EXTENSION, CPLR 205 (a).

BECAUSE THE ORDER DISMISSING THE INITIAL COMPLAINT DID NOT SPECIFY CONDUCT CONSTITUTING NEGLECT TO PROSECUTE, THE SIX-MONTH TOLL OF THE STATUTE OF LIMITATIONS PURSUANT TO CPLR 205 (a) APPLIED AND THE ACTION WAS TIMELY; THE DISSENT DISAGREED (SECOND DEPT).

The Second Department, over a strong dissent, determined that the foreclosure was timely commenced pursuant to CPLR 205 (a) within six months of the dismissal of the initial complaint. The six-month toll of the statute of limitations pursuant to CPLR 205 (a) does not apply to a dismissal for neglect to prosecute. However, the order dismissing the action for neglect to prosecute must specify the conduct constituting neglect. The majority concluded the order did not include any specific findings of neglect. The dissent disagreed:

Contrary to the defendant's contention and the finding of our dissenting colleague, the 2010 action was not dismissed for neglect to prosecute, a category of dismissal that renders CPLR 205(a) inapplicable. "Where a dismissal is one for neglect to prosecute the action . . . , the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" (CPLR 205[a]). Here, the order dated April 6, 2017, "did not include any findings of specific conduct demonstrating 'a general pattern of delay in proceeding'" … . Moreover, by dismissing the 2010 action without prejudice, the Supreme Court "permitted the plaintiff to avail itself of CPLR 205(a) to recommence the foreclosure action" … . Deutsche Bank Natl. Trust Co. v Baquero, 2021 NY Slip Op 01246, Second Dept 3-3-21

Practice Point: The CPLR 205 (a) six-month extension of time to file a new action after a dismissal of the initial action does not apply where the initial action was dismissed for failure to prosecute. An order dismissing a complaint for failure to prosecute must findings of specific conduct demonstrating a general pattern of delay. In the absence of such specific findings, the CPLR 205 (a) six-month extension is available.

STATUTE OF LIMITATIONS.

WHERE FRAUD IS THE BASIS OF A CLAIM FOR BREACH OF FIDUCIARY DUTY, THE STATUTE OF LIMITATIONS IS SIX YEARS (FIRST DEPT).

The First Department determined that where the basis of a claim for aiding and abetting breach of fiduciary duty is fraud, the statute of limitations is six years:

[Defendant] Katten contends that even if the claim for aiding and abetting breach of fiduciary duty is taken at face value, the statute of limitations is three years because plaintiff seeks damages, not equitable relief … . However, "a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period" … . Plaintiff's claim against defendant Albert Hallac for breach of fiduciary duty is based on allegations of actual fraud; hence, the statute of limitations for the claim against Katten for aiding and abetting Hallac's breach of fiduciary duty is six years. Wimbledon Fin. Master Fund, Ltd. v Hallac, 2021 NY Slip Op 01881, First Dept 3-25-21

SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, AFTER A COMPLIANCE CONFERENCE, ISSUED A PRECLUSION ORDER BECAUSE THERE WAS NO MOTION PENDING (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judge should not have, sua sponte, issued a preclusion order after a compliance conference because no motion was pending:

Order … which, upon granting plaintiff's motion to reargue, reinstated his lost earnings claim but precluded the claim for years which tax returns are not produced to defendants, unanimously reversed, without costs, and the claim reinstated without limitation.

The underlying preclusion order should not have been issued sua sponte at a compliance conference, with no motion pending … . Sullivan v Snow, 2021 NY Slip Op 01873, First Dept 3-25-21

Practice Point: A judge cannot, sua sponte, order relief in the absence of a pending motion requesting that relief.

SUMMARY JUDGMENT, PREMATURE MOTION.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS PEDESTRIAN-VEHICLE ACCIDENT CASE WAS PREMATURE; PLAINTIFF HAD NOT YET BEEN DEPOSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this pedestrian-vehicle accident case was premature because plaintiff had not been deposed:

Plaintiff alleges that after crossing Pearl Street at the intersection with Whitehall Street he was struck from behind by defendants' box truck, while he was on the curb/lip of the sidewalk. According to the affidavit of the driver, defendant Rosado, plaintiff was distracted by talking on a cell phone, and walked into the side of the truck while it was already making a right turn.

While plaintiff was not required to demonstrate the absence of comparative negligence on his part, his motion was premature in that defendants did not have the opportunity to depose him … . Bey v Rosado, 2021 NY Slip Op 01840, First Dept 3-25-21

Practice Point: In a traffic accident case, a motion for summary judgment brought by the plaintiff before the plaintiff has been deposed may be denied as premature, even though the plaintiff need not show the absence of comparative fault.

UNIFORM COMMERCIAL CODE, DEFECTIVE GOODS.

EVEN THOUGH PLAINTIFF MAY HAVE ACCEPTED DEFECTIVE GOODS WITHIN THE MEANING OF THE UCC, THE UCC PROVIDES REMEDIES, INCLUDING THE RIGHT TO BE MADE WHOLE AND THE RIGHT TO REVOKE THE ACCEPTANCE; PLAINTIFF'S VERDICT SHOULD NOT HAVE BEEN SET ASIDE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Christopher, reversing Supreme Court, determined the verdict should not have been set aside in this consumer law case. Plaintiff ordered kitchen cabinets. When they arrived one box was opened by defendant-seller's representative to confirm the color. Plaintiff then signed a "Completion Certificate" which indicated the cabinets had been found satisfactory. In fact the cabinets were not satisfactory as revealed when they were installed. The Second Department noted that, although under the UCC plaintiff, based on the "Completion Certificate," could not reject the goods, the UCC provides that she could be made whole, and, in fact, could revoke her acceptance, in addition to other available remedies. Therefore plaintiff's verdict awarding $30,000 should not have been set aside:

"Acceptance of goods by the buyer precludes rejection of the goods accepted" (UCC 2-607[2]; see Comment 2). However, "acceptance does not of itself impair any other remedy provided by [article 2 of the UCC] for non-conformity" (UCC 2-607[2] …). "Thus, 'acceptance leaves unimpaired the buyer's right to be made whole, and that right can be exercised by the buyer not only by way of cross-claim for damages, but also by way of recoupment in diminution or extinction of the [purchase] price'" … . …

Moreover, after the buyer has accepted allegedly non-conforming goods, the buyer may revoke acceptance of the goods under certain limited circumstances and "obtain the same remedies as are available upon rejection" … . …

… [E]ven if the jury found that the plaintiff did not properly revoke her acceptance of the cabinets, the jury could have found that the plaintiff was entitled to other remedies pursuant to UCC 2-607 … .

… [T]he jury's verdict that … the defendant breached their contract with the plaintiff, breached the implied warranty of fitness, and that the plaintiff was entitled to damages in the amount of $30,000 was supported by a valid line of reasoning and permissible inferences from the evidence at trial … . Campbell v Bradco Supply Co., 2021 NY Slip Op 01745, Second Dept 3-24-21

Practice Point: The Uniform Commercial Code provides relief to a party who has accepted defective goods. The party who accepted defective goods may, under the Code, be made whole and/or revoke the acceptance.

VENUE.

DEFENDANTS DID NOT PRESENT SUFFICIENT EVIDENCE IN SUPPORT OF THEIR MOTION TO CHANGE VENUE (FIRST DEPT).

The First Department reversing Supreme Court, determined defendants did not present sufficient evidence in support of their motion to change venue. The plaintiffs alleged the defendants, who were hired to paint newly-constructed residential property, did substandard work. Suit was brought in the county of plaintiffs' residence and business, New York County. The defendants sought to change the venue to Suffolk County where the property is located and defendants reside:

Where venue has properly been designated by the plaintiff based on the residence of either party, a defendant seeking a change of venue under CPLR 510(3) must make a detailed evidentiary showing that the nonparty witnesses will, in fact, be inconvenienced absent such relief. The affidavit of the moving party under CPLR 510(3) must (1) contain the names, addresses, and occupations of witnesses expected to be called; (2) disclose the facts upon which such witnesses are expected to testify, in order that the court may determine whether such witnesses are material and necessary; (3) demonstrate that such witnesses are willing to testify; and (4) show that the witnesses would be inconvenienced absent a change in venue … …

… [D]efendants neglected to show with sufficient particularity the facts upon which nonparty McAulife is expected to testify. … Defendants did not submit an affidavit from McAulife, relying instead on counsel's affirmation wherein he states that

McAulife was "familiar with the work performed by defendants at 10 Two Trees Lane," and "familiar with defendants in their business capacity." Without further detail about when, where, and under what circumstances McAulife had occasion to become "familiar with the work," defendants' burden has not been met … . Defendants also fail to set forth McAulife's name, address, and occupation, or how he would be inconvenienced absent a change in venue. The fact that the case involves work on a property located in Suffolk County does not justify an inversion of the burden of proof or relieve the moving party of its burden of establishing that the convenience of the nonparty witnesses would be served by a discretionary change of venue … . 10 Two Trees Lane LLC v Mahone, 2021 NY Slip Op 01371, First Dept 3-9-21

VERDICT, SET ASIDE.

PLAINTIFF, AN EXTERMINATOR, WAS IN THE ATTIC OF DEFENDANT'S HOUSE; THE ATTIC HAD NO FLOOR AND THE PLAINTIFF WALKED ON THE BEAMS OR JOISTS; THE PLAINTIFF TESTIFIED HE STEPPED ON A SMALLER PIECE OF WOOD LYING ACROSS THE BEAMS, IT GAVE WAY AND HIS LEG WENT THROUGH THE CEILING; THE 2ND DEPARTMENT, OVER A TWO-JUSTICE DISSENT, DETERMINED THERE WAS NO EVIDENCE THE SMALLER BOARD WAS A LATENT DEFECT OR THAT DEFENDANT HAD NOTICE OF ANY DEFECT, SET ASIDE THE PLAINTIFF'S VERDICT AND DISMISSED THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to set aside the plaintiff's verdict and dismiss the complaint should have been granted. Plaintiff, an exterminator, went into defendant's attic which apparent had no floor, only the beams or joists. Plaintiff testified that there were some smaller boards lying across the joints. According to the plaintiff, when he stepped on one of the smaller boards it gave way and his leg went through the ceiling:

"[T]he issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question" … . However, in order to meet his prima

facie burden of proof at trial, the plaintiff was required to submit sufficient evidence to enable the jury to decide this critical issue in a logical manner, based on the inferences to be drawn from the evidence, rather than through sheer speculation or guesswork … . Here, the evidence showed that the main beams were part of the structure of the house, but the function of the smaller pieces of wood was never really made clear, except that the plaintiff offered that they may have been intended to hold the insulation in place. In fact, the jury heard next to nothing about the smaller piece of wood that allegedly caused the plaintiff to fall. There were no pictures of it, no testimony regarding its dimensions, no evidence as to whether such a smaller piece of wood would ordinarily be safe to walk on, no evidence as to whether the smaller piece of wood even appeared reasonably safe to walk on, and no evidence that the smaller piece of wood was in a rotted, deteriorated, or otherwise unsafe condition, other than the plaintiff's testimony that it looked "discolored" and "pretty damp."

Viewing the evidence in the light most favorable to the plaintiff, and affording him every favorable inference which may properly be drawn from the facts presented, there was simply no rational basis upon which the jury could determine, without speculating, that the smaller piece of wood that allegedly caused the plaintiff to fall constituted a latent hazard due to its alleged rotted condition … . Saintume v Lamattina, 2021 NY Slip Op 02004, Second Dept 3-31-21

VERDICT, SET ASIDE.

THE DEFENSE EXPERT SHOULD NOT HAVE BEEN ALLOWED TO OFFER A SPECULATIVE CONCLUSION ABOUT HOW PLAINTIFF WAS INJURED WHICH WAS NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD; PLANTIFF ALLEGED THE STEP STOOL SHE WAS STANDING ON COLLAPSED; THE DEFENSE EXPERT TESTIFIED SHE COULD HAVE FALLEN ONTO THE STOOL; THE DEFENSE VERDICT SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the verdict in this products liability case should have been set aside. Plaintiff alleged she was injured when a step stool collapsed as she stood on it. The defendant's expert testified she

could have fallen onto the stool. There was no evidence in the record to support the expert's opinion, which was objected to by plaintiff. The defense verdict, therefore, should have been set aside:

Following the accident, one of the injured plaintiff's coworkers discarded the step stool in the trash. At the trial on the issue of liability, the defendant's expert testified, over the plaintiffs' objection, that the injured plaintiff's accident may have occurred because she slipped and fell onto the step stool. Over the plaintiffs' objection, the jury was asked the question: "Did the subject step stool collapse under the [injured] plaintiff while she was standing on it on October 22, 2013, causing the [injured] plaintiff's accident?" The jury answered "No," thereby finding in favor of the defendant on the ground that the accident did not occur as the injured plaintiff said it did. * * *

We agree with the plaintiffs that the evidence so preponderates in favor of the plaintiffs on the issue of whether the subject step stool collapsed as the injured plaintiff stood on it causing her accident, that the jury could not have reached the verdict it did by any fair interpretation of the evidence … . Moreover, the testimony of the defendant's expert that the accident may have happened because the injured plaintiff fell onto the step stool was speculative, lacked support in the record, and should not have been admitted in evidence … . Montesione v Newell Rubbermaid, Inc., 2021 NY Slip Op 01253, Second Dept 3-3-21