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Contents

Table of Contents

Table of Contents

ANSWERS, ENTRY OF THE ORDER DENYING A MOTION TO DISMISS STARTS THE TIME FOR SERVING AN ANSWER.

THE COURT NEVER ENTERED AN ORDER RE: DEFENDANT'S MOTION TO DISMISS; THEREFORE THE TIME FOR DEFENDANT TO INTERPOSE AN ANSWER IN THIS FORECLOSURE ACTION NEVER STARTED TO RUN (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the time for interposing an answer in this foreclosure action never started to run because the court never entered an order deciding defendant's motion to dismiss:

The Supreme Court, however, erred in granting those branches of the plaintiff's motion which were for leave to enter a default judgment against the defendant and for an order of reference. In the order … , the court held that branch of the defendant's motion which was pursuant to CPLR 3211(a)(3) in abeyance pending the framed-issue hearing, and the defendant therefore had until 10 days after service of notice of entry of the order deciding that branch of the motion to file an answer … . Since the court failed to issue an order deciding that branch of the defendant's motion which was pursuant to CPLR 3211(a)(3) prior to granting those branches of the plaintiff's motion which were for leave to enter a default judgment against the defendant and for an order of reference, the defendant's time to file an answer had not yet begun to run and the defendant therefore was not in default … .

Contrary to the plaintiff's contention, the referee's report cannot be considered a determination that, in effect, denied that branch of the defendant's motion which was pursuant to CPLR 3211(a)(3) to dismiss the complaint … , as there is no evidence in the record that the parties consented to the reference, and the referee therefore lacked the authority to determine the issue of standing conclusively … . HSBC Bank USA, N.A.. v Sewell, 2021 NY Slip Op 05850, Second Dept 10-27-21

Practice Point: The time to file an answer (10 days) after losing a pre-answer motion to dismiss doesn't start running until notice of entry of the order denying dismissal is served.

ATTORNEYS, FRIVOLOUS CONDUCT.

PLAINTIFF AND HIS ATTORNEY SENT 75 LETTERS TO HARASS DEFENDANTS; SANCTIONS FOR FRIVOLOUS CONDUCT SHOULD HAVE BEEN IMPOSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff should have been sanctioned for harassing defendants:

In 2015, the plaintiff commenced this shareholder's derivative action. After the action was commenced, the plaintiff and his attorney sent approximately 75 letters to various defendants, as well as those defendants' family members, clergy, and attorneys. Therein, the plaintiff made disturbing references, among other things, to plagues, repentance, imprisonment, and punishment by the Internal Revenue Service for tax fraud. …

Pursuant to 22 NYCRR 130-1.1, sanctions may be imposed against a party or the party's attorney for frivolous conduct. Conduct is "frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1[c]). "A party seeking the imposition of a sanction or an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(c) has the burden of proof" … .

… [T]he defendants established that the plaintiff's conduct in sending the subject letters was calculated to harass the defendants … . Glaubach v Slifkin, 2021 NY Slip Op 05323, Second Dept 10-7-21

Practice Point: Conduct is frivolous warranting sanctions if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-

1.1[c]). Here letters to defendants sent by plaintiff and plaintiff's attorney constituted frivolous conduct.

CONFORM PLEADINGS TO PROOF.

PLAINTIFF SHOULD NOT HAVE BEEN ALLOWED TO CONFORM THE PLEADINGS TO THE PROOF RE: PIERCING THE CORPORATE VEIL; DEFENDANT WAS PREJUDICED BY THE FAILURE TO PLEAD THE SUPPORTING ALLEGATIONS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff should not have been allowed to conform the pleadings to the proof re: piercing the corporate veil for two reasons: (1) defendant Chilled was prejudiced by the failure to plead facts supporting the alter ego theory; and (2) the proof at trial did not demonstrate Chilled was the alter ego of defendant EMB:

Chilled demonstrated that it was prejudiced in the preparation of its defense by the lack of notice that the plaintiff would seek to pierce EMB's corporate veil or prove that Chilled was an alter ego of EMB … . In general, claims involving veil piercing or alter ego liability are fact-laden … . Chilled established that the lack of notice hindered its ability to present evidence that might have shown … that corporate formalities were respected or that EMB and Chilled dealt with each other at arms' length. * * *

… [T]he plaintiff failed to establish that Chilled exercised complete domination over EMB in the transaction with the plaintiff … . …

„, [T]he plaintiff failed to establish that Chilled used its alleged domination of EMB to commit a fraud or wrong against the plaintiff … . Americore Drilling & Cutting, Inc. v EMB Contr. Corp., 2021 NY Slip Op 05845, Second Dept 10-27-21

Practice Point: A motion to conform the pleadings to the proof after trial will be denied if defendant would be prejudiced. Here the complaint did not include factual allegations which would support piercing the corporate veil. The motion to conform the pleadings to the proof should not have been granted.

DISCLOSURE, LANDLORD-TENANT, COVID.

DEFENDANT TENANT CLOSED ITS BUSINESS AND ABANDONED THE LEASED PROPERTY DUE TO THE COVID PANDEMIC; PLAINTIFF LANDLORD TOOK POSSESSION OF THE PROPERTY AND CHANGED THE LOCKS; DEFENDANT WAS ENTITLED TO DISCOVERY TO DETERMINE WHETHER DEFENDANT ACCEPTED SURRENDER OF THE PREMISES AND THE APPROPRIATE AMOUNT OF DAMAGES (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant was entitled to discovery in this action on a commercial lease. Plaintiff closed its furniture business due to the COVID pandemic and abandoned the leased property. Defendant took possession of the property and changed the locks. Therefore questions remained concerning whether defendant accepted surrender of the property and whether the accelerated rent amounted to a penalty:

Generally, a tenant is relieved of its obligation to pay full rent due under a lease where it surrenders the premises before expiration of the term and the landlord accepts its surrender … . A surrender by operation of law may be inferred from the conduct of the parties where "the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem their lease terminated" … . "Such a surrender and acceptance severs the relationship between the parties upon the creation of an estate inconsistent with the prior tenant's rights under the lease" … . Further, "conduct by the landlord which [falls] short of an actual reletting but which indicate[s] the landlord's intent to terminate the lease and use the premises for his [or her] own benefit" may evince an intent to accept a tenant's surrender of the premises … .

… [W]hile plaintiff had no duty to mitigate damages …, any actions it may have taken to offset the rent owed by defendants are relevant to determining the amount of damages … . Thus … the discovery sought by defendants is relevant to the issues presented in plaintiff's motion for summary judgment … . … [B]ecause plaintiff seeks accelerated rent constituting liquidated damages … , defendants should have been afforded an opportunity to obtain information regarding whether the

undiscounted accelerated rent amount was disproportionate to plaintiffs's actual losses and thus an enforceable penalty … . University Sq. San Antonio, Tx. LLC v Mega Furniture Dezavala, LLC, 2021 NY Slip Op 05192, Fourth Dept 10-1-21

Practice Point: Where there is a question whether the landlord accepted the tenant's surrender of the leased premises, here because the tenant's business closed due to COVID, the tenant is entitled to discovery to determine whether the accelerated rent constituted a penalty.

FAMILY COURT, AUTHORITY OF.

FAMILY COURT DOES NOT HAVE THE AUTHORITY TO DIRECT THE DEPARTMENT OF SOCIAL SERVICES (DSS) TO COMMENCE A NEGLECT PROCEEDING (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court does not have the authority to direct the Department of Social Services (DSS) to commence a neglect proceeding:

Neither DSS nor the attorney for the child disputes the ability of DSS to commence a neglect proceeding without leave of a court. They also do not dispute that Family Court, under Family Ct Act § 1034, may order DSS to conduct a child protective investigation and report its findings to the court. What is disputed is whether Family Court may order a child protective agency, such as DSS, to commence a neglect proceeding against a parent. …

"Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute" … . The relevant statute provides that a proceeding under Family Ct Act article 10 may be "originate[d]" either by "a child protective agency" or "a person on the court's direction" (Family Ct Act § 1032 [a], [b]). In view of the express terms of the statute, Family Court has the authority to direct the commencement of a Family Ct Act article 10 proceeding. That authority, however, is limited to directing only a "person" to do so … — which DSS is not. Matter of Donald QQ. v Stephanie RR., 2021 NY Slip Op 05760, Third Dept 10-21-21

Practice Point: Family Court does not have the authority to direct the Department of Social Services to commence neglect proceedings.

FAMILY COURT, JURISDICTION, HOME STATE.

FAMILY COURT DID NOT MAKE THE REQUIRED INQUIRIES BEFORE DETERMINING NEW YORK DID NOT HAVE JURISDICTION OVER THIS NEGLECT PROCEEDING; MOTHER AND CHILD WERE IN CONNECTICUT, FATHER RESIDED IN NEW YORK (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court did not make the required inquiries before finding New York did not have jurisdiction over this neglect proceeding. Mother and child lived in Connecticut and father resided in Westchester County:

The Family Court's jurisdiction in this child protective proceeding is governed by the Uniform Child Custody Jurisdiction and Enforcement Act … . Nevertheless, the court failed to make any determination as to whether, despite the child's Connecticut residence at the time of the filing of the petition, it had jurisdiction under Domestic Relations Law § 76 on the basis that New York was the child's "home state" … . The court further failed to determine whether it had temporary emergency jurisdiction under Domestic Relations Law § 76-c … .. In addition, although a criminal proceeding was allegedly pending in Connecticut, the court failed to determine whether a "proceeding concerning the custody of the child [had] been commenced in a court of another state having jurisdiction," in which case the court would have been required to stay the proceedings and communicate with the court of the other state (Domestic Relations Law § 76-e[1] …). Finally, in the event that the court determined that it was an inconvenient forum and that Connecticut was the more appropriate forum, there is no indication that the court considered the required factors (see Domestic Relations Law § 76-f[2][a]-[h]). Moreover, upon such a finding, the court is required to "stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state" (Domestic Relations Law § 76-f[3]). Matter of Jenny M. (Thomas M.), 2021 NY Slip Op 05701, Second Dept 10-20-21

Practice Point: Where the child in a neglect proceeding resides in another state, Family Court must make findings of fact required by the Domestic Relations Law to determine whether Family Court has jurisdiction over the matter.

FORECLOSURE, CERTIFICATE OF MERIT.

IN A FORECLOSURE ACTION, ANY DEFICIENCIES IN PLAINTIFF'S COUNSEL'S CERTIFICATE OF MERIT (CPLR 3012-B) CAN NOT BE THE BASIS FOR DEFENDANT'S MOTION TO DISMISS ALLEGING PLAINTIFF'S LACK OF STANDING (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, over a partial dissent, determined deficiencies in the certificate of merit filed by plaintiff's counsel in this foreclosure action (pursuant to CPLR 3012-b) cannot be the basis for defendants' motion to dismiss alleging plaintiff's lack of standing:

This appeal implicates the extent to which there is interplay between a CPLR 3211(a) motion to dismiss in the context of a residential mortgage foreclosure action, the attorney certification requirements of CPLR 3012-b, and the moving party's burden of proof. For reasons analyzed below, we hold that a defendant moving to dismiss a complaint on the ground of the plaintiff's lack of standing does not meet the affirmative burden of proof by merely relying upon any defects that might exist with the certificate of merit submitted by the plaintiff's attorney under CPLR 3012-b, or otherwise, if the certificate of merit fails to address all potential aspects of standing.
* * *

… [I]n a mortgage foreclosure action, a motion to dismiss pursuant to CPLR 3211(a) on the ground of the plaintiff's lack of standing is not necessarily determined based on the adequacy or inadequacy of the certificate of merit filed by the plaintiff's counsel pursuant to CPLR 3012-b. … The complaint serves the legal purpose of giving notice to defendants of the transactions, occurrences, or series of transactions or occurrences intended to be proved, and the material elements of each cause of action … . The certificate of merit serves the ministerial and ethical purpose of requiring counsel to take good faith steps to assure that the action has merit, and to certify to the best of counsel's knowledge, information, and belief that a reasonable

basis exists for commencing the action and that the plaintiff has standing to recover on the note underlying the action.

Counsel's reasonable beliefs contained in a certificate of merit are irrelevant to whether defendants, in moving to dismiss a complaint under CPLR 3211(a), establish their own defined burden of proof for the dispositive relief of dismissal. Wilmington Sav. Fund Socy., FSB v Matamoro, 2021 NY Slip Op 05741, Second Dept 10-20-21

Practice Point: In a foreclosure action, deficiencies in plaintiff-bank's attorney's certificate of merit cannot be the basis for a defendant's motion to dismiss for lack of standing.

FORECLOSURE, REFORECLOSURE, AFFIRMATIVE DEFENSE.

THERE WAS A QUESTION OF FACT WHETHER THE PLAINTIFF'S FAILURE TO INCLUDE DEFENDANT IN THE ORIGINAL FORECLOSURE PROCEEDING WAS THE RESULT OF "WILFUL NEGLECT;" THEREFORE, PURSUANT TO RPAPL 1523, DEFENDANT'S "WILFUL-NEGLECT" AFFIRMATIVE DEFENSE IN THIS REFORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's affirmative defense to the reforeclosure should not have been dismissed. Plaintiff had not named defendant in its original foreclosure action, apparently because a quitclaim deed adding defendant to the title was not discovered in the title search. Defendant demonstrated there had been a prior foreclosure action in which defendant had been named as a party. Therefore, there was a question of fact whether the failure to name defendant in the original foreclosure action was the result of "wilful neglect:"

To prevail in a reforeclosure action, the plaintiff must demonstrate that the defect in the original foreclosure action "was not due to fraud or wilful neglect of the plaintiff and that the defendant or the person under whom he claims was not actually prejudiced thereby" (RPAPL 1523[2] [emphasis added]).

Pursuant to the language of RPAPL 1523 … the plaintiff had the burden of demonstrating … both that the defect in the underlying foreclosure action was not the result of fraud or the wilful neglect of the foreclosure plaintiff, and that the defect did not prejudice the defendant (see RPAPL 1523[1], [2]). * * *

Contrary to the plaintiff's contention, the evidence of the prior foreclosure action in which the defendant was named as a party raised a triable issue of fact as to whether the plaintiff's failure to name her as a defendant in the underlying foreclosure action was the result of "wilful neglect" (RPAPL 1523[2] …). U.S. Bank N.A. v Lomuto, 2021 NY Slip Op 05363, Second Dept 10-6-21

Practice Point: In a reforeclosure action, the plaintiff must demonstrate that the defect in the original foreclosure action "was not due to fraud or wilful neglect of the plaintiff and that the defendant or the person under whom he claims was not actually prejudiced thereby" (RPAPL 1523[2]).

FORECLOSURE, SETTLEMENT CONFERENCE, RIGHT TO COUNSEL.

PURSUANT TO CPLR 3408 (B), WHEN DEFENDANTS IN THIS FORECLOSURE ACTION APPEARED WITHOUT COUNSEL AT THE SETTLEMENT CONFERENCE, SUPREME COURT SHOULD HAVE DETERMINED WHETHER THEY WERE ENTITLED TO ASSIGNED COUNSEL, MATTER REMITTED (THIRD DEPT).

The Third Department, remitting the matter for a finding whether defendants in this foreclosure action are eligible for assigned counsel, determined the judge did not comply with CPLR 3408 (b) at the settlement conference:

[CPLR 3408 (b)] provides that, at the initial foreclosure settlement conference, "any defendant currently appearing pro se[] shall be deemed to have made a motion to proceed as a poor person under [CPLR 1101]. The court shall determine whether such permission shall be granted pursuant to standards set forth in [CPLR 1101]" (CPLR 3408 [b]). Because defendants appeared at the June 2016 settlement conference without representation, each was "deemed to have made a motion to proceed as a poor person" and Supreme Court was required to determine such motion

(CPLR 3408 [b]). Although Supreme Court erred in failing to adhere to its obligations under CPLR 3408 (b), the question remains whether defendants would have been eligible for the assignment of counsel based upon their financial circumstances. The record does not contain adequate information to render such a determination (see CPLR 1101 [a]). The eligibility for assigned counsel is a threshold issue that must be resolved before we can determine the merits of this appeal. As such, we withhold decision and remit the matter to Supreme Court to render a determination as to defendants' eligibility for assigned counsel as of the June 2016 settlement conference … . Carrington Mtge. Servs., LLC v Fiore, 2021 NY Slip Op 05743, Third Dept 10-21-21

Practice Point: If the defendant appears in a pre-foreclosure settlement conference without counsel, the judge must determine whether the defendant can proceed as a poor person and thereby be eligible for assigned counsel.

FORECLOSURE, STANDING.

PLAINTIFF DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the plaintiff in this foreclosure action did not demonstrate standing to bring the action. Therefore the lack-of-standing affirmative defense should not have been struck:

… [A] plaintiff may demonstrate its standing in a foreclosure action through evidence that it was in possession of the subject note endorsed in blank, or the subject note and a firmly affixed allonge endorsed in blank, at the time of the commencement of the action (see UCC 3-202[2] …).

… The plaintiff attempted to demonstrate that it was the holder of the underlying note by attaching to the complaint a copy of the note with an allonge. The purported allonge contains an endorsement in blank, has no pagination, is undated, and contains no writing in any way to demonstrate its connection to the note or that it was firmly affixed thereto. An affirmation of the plaintiff's counsel and an affidavit of a representative of the plaintiff's loan servicer, submitted in support of the

plaintiff's motion, also failed to indicate that the purported allonge is connected to the note or that it was firmly affixed thereto. Therefore, the plaintiff failed to establish that the purported allonge was so firmly attached to the note as to become a part thereof, and thus failed to establish, prima facie, its standing to commence this foreclosure action … . Federal Natl. Mtge. Assn. v Hollien, 2021 NY Slip Op 05321, Second Dept 10-7-21

JUDGES, UNAUTHORIZED PREMATURE CONSIDERATION OF THE MERITS.

SUPREME COURT ADDRESSED THE MERITS OF THE ACTION WITHOUT DISCOVERY AND TRIAL; THE COURT SHOULD ONLY HAVE DECIDED WHETHER PETITIONER WAS ENTITLED TO A PRELIMINARY INJUNCTION; MATTER REMITTED FOR PROCEEDINGS BEFORE A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, reversing Supreme Court and remitting the matter to a different judge, determined this breach-of-contract/preliminary-injunction/declaratory-judgment/Article-78 proceeding should not have been decided on the merits without discovery, the filing of a note of issue and a trial. The court should have decided only whether petitioner was entitled to a preliminary injunction. Petitioner is a contractor hired by respondents to install a water system for snow-making for ski trails. Respondents terminated the contract for cause and petitioner brought an action for a preliminary injunction (prohibiting respondents from awarding the contract to others without competitive bidding), a declaratory judgment, and breach of contract:

… Supreme Court should have confined … its determination to whether petitioner was entitled to a preliminary injunction. … Supreme Court prematurely resolved the merits of petitioner's declaratory judgment cause of action and respondents' counterclaims, without first affording the parties their rights to discovery and a jury trial on the claims/counterclaims raised in the plenary action (see CPLR 3103 [a]; 4101 …), and without a note of issue and certificate of readiness having been filed. Moreover, Supreme Court did not acknowledge or address petitioner's third cause of action for breach of contract, even though the plenary action involves, at its

heart, a contract dispute. Although petitioner also asserted a cause of action for a declaratory judgment, the award of declaratory relief hinges on the resolution of the contract dispute — that is, whether respondents wrongfully terminated the contract for cause under the terms of the contract. Matter of Murnane Bldg. Contrs., Inc. v New York State Olympic Regional Dev. Auth., 2021 NY Slip Op 05756, Third Dept 10-21-21

Practice Point: Obviously a judge cannot prematurely determine the merits of an action if only a motion for a preliminary injunction is before the court.

JUDGES, UNAUTHORIZED PREMATURE CONSIDERATION OF THE MERITS.

WHERE RESPONDENTS MADE A PRE-ANSWER MOTION TO DISMISS, THE ULTIMATE RELIEF SOUGHT BY PETITIONER SHOULD NOT HAVE BEEN GRANTED; THE MATTER WAS REMITTED TO ALLOW RESPONDENTS TO ANSWER THE PETITION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, noted that because respondents had made a pre-answer motion to dismiss petitioner's cause of action, the motion court should not have granted the relief sought by petitioner. Rather the respondents should have been allowed to answer the petition:

… [T]he Supreme Court improperly awarded [petitioner] the ultimate relief sought on the second cause of action. Upon denying the respondents' pre-answer motion to dismiss, the Supreme Court should have permitted the respondents to answer the petition (see CPLR 7804[f] …). … [W]e remit the matter … for the service and filing of an answer and the administrative record. Matter of O'Hara v Board of Educ., Yonkers City Sch. Dist., 2021 NY Slip Op 05703, Second Dept 10-20-21

Practice Point: Again, obviously, a judge cannot determine the merits of an action when only a pre-answer motion to dismiss is before the court.

JURISDICTION (SUBJECT MATTER), EMPLOYMENT LAW, HUMAN RIGHTS LAW.

SUPREME COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S HOSTILE WORK ENVIRONMENT CLAIMS; THE CONDUCT OCCURRED WHEN PLAINTIFF WAS NOT PHYSICALLY IN NEW YORK AND DID NOT HAVE ANY IMPACT ON THE TERMS, CONDITIONS OR EXTENT OF HER EMPLOYMENT WITHIN NEW YORK; THE FACTS WERE NOT DESCRIBED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the court did not have subject matter jurisdiction over the hostile work environment claims under the Human Rights Law. The facts were not explained. The conduct occurred when plaintiff was "physically situated outside of New York" and did not have any impact on the "terms, conditions or extent of her employment" within New York:

Supreme Court lacks subject matter jurisdiction over the Human Rights Law claims … . Defendants' alleged conduct occurred while plaintiff was "physically situated outside of New York" … , and did not have "any impact on the terms, conditions or extent of her employment . . . within the boundaries of New York" … . "The fact that the alleged discriminatory acts . . . occurred in New York is insufficient to plead impact in New York" … . Jarusauskaite v Almod Diamonds, Ltd., 2021 NY Slip Op 05460, First Dept 10-12-21

Practice Point: The facts of this employment discrimination action were not described in the decision. Supreme Court did not have subject matter jurisdiction over the action, even though the alleged discriminatory acts occurred in New York.

JURISDICTION, CORPORATIONS.

A FOREIGN CORPORATION WHICH REGISTERS TO DO BUSINESS IN NEW YORK CONSENTS TO THE SERVICE OF PROCESS IN NEW YORK BUT DOES NOT CONSENT TO THE GENERAL JURISDICTION OF NEW YORK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over a two-judge dissent, determined that a corporation registered to do business in New York consents to the service of process in New York, but not to general jurisdiction in New York. The underlying lawsuit stemmed from a car accident in Virginia. Both Ford and Goodyear were sued. Neither the car or the tire were made or sold in New York:

Aybar [the New York resident who drove the car] purchased the vehicle in New York from a third party. Ford did not sell the vehicle in this state in the first instance, nor did Ford design or manufacture the vehicle here. Similarly, Goodyear designed, manufactured, and initially sold the tire in other states. It is undisputed that Ford was incorporated in Delaware and maintains its principal place of business in Michigan and that Goodyear was incorporated and has its principal place of business in Ohio. At all relevant times, Ford and Goodyear were registered with the New York Secretary of State as foreign corporations authorized to do business in this state and had appointed in-state agents for service of process in accordance with the Business Corporation Law. * * *

We have never conflated statutory consent to service with consent to general jurisdiction, and the fact remains that, under existing New York law, a foreign corporation does not consent to general jurisdiction in this state merely by complying with the Business Corporation Law's registration provisions. Aybar v Aybar, 2021 NY Slip Op 05393, Ct App 10-7-21

Practice Point: The Court of Appeals, in an important opinion, determined corporations do not agree to general jurisdiction in New York by registering, for service of process purposes, with New York's Secretary of State.

RES JUDICATA.

RES JUDICATA PRECLUDED CLAIMS WHICH COULD HAVE BEEN RAISED IN A PRIOR PROCEEDING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the causes of action for tortious interference with contract and tortious interference with business relations against defendant JAZ were precluded by the doctrine of res judicata:

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" … . "One linchpin of res judicata is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim between the parties has been previously brought to a final conclusion" … . "The doctrine of res judicata operates to preclude the reconsideration of claims actually litigated and resolved in a prior proceeding, as well as claims for different relief against the same party which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding" … . "A pragmatic test has been applied to make this determination—analyzing whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage" … .

Here, the tortious interference with contract and tortious interference with business relations causes of action insofar as asserted against JAZ in this action could have been raised in the prior action, which arose out of the same transaction or series of transactions as those presented in this action … . Jacobson Dev. Group, LLC v Grossman, 2021 NY Slip Op 05851, Second Dept 10-27-21

SUMMARY JUDGMENT, CONVERSION OF MOTION TO DISMISS.

THE MOTION TO DISMISS THIS ACTION TO QUIET TITLE SHOULD NOT HAVE BEEN CONVERTED TO A MOTION FOR SUMMARY JUDGMENT TO WHICH PLAINTIFFS HAD NO OPPORTUNITY TO RESPOND; THE COMPLAINT STATED A CAUSE OF ACTION TO QUIET TITLE PURSUANT TO RPAPL ARTICLE 15 (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to dismiss the complaint seeking to quiet title should not have been converted to a summary judgment motion. The complaint stated a cause of action to quiet title pursuant to RPAPL article 15:

… [T]he court should not have converted defendant's motion to dismiss into a motion for summary judgment under CPLR 3211(c), since plaintiffs did not agree to "charting a summary judgment course," and the case did not involve a "purely legal question without any disputed issues of fact" … . Conversion of the motion prejudiced plaintiffs, who had no opportunity to respond to the contentions raised by defendant for the first time in reply … . …

"To maintain a cause of action to quiet title [to real property], a plaintiff must allege actual or constructive possession of the property and the existence of a removable cloud on the property, which is an apparent title to the property, such as in a deed or other instrument, that is actually invalid or inoperative" (…see RPAPL 1515; RPAPL 1501[1]). Here, the complaint adequately alleges facts that, if established, could support a finding that plaintiffs attained equitable title arising from the contract of sale they allegedly entered into with codefendant … for 25% of the property, as well as their payment of the agreed price and exclusive and actual occupancy of an apartment in the property … . Davis v Augoustopoulos, 2021 NY Slip Op 05772, First Dept 10-21-21

Practice Point: If a judge converts a motion to dismiss to a motion for summary judgment, the plaintiff must be given an opportunity to respond to any allegations made by defendant in reply.

SUMMARY JUDGMENT, SUBMISSION OF UNDISCLOSED EVIDENCE.

AN AFFIDAVIT WITH A PARTY STATEMENT AND A NON-PARTY AFFIDAVIT WHICH WERE NOT DISCLOSED SHOULD HAVE BEEN CONSIDERED IN OPPOSTION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS DOG-BITE CASE (FOURTH DEPT)

The Fourth Department, reversing Supreme Court and reinstating the complaint in this dog-bite case, determined an affidavit which should have been disclosed because it contained the statement of a party was admissible in opposition to defendant's motion for summary judgment (the Davis affidavit). In addition, the affidavit of a non-party witness should have been considered by the court (the Cheetham affidavit). Even if the discovery demands are read to include the non-party affidavit, the affidavit was privileged as material prepared for litigation and therefore not discoverable. Supreme Court had precluded both affidavits on the ground they had not been disclosed:

… [W]e agree with the court that the affidavit of Davis, insofar as it contained a party statement of defendant, should have been disclosed. CPLR 3101 (e) "enables a party to unconditionally obtain a copy of his or her own statement[,] creating an exception to the rule that material prepared for litigation is ordinarily not discoverable" … . We nevertheless agree with plaintiff that the court abused its discretion in precluding Davis's affidavit from consideration in opposition to the motion … . Defendant knew of Davis as a person of interest, which is why counsel sought to depose her approximately four months prior to making the motion, and defendant did not seek the assistance of the court to compel Davis's production … . Inasmuch as plaintiff is not precluded from relying on Davis's affidavit to oppose summary judgment, Davis is not precluded from testifying at trial … .

We also conclude that the court abused its discretion in precluding the Cheetham affidavit from consideration. Cheetham was listed as a witness in discovery and was deposed. Cheetham is not a party to this action, and his affidavit did not include any statements of a party. Even assuming that Cheetham's statement was discoverable, we note that defendant's discovery demands did not include a demand for nonparty witness statements. Assuming further that defendant's discovery demands could be

read to include a request for the statement of a nonparty witness, i.e., Cheetham, we conclude that Cheetham's statement was conditionally privileged as material prepared in anticipation of litigation (see CPLR 3101 [d] [2 …). Defendant would be unable to show any substantial need for Cheetham's statement inasmuch as Cheetham was deposed and therefore provided the substantial equivalent of the material contained in the statement … . Vikki-lynn A. v Zewin, 2021 NY Slip Op 05412, Fourth Dept 10-8-21

Practice Point: The court in this dog-bite case abused its discretion by prohibiting plaintiff from relying on affidavits which included previously undisclosed statements by a party (defendant) and by a nonparty witness submitted in opposition to defendant's motion for summary judgment. The defendant was aware of the affiant whose affidavit included a statement by defendant but did not depose her. The nonparty witness was deposed and the statement was privileged as material prepared for litigation.

SUMMARY JUDGMENT, LATE MOTION FOR.

A LATE MOTION FOR SUMMARY JUDGMENT SHOULD NOT BE CONSIDERED ON THE MERITS ABSENT GOOD CAUSE FOR THE DELAY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' late motion for summary judgment should not have been considered on the merits:

CPLR 3212(a) provides, inter alia, that the court may set a date after which no motion for summary judgment may be made, and "[i]f no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." "'[G]ood cause' in CPLR 3212(a) requires a showing of good cause for the delay in making the motion" … .

Here, the plaintiffs' motion was, in effect, for summary judgment. The plaintiffs do not dispute that they did not file their motion within the period specified by CPLR 3212(a), and no good cause for the delay was shown. Thus, the Supreme Court erred

in considering the motion on the merits … , and should have denied the motion. Bennett v State Farm Fire & Cas. Co., 2021 NY Slip Op 05687, Second Dept 10-20-21

Practice Point: A late motion for summary judgment should not be considered by the court absent showing good cause for the delay in bringing the motion.

VENUE, DEFENDANT DOCTOR WORKED IN TWO COUNTIES.

ALTHOUGH DEFENDANT DOCTOR PRACTICED IN THE BRONX FOR PART OF EACH WEEK, THE PRINCIPAL OFFICE OF HIS BUSINESS AND HIS RESIDENCE WERE IN WESTCHESTER COUNTY, WHERE PLAINTIFF WAS TREATED; SUPREME COURT PROPERLY GRANTED DEFENDANTS' MOTION TO CHANGE THE VENUE FROM BRONX TO WESTCHESTER COUNTY (CT APP).

The Court of Appeals, reversing the Appellate Division, over an extensive two-judge dissent, determined Supreme Court had properly granted defendants' motion for a change of venue from Bronx County to Westchester County in this medical malpractice action. The defendant doctor (Goldstein) was described by plaintiff as an "individually-owned business" with a "principal office" in Bronx County. Dr. Goldstein treats some patients in Bronx County. But plaintiff was treated by Dr. Goldstein in Westchester County, where defendant business (Westmed) is located and where Dr. Goldstein resides:

Under CPLR 503(d), "[a] partnership or an individually-owned business shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner or individual owner suing or being sued actually resides." * * *

While … registration documents confirmed … that Dr. Goldstein also worked in the Bronx, the venue statute does not deem an individually-owned business a resident of every county where it has an office or transacts business. To conclude otherwise would read the phrase "principal office" out of the statute. Lividini v Goldstein, 2021 NY Slip Op 05618, CtApp 10-14-21

Practice Point: The defendant doctor in this medical malpractice action resided and treated plaintiff in Westchester County. The fact that the doctor saw patients every week in Bronx County was not enough to allow the action to be brought there.

VERDICT, MOTION TO SET ASIDE, ERRONEOUS EXCLUSION OF EVIDENCE.

SUPREME COURT ERRONEOUSLY PRECLUDED PLAINTIFF'S TREATING PHYSICIAN'S TESTIMONY AND THE ADMISSION OF MEDICAL RECORDS IN THIS TRAFFIC ACCIDENT CASE; PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to set aside the defense verdict in this traffic accident case should have been granted. The trial court had erroneously precluded some of the testimony of one of plaintiff's treating physicians and the admission of another treating physician's medical records. The defendant had waived any objection to the records by failing to object after service of plaintiff's notice of intention to enter the documents:

At the trial on the issue of damages, the plaintiff called one of her treating physicians, Irving Friedman, as a witness. The Supreme Court erred in granting the defendant's application to preclude Friedman's testimony concerning the cervical and thoracic regions of the plaintiff's spine based upon a conceded error Friedman made wherein he misidentified the MRI of the plaintiff's spine … . Under the circumstances of this case, any defects in Friedman's opinions or the foundations on which those opinions are based "should go to the weight to be accorded that evidence by the trier of fact, not to its admissibility in the first instance" … .

In addition, the Supreme Court erred in precluding Friedman's testimony regarding future treatment and possible need for future surgery, as Friedman had addressed these issues in his medical reports … .

… [T]he Supreme Court erred in precluding the admission of the medical records of another of the plaintiff's treating physicians, Rubin Ingber, under the business

records exception to the hearsay rule. The defendant waived his right to any objection to the admission of the records as business records, as he failed to timely object after having been served with the plaintiff's notice of her intention to enter the documents into evidence pursuant to CPLR 3122- … . Benguigui v Racer, 2021 NY Slip Op 05318, Second Dept 10-6-21