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ADVISORY DECISIONS, RES JUDICATA, COLLATERAL ESTOPPEL, LAW OF THE CASE.

SUPREME COURT HAD THE AUTHORITY UNDER CPLR 3001 TO ISSUE A DECLARATORY JUDGMENT ON THE PROPER RATE FOR POST-JUDGMENT INTEREST; ANOTHER COURT'S PRIOR DISCUSSION OF THE PROPER INTEREST RATE WAS MERELY ADVISORY (I.E., NOT ON THE MERITS) AND THEREFORE WAS NOT SUBJECT TO THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL OR LAW OF THE CASE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, over an extensive dissent, determined (1) Supreme Court had the power to issue a declaratory judgment in this hybrid proceeding seeking a declaratory judgment on the rate of post-judgment interest; and (2) Supreme Court correctly found that dicta in a prior ruling about the proper post-judgment interest rate (i.e., that the rate should be 9% per year under the CPLR, not 2% per month under the Insurance Law) was merely "advisory" and therefore was not controlling under the doctrines of collateral estoppel, res judicata, or law of the case. Supreme Court's finding that the Insurance Law interest rate applied was affirmed. Using that rate the original 2001 judgment of $8,842.49 had apparently grown to $229,981.66 as of 2015:

CPLR 3001 uniquely vests the Supreme Court with authority to render declaratory judgments to the exclusion of other courts of the state. … [T]o the extent [respondent] wished to obtain a declaratory judgment governing the rate of interest on its judgment, … with appellate remedies correctly foreclosed, the Supreme Court was the only court where it could seek redress on that issue. * * *

… [T]he Appellate Term's expression in its decision and order dated August 18, 2017, regarding the applicable rate of interest was not determined on the merits, but was instead merely advisory. * * *

… [Appellant] was unable to establish that there was a determination on the merits in any prior proceeding about the proper rate of interest applicable to the judgment, as to preclude the Supreme Court from considering the issue de novo … . Matter of

B.Z. Chiropractic, P.C. v Allstate Ins. Co., 2021 NY Slip Op 04484, Second Dept 7-21-21

Practice Point: A discussion in a decision which is merely advisory--here a discussion regarding the appropriate interest rate on a judgment—does not trigger the res judicata, collateral estoppel, or law of the case doctrines.

APPEALS.

IN THIS FORECLOSURE ACTION PLAINTIFF'S ATTORNEY DID NOT FILE AN AFFIRMATION AS REQUIRED BY AN ADMINSTRATIVE ORDER; THE MAJORITY DID NOT ADDRESS THE ISSUE BECAUSE IT SHOULD HAVE BEEN RAISED IN A PRIOR APPEAL WHICH DEFENDANT DID NOT PERFECT; THE DISSENT ARGUED THE ISSUE COULD AND SHOULD BE CONSIDERED ON THIS APPEAL (THIRD DEPT).

The Third Department, over a dissent, determined defendant in this foreclosure action could not raise the plaintiff's failure to comply with an Administrative Order (AO) because it could have been raised on a prior appeal which was not perfected. The dissent argued the court could and should address the "AO" issue on this appeal:

From the dissent:

… [A] plaintiff's attorney is required to affirm after conferring with a representative of the plaintiff and upon the attorney's "own inspection and other reasonable inquiry" that the pleadings and submissions "contain no false statements of fact or law." …

… [P]laintiff's attorney was required to file the affidavit conforming with AO/431/11 and AO/208/13, an issue that was directly raised in defendant's motion to vacate and could have been addressed by this Court had defendant perfected his appeal from the court's April 2018 order. In an instance such as this, this Court "has the authority to entertain a second appeal in the exercise of [our] discretion, even where a prior appeal on the same issue has been dismissed for failure to prosecute" … . Given that the filing of an attorney affirmation is mandatory and, at the latest,

must be filed five business days before a scheduled auction … , I believe we should exercise our discretion and address the issue of noncompliance (id.). To assure the integrity of the foreclosure process, which is the entire objective of the Administrative Orders, we should modify the order by requiring a continued stay of any auction sale pending the submission of a compliant attorney affirmation. HSBC Bank USA, N.A. v Sage, 2021 NY Slip Op 04583, Third Dept 7-29-21

Practice Point: An issue which should have been raised in a prior appeal which was not perfected will not be considered in a subsequent appeal.

ARTICLE 78, JURISDICTIONAL DEFECT, STATUTE OF LIMITATIONS.

A TIMELY BUT DEFECTIVE ATTEMPT TO COMMENCE AN ARTICLE 78 PROCEEDING IS A JURISDICTIONAL DEFECT WHICH CANNOT BE CURED BY A SECOND ATTEMPT AFTER THE FOUR-MONTH STATUTE OF LIMITATIONS HAS RUN (FIRST DEPT).

The First Department, reversing Supreme Court, determined the petitioner's Article 78 action should have been dismissed because it was not properly commenced within four months. An attempt to commence the action was timely made, but the petition was returned:

An article 78 proceeding must be commenced within four months of the final determination under review (see CPLR 217[1]). Such a proceeding is commenced when the clerk of the court receives the petition in valid form … . Although petitioners attempted to file the petition in Queens County within four months, they did not do so in a manner which was then authorized (see CPLR 304[b]; 22 NYCRR 202.5-b[a], 202.5-bb[a]). The petition was returned to petitioners, who filed it after the four-month period had passed. The petition was untimely, and the court had no discretion to extend the statute of limitations … . Contrary to petitioners' contention, the deficiency in their initial filings is not subject to correction pursuant to CPLR 2001 so as to render the proceeding timely, as the failure to file the papers required to commence a proceeding constitutes a nonwaivable, jurisdictional defect … . Matter of Heffernan v New York City Mayor's Off. of Hous. Recovery Operations, 2021 NY Slip Op 04276, First Dept 7-8-21

Practice Point: An attempt to commence an Article 78 proceeding which is rejected because of noncompliance with the CPLR and the NYCRR is a jurisdictional defect which cannot be cured after the four-month statute of limitations has expired.

ATTORNEYS (WITHDRAWAL OF), DEFAULT, APPEALS.

MOTHER'S ATTORNEY SHOULD NOT HAVE BEEN ALLOWED TO WITHDRAW WITHOUT NOTICE TO MOTHER WHO DID NOT ATTEND THE TERMINATION-OF-PARENTAL-RIGHTS HEARING; THE DEFAULT ORDER TERMINATING MOTHER'S PARENTAL RIGHTS WAS THEREFORE IMPROPER AND APPEAL IS NOT PRECLUDED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the default order terminating mother's parental rights was improper because mother's attorney was allowed to withdraw without notice to mother. Because the default order was improper, mother's appeal is not precluded (default orders are not appealable):

In this proceeding pursuant to Social Services Law § 384-b,respondent mother contends that Family Court erred in allowing the mother's attorney to withdraw as counsel and in proceeding with the hearing in the mother's absence. We agree. " 'An attorney may withdraw as counsel of record only upon a showing of good and sufficient cause and upon reasonable notice to the client . . . [, and a] purported withdrawal without proof that reasonable notice was given is ineffective' " … . Because there is no indication in the record that the mother's attorney informed her that he was seeking to withdraw as counsel, the court should not have relieved him as counsel … . Although, generally, no appeal lies from an order entered on default (see CPLR 5511 …), here, the absence of evidence that the mother was put on notice of her attorney's motion to withdraw renders the finding of default improper, and thus the mother's appeal is not precluded … . We therefore reverse the order and remit the matter to Family Court for the assignment of new counsel and a new hearing … . Matter of Calvin L.W. (Dominique H.), 2021 NY Slip Op 04470, Fourth Dept 7-15-21

Practice Point: In this Family Court proceeding, mother's attorney should not have been allowed to withdraw in her absence (without notice to her). Because mother was not given notice of the attorney's motion to withdraw, she was not in default and appeal is therefore not precluded.

ATTORNEYS, SETTLEMENT EMAILS, ELECTRONIC SIGNATURES.

A SETTLEMENT EMAIL WILL BE DEEMED SIGNED BY THE SENDING ATTORNEY WITHOUT RETYPING THE ATTORNEY'S NAME IN THE EMAIL (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Moulton, overruling precedent, determined it is no longer necessary for an attorney to retype his or her name in an email stipulation of settlement. As long as the attorney's name appears in the "prepopulated" area of the email it will be deemed to have been signed by the attorney:

We now hold that this distinction between prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today. It is not the signoff that indicates whether the parties intended to reach a settlement via email, but rather the fact that the email was sent. Since 1999, New York State has joined other states in allowing, in most contexts, parties to accept electronic signatures in place of "wet ink" signatures. Section 304(2) of New York's Electronic Signatures and Records Act (ESRA) provides: "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." Moreover, the statutory definition of what constitutes an "electronic signature" is extremely broad under the ESRA, and includes any "electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record" (State Technology Law § 302[a]). We find that if an attorney hits "send" with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as

their own, then it is unnecessary for them to type their own signature. Matter of Philadelphia Ins. Indem. Co. v Kendall, 2021 NY Slip Op 04284, First Dept 7-8-21

Practice Point: In the First Department, as long as the attorney sending the settlement email is identified in the email, there is no need for the attorney to type his or her name in the email to effect a valid "electronic signature."

ATTORNEYS, STAY BASED ON SUSPENSION OF ATTORNEY, FORECLOSURE.

A STAY OF THE FORECLOSURE PROCEEDINGS WAS TRIGGERED BY THE SUSPENSION OF DEFENDANT'S ATTORNEY; BUT THE APPEARANCE OF NEW COUNSEL FOR THE DEFENDANT TO OPPOSE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAIVED THE PROTECTION OF THE STAY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon,, determined the defendant in this foreclosure action waived any stay of proceedings under CPLR 321(c) triggered by her attorney's suspension:

CPLR 321(c) … provides any adversary party with a mechanism for lifting a stay—by serving a notice upon the nonrepresented party to obtain a new attorney. Thus there are … two ways in which a CPLR 321(c) stay may be lifted. One way is if the party that lost its counsel retains new counsel at its own initiative, or otherwise communicates an intention to proceed pro se … . The second way is by means of the above-described notice procedure … . …

… [T]he plaintiff moved … for summary judgment … and for an order of reference … at a time when no event allowing for the lifting of the CPLR 321(c) stay had yet occurred. No new attorney had yet appeared on behalf of the defendant, and there is no indication that the defendant had elected to proceed pro se … . Moreover, the plaintiff moved for summary judgment without having served a CPLR 321(c) notice demanding the appointment of new counsel and without abiding by the statutorily mandated 30-day waiting period that follows the notice.

Nevertheless, the defendant's new counsel formally appeared in the action six days after the plaintiff's summary judgment motion was filed, submitted papers in opposition to that motion, and cross-moved to dismiss the complaint insofar as asserted against the defendant, all within the original or adjusted briefing schedule. … The appearance and activities of the defendant's new counsel operated, in effect, as a waiver of the protections otherwise afforded to the defendant by CPLR 321(c) … . Wells Fargo Bank, N.A. v Kurian, 2021 NY Slip Op 04509, Second Dept 7-31-21

DEBTOR-CREDITOR, NOTES, ACCELERATION CLAUSE.

THE FULL AMOUNT OF THE NOTE WAS NOT RECOVERABLE BECAUSE THERE WAS NO ACCELERATION CLAUSE; CLAIMS FOR UNPAID INSTALLMENTS DUE MORE THAN SIX YEARS BEFORE FILING SUIT WERE TIME-BARRED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the full amount of the note could not be recovered because it did not include an acceleration clause. In addition, claims for unpaid installments due more than six years before the filing of the lawsuit were time-barred:

"As a general rule, in the absence of an acceleration clause providing for the entire amount of a note to be due upon the default of any one installment, [a plaintiff is] only entitled to recover past due installments and [can]not unilaterally declare the note[] accelerated" … . "Rather, each default on each installment gives rise to a separate cause of action" … . Here, the record is devoid of any evidence of an acceleration clause and, thus, plaintiff was entitled to recover "only the amount of the installments past due at the time of trial" … . … "Where, as here, 'a loan secured by a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the statute of limitations begins to run on the date that each installment becomes due' " … . As defendant correctly asserted as a defense, inasmuch as plaintiff commenced this action on July 13, 2017, any claims for missed installments that accrued prior to July 13, 2011 were time-barred by the applicable statute of limitations … . Estate of Kathryn Essig v Essig, 2021 NY Slip Op 04301, Fourth Dept 7-9-21

Practice Point: The full amount of a note which does not have an acceleration clause requiring payment of the full amount upon missing an installment is not recoverable. Only the installments missed during the six years prior to filing suit are recoverable.

DEFAULT, ABANDONMENT, FORECLOSURE.

PLAINTIFF BANK'S MOVING FOR SUMMARY JUDGMENT TWO YEARS AFTER THE DEFENDANT'S DEFAULT DID NOT DEMONSTRATE IT DID NOT INTEND TO ABANDON THE ACTION; THEREFORE DEFENDANT WAS ENTITLED TO DISMISSAL OF THE COMPLAINT PURSUANT TO CPLR 3215 (C) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate an adequate excuse for failure to take steps to enter a default judgment in this foreclosure action within one year of the default:

The plaintiff's … argument … [is] that, by moving for summary judgment and leave to enter a default judgment … , the plaintiff had "manifest[ed] its intent not to abandon this case." However, while "[i]t is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)" … , and a plaintiff is not even required to specifically seek a default judgment within a year, but may take "the preliminary step toward obtaining a default judgment of foreclosure and sale by moving . . . for an order of reference pursuant to RPAPL 1321" … that preliminary step still must be taken "within one year of [a defendant's] default" … . Here, since the plaintiff moved for summary judgment and an order of reference almost two years after the default, when the statutory time within which to enter a default had long since expired, it was too late for the plaintiff to "manifest an intent not to abandon the case" … so as to avoid dismissal of the complaint … . US Bank N..A.. v Davis, 2021 NY Slip Op 04251, Second Dept 7-7-21

DISCOVERY, APPEALS.

DISCOVERY REQUESTS AIMED AT AN ISSUE WHICH WAS ADMITTED BY DEFENDANTS SHOULD NOT HAVE BEEN GRANTED; BECAUSE THE ALTERNATIVE ARGUMENT FOR THE DISCOVERY REQUESTS WAS NOT SUPPORTED BY A MEMO IN THE RECORD DEMONSTRATING THE ISSUE WAS PRESERVED, THE ARGUMENT WAS REJECTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' discovery requests in this traffic accident case should not have been granted. The requests for defendants' cell phone records and receipts for food and beverages on the day of the accident were aimed at demonstrating the identity of the driver of defendants' vehicle. But the identity of the driver had been admitted by the defendants. Plaintiff's alternative argument was rejected because there was no memorandum of law in the record to demonstrate the issue had been raised below:

Given the prior admission establishing that [defendant] Vladyslav was the operator of the pickup truck, plaintiff "failed to meet the threshold for disclosure by showing that [his] request for [defendants'] cell phone [records and records for food and beverage purchases] was reasonably calculated to yield information material and necessary to [his action]" … . …

Plaintiff … contends, as an alternative ground for affirmance, that there is a different reason supporting disclosure that was not included in his discovery requests or motion papers in the record on appeal, i.e., the requested records are potentially relevant to identifying witnesses who could testify about Vladyslav's physical condition on the night of the accident and to determining whether Vladyslav was intoxicated or impaired. On the record before us, which does not include any memoranda of law despite our repeated and longstanding advisements that such memoranda may properly be included in the record on appeal for the limited purpose of determining preservation … , we conclude that plaintiff's contention is not properly before us inasmuch as it is raised for the first time on appeal … . Brennan v Demydyuk, 2021 NY Slip Op 04425, Fourth Dept 7-16-21

Practice Point: A discovery request which relates to an admitted issue should not be granted.

Practice Point: If you raise an issue on appeal which was only addressed in a memo submitted to the trial court, include the memo in the record on appeal or it will be deemed unpreserved.

DISCOVERY, HABIT OR CUSTOM.

IN THIS CHILD-VICTIMS-ACT SEXUAL-ABUSE (NEGLIGENT-SUPERVISION) ACTION AGAINST THE CATHOLIC DIOCESE OF ALBANY, PLAINTIFFS' DISCOVERY REQUEST FOR THE FILES OF SEVERAL NONPARTY PRIESTS WAS PROPERLY GRANTED ON THE GROUND THE FILES MAY REVEAL A "HABIT" OR "CUSTOM" REGARDING HOW THE DIOCESE HANDLED SUSPECTED CHILD-SEXUAL-ABUSE (THIRD DEPT).

The Third Department determined plaintiffs' discovery request for the files of several nonparty priests in this Child-Victims-Act sexual-abuse (negligent-supervision) action against defendant Catholic Diocese of Albany was properly granted. The discovery was relevant to whether the diocese followed a "habit" or "custom" in dealing with priests suspected of sexually abusing children:

Although the Diocese raises several arguments concerning the appropriateness of habit evidence in this context — namely, that it is prejudicial and that the circumstances surrounding allegations of abuse vary and do not yield habitual responses from the Diocese — these arguments conflate plaintiffs' requirement on their motion to compel with plaintiffs' future requirements to introduce the files into evidence. For now, on their motion to compel discovery, plaintiffs are merely required to show that their discovery request is reasonably calculated to yield material and necessary information … . Whether plaintiffs can actually demonstrate "a sufficient number of instances" of the Diocese's repetitive conduct in order to introduce the subject files into evidence as habit evidence is plaintiffs' future burden … . Melfe v Roman Catholic Diocese of Albany, N.Y., 2021 NY Slip Op 04179, Third Dept 7-1-21

Practice Point: Discovery which may reveal a party's habit or custom in dealing with a relevant issue should be allowed. In this Child Victims Act action against a

Catholic Diocese evidence of how the Diocese dealt with priests suspected of sexually abusing child was deemed discoverable.

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FORECLOSURE, BUSINESS RECORDS.

DEFENDANTS' DEFAULT IN MAKING MORTGAGE PAYMENTS WAS NOT SUPPORTED BY THE SUBMISSION OF THE RELEVANT BUSINESS RECORDS; THEREFORE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the proof of defendants' default in mortgage payments was based upon business records which were not produced:

… [T]he plaintiff failed to establish, prima facie, the defendants' default in payment by submitting the affidavit of Haley Pope, the Foreclosure Manager for its loan servicer. Pope did not specifically state that she had personal knowledge of the defendants' default in payment. To the extent Pope relied on her review of business records, she did not identify which records she relied on to assert a default in payment, or attach any business records to her affidavit to substantiate the alleged default in payment. Thus, the plaintiff failed to meet its prima facie burden by relying on Pope's conclusory assertion that the defendants defaulted in payment, which was not supported by a factual basis … . Wilmington Sav. Fund Socy., FSB v McLaughlin, 2021 NY Slip Op 04576, Second Dept 7-28-21

Practice Point: When relying on business records for summary judgment, the affidavit must describe the records and the records must be attached.

FORECLOSURE, BUSINESS RECORDS.

THE BUSINESS RECORDS REFERRED TO IN THE SUPPORTING AFFIDAVIT WERE NOT ATTACHED; THE BANK'S MOTION FOR A DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for a default judgment in this foreclosure action should not have been granted. The business records referred in the affidavit of the banks servicing agent were not attached:

Where, as here, a foreclosure complaint is not verified, CPLR 3215(f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit made by the party'" … . Here, in support of its motion, the plaintiff submitted an affidavit of merit executed by a "Document Execution Specialist" who was employed by the plaintiff's servicing agent … . The affiant asserted that she had personal knowledge of the merits of the plaintiff's cause of action based upon her review of various business records. However, as the defendants correctly contend, since the plaintiff failed to attach the business records upon which the affiant relied in her affidavit, her factual assertions based upon those records constituted inadmissible hearsay, and her affidavit was insufficient to demonstrate "proof of the facts constituting the claim" … . Deutsche Bank Natl. Trust Co. v Hossain, 2021 NY Slip Op 04480, Second Dept 7-21-21

FORECLOSURE, DEFAULT, BUSINESS RECORDS, REFEREE'S REPORT.

ALTHOUGH DEFENDANT WAS IN DEFAULT IN THIS FORECLOSURE ACTION, SHE STILL CAN CONTEST THE AMOUNT OWED; THE REFEREE'S REPORT HERE WAS REJECTED BECAUSE IT WAS BASED IN PART ON UNPRODUCED BUSINESS RECORDS AND THE MATTER WAS REMITTED FOR RECALCULATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this foreclosure action should have been rejected because it was based in part on business records which were not produced. Although defendant was in default, she still could contest the amount owed:

The fact that the defendant defaulted in appearing did not mean that she was precluded from contesting the amount owed … . The Supreme Court should not have confirmed the referee's report because the referee's recommendation that the plaintiff be awarded tax and hazard insurance disbursements was premised upon unproduced business records … . Consequently, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record … . Accordingly, we reject the referee's report and remit the matter to the Supreme Court, Kings County, for a new report computing the amount due to the plaintiff, followed by further proceedings in accordance with CPLR 4403 and the entry of an appropriate amended judgment thereafter. Wells Fargo Bank, N.A. v Campbell, 2021 NY Slip Op 04574, Second Dept 7-28-21

Practice Point: A defendant who is in default in a foreclosure action can still contest the amount owed.

Practice Point: A referee's report which relies on business records which were not produced should be rejected.

JUDGES.

THE JUDGE SHOULD NOT HAVE DISMISSED DEFENDANTS' AFFIRMATIVE DEFENSES BECAUSE PLAINTIFF DID NOT REQUEST THAT RELIEF (SECOND DEPT).

The Second Department noted that the judge should not have ordered relief not requested by the plaintiff:

… [T]he Supreme Court erred by, in effect, sua sponte, directing dismissal of all of [defendants'] affirmative defenses to the complaint … . The plaintiff did not move for summary judgment dismissing any of [defendant's] affirmative defenses, and the court erred in awarding this unrequested relief … . MacKay v Paliotta, 2021 NY Slip Op 04348, Second Dept 7-15-21

Practice Point: A judge is only authorized to grant relief which has been requested by a party.

JURIES, JUDGES.

THE REFUSAL OF DEFENDANT'S REQUEST TO POLL THE JURY REQUIRED A NEW TRIAL (FOURTH DEPT).

The Fourth Department, reversing the judgment, determined defendant's request to poll the jury should not have been denied:

Plaintiff commenced this action seeking damages for, inter alia, assault and battery, and in his amended answer defendant asserted counterclaims for, inter alia, defamation. The matter proceeded to trial, and now plaintiff appeals and defendant cross-appeals from an order and judgment of Supreme Court that denied the parties' respective motions to set aside portions of the jury verdict and, upon the jury verdict, awarded damages both to plaintiff and to defendant. We reverse.

We agree with defendant on his cross appeal that the court erred in denying his request to poll the jury. "A party has an absolute right to poll the jury, and a court's denial of that right mandates reversal and a new trial" … . We therefore reverse the order and judgment and remit the matter to Supreme Court for a new trial … . Fitzgerald v Kula, 2021 NY Slip Op 04452, Fourth Dept 7-16-21

Practice Point: It is reversible error to refuse a request to poll the jury.

PARTIES, SUBSTITUTION AFTER DEATH.

ALTHOUGH DOMINICA, THE EXECUTRIX OF JOSEPHINE'S ESTATE, WAS NEVER SUBSTITUTED FOR JOSEPHINE AFTER JOSEPHINE'S DEATH, DOMINICA APPEARED AND ACTIVELY LITIGATED A MOTION TO VACATE; THE FAILURE TO EFFECT SUBSTITUTION IN THAT CIRCUMSTANCE IS A MERE IRREGULARITY; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the failure to substitute the executrix of Josephine's estate, Dominica P., after Josephine's death did not nullify the proceedings. Dominca P appeared and actively litigated a motion to vacate brought by Kathleen. In that circumstance the failure to effect substitution was deemed a mere irregularity:

Josephine died at some point before the entry of the order on appeal, and the executrix of her estate, Dominica P., was never formally substituted as the petitioner in this proceeding. There is no dispute, however, that Dominica was properly served with Kathleen's motion to vacate, and Dominica never objected to adjudicating Kathleen's motion in the absence of a formal substitution order. To the contrary, Dominica—acting in her capacity as the executrix of Josephine's estate—appeared and successfully opposed Kathleen's motion on the merits. Dominica likewise appeared in this Court to oppose Kathleen's appeal. Because Dominica appeared and actively litigated Kathleen's motion on the merits, it is well established that any "defect in failing to first effect substitution was a mere irregularity" … . Moreover, to formally correct this irregularity, we now modify the order by substituting

Dominica as the petitioner in this proceeding … . Matter of Robinson v Kathleen B., 2021 NY Slip Op 04320, Fourth Dept 7-9-21

Practice Point: Here the failure to substitute the executrix of the estate for the party who died during the ongoing litigation was excused as a mere irregularity.

SEPARATE TRIALS, DIFFERENT THEORIES, SAME EVIDENCE, ONE APPEALABLE JUDGMENT.

SEPARATE TRIALS WERE HELD ON THE TORT AND BREACH OF CONTRACT ACTIONS STEMMING FROM DAMAGE TO PLAINTIFFS' BUILDING CAUSED BY RENOVATION OF DEFENDANT'S NEIGHBORING BUILDING; THE DAMAGES AWARDED IN EACH ACTION WERE BASED UPON THE SAME EVIDENCE OF THE COST OF REPAIR AND ALTERNATE LIVING EXPENSES BUT THE AMOUNTS OF THE AWARDS DIFFERED; SUPREME COURT PROPERLY ENTERED THE DAMAGES AWARDED IN THE BREACH OF CONTRACT ACTION, PLUS INTEREST AND ATTORNEY'S FEES, AS THE APPEALABLE FINAL JUDGMENT (FIRST DEPT).

The First Department, in an extensive opinion by Justice Moulton, addressed several unusual issues stemming from the allegation the renovation of defendant's neighboring property damaged plaintiffs' property. Two separate trials were held: a jury trial on tort (negligence) claims; and a nonjury trial on breach of contract claims (i.e., the contract allowing defendants access to plaintiffs' property to facilitate the renovation). In the nonjury breach of contract action plaintiffs were awarded $6,255,007 for repair costs and $1,152,000 for alternate living expenses. In the jury trial (tort action) plaintiffs were awarded $5,000,000 for repair and $500,000 for alternate living expenses. The issues decided in plaintiff's appeal are: the breach of contract judgment is appealable as a final judgment; Supreme Court properly precluded expert testimony on the loss of market value in plaintiffs' home. The issues decided in defendant's cross appeals are: Supreme Court properly denied defendant's motion to set aside the breach of contract judgment and adopt the jury's tort judgment; plaintiffs were entitled to conditional contractual indemnification from defendant. The final judgment which was entered used the breach of contract

(nonjury trial) damages, plus interest and attorney's fees totaling over $12 million. With respect to whether the judgment was appealable as a final judgment, the court wrote:

Our conclusion that the contract judgment is a final judgment starts with the definition of a judgment. "A judgment is the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final" (CPLR 5011; see also CPLR 105 [k] ["The word 'judgment' means a final or interlocutory judgment"]). "[A] fair working definition of the concept can be stated as follows: a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters" … . Shah v 20 E. 64th St., LLC, 2021 NY Slip Op 04587, First Dept 7-29-21

Practice Point: Here a tort action and breach of contract action stemming from damage to plaintiff's building caused by renovation of a neighboring building were tried separately, one a jury trial, one a bench trial. The evidence was the same but the damages awards were different. The judge properly chose the higher damages award as the final appealable judgment.

STATUTE OF LIMITATIONS, TOXIC TORTS.

PLAINTIFFS' CAUSES OF ACTION ALLEGING EXPOSURE TO TOXIC FUMES ARE TIME-BARRED PURSUANT TO CPLR 214-C (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the causes of action alleging exposure to toxic fumes and hazardous substances were time-barred:

… [T]he … causes of action [alleging] the purported exposure to toxic fumes and hazardous substances (exposure claims) because they are untimely under the applicable three-year statute of limitations (see CPLR 214-c [2]). … [T]hat statute of limitations began to run from the date of discovery of plaintiff's injury. Discovery occurs "when the injured party discovers the primary condition on which the claim is based" and not "when the connection between . . . symptoms and the injured's

exposure to a toxic substance is recognized" … . By submitting, inter alia, plaintiff's deposition testimony and a workers' compensation claim filed by him in 2011, defendants established that the exposure claims accrued in 2003 when he "made repeated visits to [his] treating providers for symptoms described in [his] bill of particulars as caused by the [chemical] exposure" … , and well over three years prior to the commencement of this action in 2014. To the extent that plaintiff relies on the one-year statute of limitations provided by CPLR 214-c (4), plaintiff cannot avail himself of that limitations period because, inter alia, plaintiff explicitly linked his exposure-related symptoms to exposure at Niagara Lubricant in his workers' compensation claim, i.e., over one year prior to the commencement of this action … . Cotter v Lasco, Inc., 2021 NY Slip Op 04293, Fourth Dept 7-9-21