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APPEALS, FILING AND SERVICE OF NOTICE OF APPEAL.

THE NOTICE OF APPEAL WAS TIMELY SERVED BUT WAS NOT TIMELY FILED WITH THE CLERK OF THE COURT; THE 3RD DEPARTMENT DISMISSED THE APPEAL; THE APPELLATE COURT HAS THE DISCRETION TO ALLOW A LATE FILING; MATTER REMITTED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined that, although the pro se inmate-petitioner did not timely file the notice of appeal, the notice was timely served and the Third Department could have exercised discretion to allow a late filing. The matter was remitted because the Third Department's decision was silent about the reasons for dismissing the appeal:

… [P]etitioner argues that the Appellate Division should have applied a pro se inmate "mailbox rule" to deem the notice of appeal timely filed upon delivery to prison authorities for forwarding to the appropriate court.

CPLR 5515 (1) provides that an appeal is taken when, in addition to being duly served, the notice of appeal is "fil[ed] . . . in the office where the judgment or order of the court of original instance is entered." The CPLR further clarifies that "papers required to be filed shall be filed with the clerk of the court in which the action is triable" (CPLR 2102 [a]). Thus, by its express terms, the CPLR indicates that filing occurs when the clerk's office receives the notice of appeal. Indeed, "filing" has long been understood to occur only upon actual receipt by the appropriate court clerk … . A "mailbox rule" for filing would also contravene the clear distinctions between filing and service drawn by the legislature inasmuch as the CPLR directs that, unlike filing, "service by mail shall be complete upon mailing" (CPLR 2103 [b] [2]). .. * * *

… [T]he legislature has given courts the authority to excuse untimely filing under certain circumstances. CPLR 5520 provides that, "[i]f an appellant either serves or files a timely notice of appeal . . . , but neglects through mistake or excusable neglect to do another required act within the time limited, the court from or to which the

appeal is taken . . . may grant an extension of time for curing the omission" (CPLR 5520 [a]). Matter of Miller v Annucci, 2021 NY Slip Op 04954, CtApp 9-9-21

Practice Point: A notice of appeal is filed when it is in the hands of the court clerk, and it is served on the opposition when it is mailed. If the notice of appeal is either timely served but not timely filed, or timely filed but not timely served, the court to which the appeal is taken has the discretion to allow more time to complete the process.

COLLATERAL ESTOPPEL, WORKERS' COMPENSATION, LABOR LAW-CONSTRUCTION LAW.

THE LABOR-LAW CONSTRUCTION-ACCIDENT ACTION WAS PRECLUDED BY THE RESULT OF THE PRIOR WORKERS' COMPENSATION HEARING UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL; THE MOTION TO AMEND THE ANSWER TO ADD THE COLLATERAL ESTOPPEL DEFENSE WAS PROPERLY GRANTED, EVEN THOUGH THE MOTION WAS MADE AFTER THE NOTE OF ISSUE WAS FILED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, determined the Labor Law 240(1), 241(6) and 200 action was precluded by the doctrine of collateral estoppel based upon the result of a Workers' Compensation hearing. Plaintiff alleged a hoist at a construction site malfunctioned causing knee injuries. Plaintiff was represented by an attorney at the Workers' Compensation hearing and witnesses were cross-examined. The Administrative Law Judge (ALJ) concluded that the incident (hoist malfunction) never occurred. In addition, the Second Department held that the motion to amend the answer to add the collateral estoppel defense, made after the note of issue was filed, was properly granted. Plaintiff could not have been surprised by the defense and suffered no prejudice from the late amendment:

Determinations rendered by quasi-judicial administrative agencies may qualify for collateral estoppel effect so long as the requirements of the doctrine [identity of issues and a full and fair opportunity to contest the controlling decision] are satisfied.

Determinations of the Workers' Compensation Board are potentially within the scope of the doctrine … . * * *

… [T]he defendants met their burden of establishing, prima facie, their entitlement to judgment as a matter of law on the ground that the plaintiff's action was barred by the doctrine of collateral estoppel. The ALJ's findings, as affirmed by the Workers' Compensation Board, established as a matter of fact that the accident claimed by the plaintiff did not occur, or did not occur in the described manner as would cause injury. That finding is material and, in fact, pivotal, to the core viability of any personal injury action that the plaintiff could pursue in a court at law regarding the same incident … . Lennon v 56th & Park(NY) Owner, LLC, 2021 NY Slip Op 04972, Second Dept 9-15-21

Practice Point: At least where the Workers' Compensation claimant is represented by counsel and witnesses are cross-examined, the denial of a Workers' Compensation claim may, under the collateral estoppel doctrine, preclude a Labor Law-Construction Law action based on the same facts.

FORECLOSURE, DEFAULT JUDGMENTS.

PLAINTIFF BANK DID NOT PROVIDE AN ADEQUATE EXCUSE FOR FAILING TO TAKE A TIMELY DEFAULT JUDGMENT; THE FORECLOSURE ACTION WAS ABANDONED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action should have been dismissed because plaintiff's excuse for failing to take a timely default judgment was inadequate:

To avoid dismissal of a complaint pursuant to CPLR 3215(c) as abandoned, a plaintiff must demonstrate both that there is a reasonable excuse for the delay and that the action is meritorious … . "Although the determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court, reversal is warranted if that discretion is improvidently exercised" … .

Here, contrary to the Supreme Court's determination, the excuse for the plaintiff's failure to take proceedings for the entry of a judgment within one year after the action was released from the foreclosure settlement conference part was not reasonable … . Throughout the course of this litigation, there were unexplained gaps of time where months of inactivity passed. Neither the need to move for the appointment of a successor guardian nor the plaintiff's change of attorney which change occurred after the statutory one-year period had expired constitutes a reasonable excuse for the plaintiff's failure to timely prosecute this action … . HSBC Bank USA, N.A. v Whaley, 2021 NY Slip Op 05027, Second Dept 9-22-21

Practice Point: Whether to grant a motion to vacate a default judgment is considered an exercise of discretion. But if a motion to vacate a default judgment is granted based on a flimsy excuse, an appellate court may reverse, finding that the motion court abused its discretion.

FORECLOSURE, MOTION TO CONFIRM REFEREE'S REPORT, NOTICE TO PARTY WHICH HAS "FAILED TO APPEAR."

A DEFENDANT IN A FORECLOSURE ACTION WHICH HAS "FAILED TO APPEAR" IS NOT ENTITLED TO NOTICE OF A MOTION TO CONFIRM A REFEREE'S REPORT, NOTWITHSTANDING DICTA IN PRIOR 2ND DEPARTMENT RULINGS; A DETAILED AND COMPREHENSIVE DISCUSSION OF THE NOTICE REQUIREMENTS WHERE A DEFENDANT IN A FORECLOSURE ACTION HAS DEFAULTED (SECOND DEPT).

The Second Department, in a comprehensive discussion of the requirements for seeking a default judgment, including the meaning of "failure to appear," determined the party which failed to appear in this foreclosure action was not entitled to notice of a motion to confirm a referee's report. The extensive and detailed explanation of the applicable law was deemed necessary to clear up dicta in Second Department decisions which indicated such notice was required:

CPLR 3215(g)(1) applies "whenever application is made to the court or to the clerk." By its plain language, it merely requires the plaintiff to provide "notice of the time

and place of the application" for a default judgment … , which application must be held in a location authorized by CPLR 3215(e), and supported by, among other things, "proof of . . . the amount due" … . … [T]he purpose of the notice is to provide a defaulted defendant with the "opportunity to challenge the amount of damages sought by the plaintiffs" … . Contrary to [defendant's] contention, CPLR 3215(g)(1) does not, once triggered, require a plaintiff to provide five days' notice of every subsequent motion or application in the action … .

The 2017 motion was not an "application" for a default judgment within the meaning of CPLR 3215(b). Rather, the 2017 motion sought confirmation of the referee's report and entry of a judgment of foreclosure and sale, relief predicated on CPLR 4403 … . Since the 2017 motion was not an "application" within the meaning of CPLR 3215(b), the notice specified in CPLR 3215(g)(1) was inapplicable to the 2017 motion, and notice of that motion was instead governed by the general notice provisions applicable to all motions (see CPLR 2103[e]). As already observed, that section merely requires that notice be served on "every other party who has appeared" … . Since, at the time of the 2017 motion, [defendant's predecessor] still had not made any appearance in the action, it was not, without more, entitled to notice of that motion … . 21st Mtge. Corp. v Raghu, 2021 NY Slip Op 05016, Second Dept 9-22-21

Practice Point: Where a defendant in a foreclosure action has "failed to appear" the defendant is not entitled to notice of a motion to confirm the referee's report. The motion to confirm is not considered an application for a default judgment, for which notice is required by CPLR 3215(b).

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDING LAW (RPAPL) 1304, PROOF OF MAILING OF NOTICE.

PROOF OF MAILING OF THE RPAPL 1304 NOTICE TO THE CORRECT ADDRESS WAS NOT INCLUDED IN THE INITIAL MOTION PAPERS AND THEREFORE WAS NOT PART OF PLAINTIFF'S ATTEMPT TO MAKE OUT A PRIMA FACIE CASE; IN ADDTIION, THE PROOF OF MAILING OF THE RPAPL 1304 NOTICE WAS DEFICIENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant failed to demonstrate compliance with the RPAPL 1304 notice requirements in this foreclosure action. The proof of mailing to the correct address was first provided in reply papers for the motion to confirm the referee's report and was not part of plaintiff's initial summary judgment motion. And the proof of mailing was not supported by proof of the affiant's knowledge of the mailing practices and procedures of the party which actually mailed the documents:

Although Cantu [plaintiff's default servicing officer] stated in his affidavit that the RPAPL 1304 notices were mailed by certified and first-class mail to the defendants at the property, and he attached copies of 90-day notices with corresponding certified and first-class envelopes, Cantu did not attach the 90-day notices and envelopes addressed to the property where the defendants resided or any United States Post Office documentation showing that the purported mailings to the property actually occurred … . To the extent the plaintiff relies on copies of the 90-day notices with corresponding certified and first-class envelopes addressed to the property which were submitted for the first time in its reply papers on its subsequent motion … to confirm the referee's report, those documents were insufficient to satisfy the plaintiff's prima facie burden on its initial motion … for summary judgment … . "A party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third chance" … . Further, while Cantu asserted that he had personal knowledge of the plaintiff's procedures for creating and maintaining its business records, he did not attest that he was familiar with the mailing practices and procedures of Walz, the third-party entity that he acknowledged sent the notices … . Thus, the plaintiff failed to establish proof

of standard office practices and procedures designed to ensure the notices were properly addressed and mailed … . Caliber Home Loans, Inc. v Weinstein, 2021 NY Slip Op 05021, Second Dept 9-22-21

Practice Point: Proof the bank provided notice of the foreclosure action to the borrower(s) pursuant to Real Property Actions and Proceedings Law section 1304 is a condition precedent to the action. If the proof of notice is not included in the original summary judgment papers, the bank has not made out a prima facie case and the omission cannot be fixed by a subsequent submission.

JUDGMENT AS A MATTER OF LAW, CPLR 4401.

THE MOTION FOR A JUDGMENT AS A MATTER OF LAW (CPLR 4401) FINDING THE NYC HOUSING AUTHORITY LIABLE FOR A BEDBUG INFESTATION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for a judgment as a matter law (CPLR 4401), finding the NYC Housing Authority (NYCHA) liable for a bedbug infestation of plaintiffs' apartments, should not have been granted:

A motion pursuant to CPLR 4401 should not be granted unless, affording the party opposing the motion every inference which may properly be drawn from the facts presented, and viewing the evidence in the light most favorable to the nonmovant, there is no rational process by which the jury could find for the nonmovant against the moving party … . A court considering a motion for a directed verdict "must not 'engage in a weighing of the evidence,' nor may it direct a verdict where 'the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question'" … .

… [T]he evidence adduced at trial, viewed in the light most favorable to NYCHA, did not establish that there is no rational process by which the jury could find in favor of NYCHA … . The evidence included the plaintiffs' testimony, as well as the parties' competing expert testimony regarding the appropriate protocols for the treatment of a bedbug infestation and competing conclusions by the expert witnesses

as to whether NYCHA's bedbug eradication efforts were appropriate. Although a landlord's violation of a municipal ordinance, including, as relevant here, Administrative Code of the City of New York §§ 27-2017 and 27-2018, may constitute some evidence of negligence for the jury to take into account, it does not constitute negligence per se … . Aponte v New York City Hous. Auth., 2021 NY Slip Op 05114, Second Dept 9-29-21

Practice Point: When the trial is over and a party moves for a judgment as a matter of law pursuant to CPLR 4401, the court cannot "weigh the evidence." The motion cannot be granted if facts are in dispute, if different inferences can be drawn from the facts or if the credibility of witnesses must be assessed. There must be no rational process by the which the jury could have reached its verdict.

JUDGMENT BY CONFESSION, VACATION OF.

GENERALLY, TO VACATE A JUDGMENT BY CONFESSION, A PLENARY ACTION, NOT A MOTION TO VACATE, MUST BE BROUGHT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, in order to vacate a judgment by confession, a plenary action must be commenced. Here the motion to vacate was not the proper vehicle:

"Generally, a person seeking to vacate a judgment entered upon the filing of an affidavit of confession of judgment must commence a separate plenary action for that relief" … . Here, the grounds for vacatur relied upon by the defendant do not fall within an exception to that general rule … . Accordingly, the Supreme Court should have denied the defendant's motion without prejudice to his right to commence a plenary action to vacate the judgment by confession. Funding Metrics, LLC v D & V Hospitality, Inc., 2021 NY Slip Op 04964, Second Dept 9-15-21

Practice Point: Although there are exceptions to the rule, generally a plenary action must be brought to vacate a judgment by confession. A motion to vacate will not do it.

LABOR LAW-CONSTRUCTION LAW, AMENDMENT OF BILL OF PARTICULARS, INDUSTRIAL CODE PROVISIONS ADDED AFTER THE NOTE OF ISSUED HAS BEEN FILED.

SUPREME COURT PROPERLY ALLOWED THE AMENDMENT OF THE BILL OF PARTICULARS AFTER THE NOTE OF ISSUE HAD BEEN FILED; THE AMENDMENT ALLEGED ADDITIONAL VIOLATIONS OF THE INDUSTRIAL CODE IN THIS LABOR LAW 241(6) ACTION (SECOND DEPT).

The Second Department determined Supreme Court properly allowed the amendment of the bill of particulars after the note of issue had been filed in this Labor Law 231(6). The amendment alleged additional violations of the Industrial Code:

"[L]eave to amend the pleadings to identify a specific, applicable Industrial Code provision may properly be granted, even after the note of issue has been filed, 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"… . Here, the Supreme Court providently exercised its discretion in granting that branch of the plaintiff's cross motion which was to amend the bill of particulars to allege violations of additional Industrial Code sections. The plaintiff's amendment did not prejudice the defendants and did not involve new factual allegations or raise new theories of liability … . Palaguachi v Idlewild 228th St., LLC, 2021 NY Slip Op 05127, Second Dept 9-29-21

Practice Point: A Labor Law 241(6) cause of action is based on the violation of Industrial Code provisions. Where there is merit to the alleged violations, there are no new factual allegations and there is no prejudice to the defendant, the bill of particulars can be amended to include additional violations of the Industrial Code even after the note of issue has been filed.

LACHES, LIEN LAW.

GARAGEKEEPER'S LIEN DECLARED NULL AND VOID UNDER THE DOCTRINE OF LACHES (THIRD DEPT).

The Third Department determined that the garagekeeper's lien action was properly declared null and void under the doctrine of laches. The respondent did not start the Lien Law action for six months, during which storage charges of $55-a-day were accruing:

"A garagekeeper's lien is authorized by Lien Law § 184 (1) and the purpose of this statute is to provide the repair shop with security for the labor and material it expends which enhance the value of the vehicle" … . "The statute is in derogation of common law and thus is strictly construed" … . "Laches is defined as an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party" … . We are unpersuaded by respondent's claim that the doctrine of laches is inapplicable to the circumstances of this case as the claim is purely statutory and does not lie in equity. Petitioner, by posting a $15,000 bond as collateral for respondent's claim, has attempted in good faith to discharge the lien. We note that this action to enforce the lien is equitable, not legal, in nature … . … [I]t is clear from the record that petitioner was unaware of the existence of the lien until more than six months after storage charges began to accrue, and it was prejudiced by respondent's assertion of such claim after such a prolonged period of delay. "It is well settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches" … . Matter of Santander Consumer USA, Inc. v Steve Jayz Automotive Inc., 2021 NY Slip Op 04998, Third Dept 9-16-21

Practice Point: A successful laches defense is not seen too often. Here it was successful where the garage which was charging vehicle-storage fees of $55-a-day waited six months before starting the Lien-Law proceeding.

MUNICIPAL LAW, DEADLINE FOR APPEAL OF ZONING BOARD RULINGS.

THE FINDING BY THE BOARD OF ZONING APPEALS WAS NEVER FILED AS REQUIRED BY THE GENERAL CITY LAW; THEREFORE THE 60-DAY TIME LIMIT FOR CONTESTING THE RULING NEVER STARTED TO RUN (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the 60-day statute of limitation for contesting a ruling of the board of zoning appeals (BZA) never started to run because the ZBA's finding was never filed:

General City Law § 81-a (5) (a) imposes an affirmative duty on administrative officials charged with the enforcement of a local zoning law or ordinance in mandating that "[e]ach order, requirement, decision, interpretation or determination . . . shall be filed. . . within five business days from the day it is rendered, and shall be a public record" … . General City Law § 81-a (5) (b) states that "[a]n appeal shall be taken within [60] days after the filingof any order, requirement, decision, interpretation or determination of the administrative official, by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought" (… see Code of the City of Ithaca § 325-40 [B] [1] [e]). Upon review of the record, it is impossible to ascertain exactly when the Planning Board determined that variances were not necessary. However, it is undisputed that no determination of such finding was ever filed. As General City Law § 81-a (5) (b) plainly provides that the time period for commencing a review proceeding is to be measured from the filing, and there was no filing, the time period for the administrative appeal never began to run … . Matter of Grout v Visum Dev. Group LLC, 2021 NY Slip Op 04997, Third Dept 9-16-21

Practice Point: If a municipality does not file its zoning determination, the time-limit for appealing it (30 days here) never starts to run.