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AMEND ANSWER, WORKERS' COMPENSATION, LABOR LAW-CONSTRUCTION LAW, EMPLOYMENT LAW.

DEFENDANT EMPLOYER'S LATE MOTION TO AMEND THE ANSWER IN THIS LABOR LAW 240 (1) ACTION TO ASSERT THAT PLAINTIFF'S EXCLUSIVE REMEDY WAS THE WORKER'S COMPENSATION BENEFITS ALREADY AWARDED SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant employer's (H&M's) motion to amend its answer to allege Workers' Compensation was plaintiff's sole remedy in this Labor Law 240(1) action should have been granted, despite the lateness of the motion:

H&M's initial failure to submit the proposed amended pleading (CPLR 3025[b]) was a technical defect that the court should have overlooked (see CPLR 2001), particularly since H&M attached the proposed amendment to its reply … . Plaintiff's arguments that he was prejudiced by the amendment proposed in H&M's cross motion, filed about three years after this action was commenced and two years after the workers' compensation ruling was affirmed, are unavailing … . It is not dispositive that leave to amend was sought a few months after the note of issue was filed … .

The valid and final decision of a panel of the Workers' Compensation Board, affirming a decision by a Workers' Compensation Law Judge that was based on a finding that H&M was plaintiff's employer at the time of the accident, "bars [plaintiff] from relitigating the identical issue in this proceeding" … . Chen v 111 Mott LLC, 2021 NY Slip Op 07501, First Dept 12-28-21

Practice Point: Workers' Compensation may be a worker's only remedy re: his/her employer.

ANONYMOUS CAPTION.

DEFENDANT'S MOTION TO COMPEL PLAINTIFF, WHO SUED UNDER THE NAME MARGARET DOE, TO AMEND THE CAPTION TO INCLUDE HER LEGAL NAME SHOULD NOT HAVE BEEN GRANTED; PLAINTIFF PRESENTED EVIDENCE SUING UNDER HER OWN NAME WOULD HAVE SEVERE MENTAL-HEALTH CONSEQUENCES (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to compel plaintiff to amend the pleadings to include her legal name (the caption reads "Margaret Doe") should not have been granted:

The presumption in favor of open trials and the potential prejudice to defendant did not outweigh plaintiff's privacy interest … . In addition to her own affidavit attesting to the psychological harm it would cause to disclose her name publicly, plaintiff submitted affidavits from her treating psychologist and psychiatrist, both of whom opined that forcing plaintiff to proceed with the litigation under her legal name would have severe consequences for her mental health. This particularized medical evidence corroborating plaintiff's claims of personal harm is compelling … . Doe v Bloomberg L.P., 2021 NY Slip Op 06754, First Dept 12-2-21

Practice Point: A plaintiff will be allowed to sue anonymously (using "Margaret Doe" in the caption, for example) if he/she can demonstrate suing under his/her legal name will have severe mental health consequences.

APPEALS, CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

THE REQUIREMENTS FOR AN APPEALABLE ORDER IN A SORA RISK-LEVEL PROCEEDING EXPLAINED (THIRD DEPT).

The Third Department, withholding a decision on the merits of the SORA risk-level determination by County Court until the People enter and serve an appealable order, in a full-fledged opinion by Justice Garry, explained the "appealable order" requirements for SORA proceedings:

Despite the statutory requirement that the court render a written SORA "order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based" (Correction Law § 168-n [3]), the lack of such orders is a recurring problem … . In some cases, as here, the court states during a bench decision that a so-ordered provision will be provided on the transcript but that does not occur … . In others, the court signs a standard form designating the defendant's risk level classification without "so-ordered" language or specific findings and conclusions … . In each of these situations, this Court generally dismisses the appeal, as we must, because it is not properly before us due to the lack of an appealable order … . This creates a confusing situation in which no proper order exists regarding the defendant's status under SORA (see Correction Law § 168-n [3]).

… Generally, in any civil case, upon a clerk's entry of a written order, the prevailing party should serve a copy of the order, together with notice of entry, upon the losing party (see CPLR 2220 [b]; 5513 [a] …). The losing party, once served with a copy of that entered order and notice of entry, has 30 days to take an appeal as of right (see CPLR 5513 [a]; see also Correction Law § 168-n [3]). Pursuant to SORA, "the district attorney, or his or her designee," is statutorily required to appear at the SORA hearing on behalf of the state and bears the burden of proving the facts supporting the risk level determination being sought (Correction Law § 168-n [3]). Thus, the People bear the responsibility of ensuring that a written SORA order is entered and that notice of entry, along with a copy of that written order, is served on the defendant. People v Lane, 2021 NY Slip Op 07324, Third Dept 12-23-21

Practice Point: A written order served on the defendant is a prerequisite for an appeal of a SORA risk-level determination.

APPEALS, SERVICE OF PROCESS.

THE ORDER ISSUED AFTER A TRAVERSE HEARING FINDING DEFENDANTS WERE NOT PROPERLY SERVED IS APPEALABLE PURSUANT TO CPLR 5501 (C); THE ORDER BRINGS UP FOR APPEAL WHETHER THE TRAVERSE HEARING WAS NECESSARY; THE MAJORITY CONCLUDED THE HEARING WAS NOT NECESSARY; THERE WAS AN EXTENSIVE DISSENT (SECOND DEPT).

The Second Department, reversing Supreme Court, over an extensive concurrence and an extensive dissent, determined: (1) the order issued after a traverse hearing finding that defendant was not properly served in this foreclosure action was an appealable order pursuant to CPLR 5501 (c); (2) the order brings up for review the finding that a traverse hearing was necessary; and)3), defendants' affidavit denying proper services was conclusory and, therefore, a traverse hearing was not required. The central issue in the decision is whether the order directing the traverse hearing had been brought for review by the order dismissing the complaint after the hearing:

… [O]ur jurisdiction is premised upon CPLR 5501(c), which directs that this Court "shall review questions of law and questions of fact on an appeal from a[n] . . . order of a court of original instance," as well as the consistent line of cases from this Court holding that an appeal from an order granting a motion to dismiss based upon lack of personal jurisdiction—issued after a hearing—also brings up for review the issue of whether a hearing was necessary to determine the motion … . Since an order directing a hearing to aid in the determination of a motion holds the determination of the motion in abeyance, the subsequent order made after the hearing is "the proper order to appeal from" … . OneWest Bank FSB v Perla, 2021 NY Slip Op 07550, Second Dept 12-29-21

Practice Point: An order issued after finding defendant was not properly served brings up for appeal whether the traverse hearing was necessary in the first place.

ARBITRATION, MECHANIC'S LIENS.

THE MOTION TO DISMISS THE ARBITRATION IN THIS ACTION ALLEGING NONPAYMENT FOR CONSTRUCTION WORK SHOULD NOT HAVE BEEN GRANTED; THE ARBITRATOR RULES ON PAYMENT FOR LABOR AND MATERIALS; COURTS RULE ON THE VALIDITY OF MECHANIC'S LIENS (FIRST DEPT).

The First Department noted that an arbitrator's ruling on the value of labor an materials is conclusive for all parties, but it is not conclusive on the validity of the underlying mechanic's lien itself. Here the contactor, Flowcon, filed mechanic's lens alleging defendant, Andiva, failed to pay for construction work on Andiva's townhouse. The construction contract required arbitration and granted the arbitrator broad powers. Supreme Court granted Andiva's motion to dismiss the arbitration and the First Department reversed, compelled arbitration and stayed the LIen Law counterclaims:

The AAA's Construction Industry Arbitration Rules provide that the arbitration tribunal shall rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement. Thus, the threshold issue of the arbitrability of Flowcon's claims alleging nonpayment is one for the arbitrator, not the courts, particularly given the parties' broad arbitration clause … . To the extent Andiva argues that arbitration would usurp the court's "gatekeeper" role of ruling upon the validity of a lien and undermine the public policy underlying the remedies afforded a lienee under Lien Law §§ 39 and 39-a since its allegation of lien exaggeration would be effectively resolved by an arbitrator rather than a court, the argument is unavailing. This Court has held that an arbitrator's decision as to the value of labor and materials is conclusive as to all parties to the arbitration but not conclusive as to the validity of the mechanic's lien itself … . Flowcon, Inc. v Andiva LLC, 2021 NY Slip Op 06756, First Dept 12-2-21

Practice Point: Here the arbitrator's rulings on payment for labor and materials in this construction dispute are conclusive on the parties, but any rulings on the validity of mechanic's liens are not conclusive.

ATTORNEYS, SUBMISSION OF LATE OPPOSITION PAPERS.

SUPREME COURT SHOULD HAVE ACCEPTED PLAINTIFF'S LAW-OFFICE-FAILURE EXCUSE FOR LATE SUBMISSION OF PAPERS OPPOSING DFENDANT'S MOTION FOR SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate a default judgment, based upon law office failure, should have been granted:

… [T]he defendant moved for summary judgment dismissing the complaint. That motion was initially returnable on October 20, 2016, but the return date was adjourned to December 8, 2016, with opposition papers to be served by November 21, 2016. The plaintiff served opposition to the motion on or about November 28, 2016 … . In an order entered February 2, 2017, the Supreme Court granted the defendant's motion for summary judgment. …

… [G]iven the totality of all relevant factors, including the delay of only approximately seven days from the due date for opposition papers to the time the plaintiff served opposition papers, the lack of any evidence of willfulness by the plaintiff, or prejudice to the defendant from the delay, and the strong public policy in favor of resolving cases on the merits, the Supreme Court improvidently exercised its discretion in not accepting the plaintiff's excuse of law office failure … . … [T]he plaintiff demonstrated that he had a potentially meritorious opposition to the defendant's motion for summary judgment. Stango v Byrnes, 2021 NY Slip Op 06877, Second Dept 12-8-21

ATTORNEYS, GENDER DISCRIMINATION, HUMAN RIGHTS LAW, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

PLAINTIFF'S COMPLAINT AGAINST THE DEFAULTING DEFENDANT-ATTORNEY SUFFICIENTLY ALLEGED GENDER DISCRIMINATION AND INFLICTION OF EMOTIONAL DISTRESS BY DEFENDANT-ATTORNEY'S WITHHOLDING REQUESTED LEGAL SERVICES AND ENGAGING IN SEXUAL HARASSMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's complaint against the defaulting attorney-defendant should not have been dismissed. Plaintiff alleged defendant attorney discriminated against her by depriving her of the legal services she sought in connection with a sexual assault. Plaintiff alleged she was sexually harassed by defendant attorney. The matter was sent back to determine damages:

"[B]y defaulting, a defendant admits all traversable allegations contained in the complaint, and thus concedes liability, although not damages" … . "Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action," but the standard of proof is "minimal," "not stringent" … .

… [P]laintiff averred that defendant … used his position of authority and confidence as an attorney to gain her trust, and then discriminated against her by withholding the legal services she sought in connection with litigation related to a sexual assault of plaintiff and using the pretext of offering such services to harass and subject her to unwelcome sexual conduct and advances. …

Plaintiff established claims under New York State Executive Law § 269(2)(a) (State HRL) that defendant … discriminated against plaintiff based on her gender … . [P]laintiff also made a prima facie showing that defendant['s] … discriminatory behavior violated the City HRL … . [P]laintiff established her claim for intentional infliction of emotional distress by demonstrating that defendant … engaged in extreme and outrageous conduct through his deliberate and malicious campaign of harassment, while disregarding a substantial probability that doing so would cause severe emotional distress to her, and that his conduct did in fact did

cause her severe emotional distress … . Petty v Law Off. of Robert P. Santoriella, P.C., 2021 NY Slip Op 07527, First Dept 12-28-21

Practice Point: An attorney's withholding requested services from a client may constitute discrimination under the NYS Human Rights Law.

BANKRUPTCY, CLAIMS ARISING AFTER BANKRUPTCY FILING.

A CLAIM WHICH ARISES AFTER THE FILING OF A BANKRUPTCY PETITION BELONGS TO THE DEBTOR, NOT TO THE BANKRUPCTY ESTATE (FIRST DEPT).

The First Department, noting its prior rulings to the contrary, determined a claim which arises after the filing of a bankruptcy petition belongs to the debtor, not the bankruptcy estate:

This Court has previously held that a claim which arose after the filing of a bankruptcy petition was the property of the estate (see Barranco v Cabrini Med. Ctr., 50 AD3d 281, 282 [1st Dept 2008]; Williams v Stein, 6 AD3d 197, 198 [1st Dept 2004]). When those cases were decided, there was a split among the federal courts which had addressed the issue. However, there is now uniformity among the Federal Courts of Appeals, which have held that pursuant to section 541(a) of the Bankruptcy Code, a claim which arose after the filing of a bankruptcy petition belongs to the debtor and not the estate … . As this Court is bound by federal law when making a determination on this issue … we follow the … federal holdings and find that because the claims at issue arose after the filing of the bankruptcy petition, the claims belong to Realty [plaintiff]. Thus, Realty has the capacity to sue [defendants]. Moncho v Miller, 2021 NY Slip Op 06960, First Dept 12-14-21

Practice Point: A claim which arises after a bankruptcy petition is filed belongs to the debtor, not the bankruptcy estate.

CLASS ACTIONS, CONTRACT LAW, UTILITIES, POWER OUTAGES.

THE CLASS—LONG ISLAND POWER AUTHORITY (LIPA) CUSTOMERS AFFECTED BY POWER OUTAGES CAUSED BY HURRICANE SANDY—SHOULD NOT HAVE BEEN CERTIFIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the class, Long Island Power Authority (LIPA) customers affected by Hurricane-Sandy power outages, should not have been certified:

The plaintiffs base their claims against LIPA on an allegation that LIPA failed to fulfill its promise, made in 2006, that it would spend $25 million annually on a 20-year "storm hardening" project (i.e., $500 million total) intended to render its electric system more durable and resilient in the face of major storms. …

… [T]o establish liability, the plaintiffs would have to demonstrate that, had LIPA performed storm hardening work consistent with its promise, their outages would have been shortened or avoided. This is, as LIPA argues, a fact-driven inquiry which is both speculative and hopelessly individual since it would require the factfinder to determine not only what should have been completed … , but also to speculate whether that work, had it been performed, would have prevented or shortened individual class members' outages. * * *

… [T]he Supreme Court should also have denied class certification on the basis that the plaintiffs cannot state a viable cause of action to recover damages for breach of contract … . Matter of Long Is. Power Auth. Hurricane Sandy Litig. v Long Is. Power Auth., 2021 NY Slip Op 07545, Second Dept 12-29-21

Point Point: When there are too many factual differences in how members of a class are affected by the acts or omissions of a defendant, class certification will not fly.

COMPLAINTS, CHILD VICITIMS ACT, SCANDALOUS OR PREJUDICIAL MATTER.

GUIDELINES FOR FUTURE CHILD VICTIMS ACT COMPLAINTS WHERE DEFENDANT MOVES TO STRIKE "SCANDALOUS OR PREJUDICIAL MATTER" (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, laid out guidelines for future pleadings in Child Victims Act (CVA) complaints alleging sexual abuse. The question before the court was how the statute allowing the striking of "scandalous and prejudicial matter" (CPLR 3024(b)) should be applied to CVA complaints. The court ultimately only struck one phrase which referenced "another survivor of [defendant's] molestation…". Although the denial of a motion to strike scandalous matter from a pleading is not appealable, the 2nd Department granted leave to appeal:

Based upon the conclusions directly reached here, there are bright lines that should be followed in the future:

— Factual allegations about a plaintiff's own alleged sexual abuse will not be stricken from the complaint under CPLR 3024(b) as they are central and necessary to giving notice of the transaction or occurrence or series of transactions and occurrences, and the material elements of the cause(s) of action asserted.

— Factual allegations about a defendant's prior sexually-abusive conduct will not be stricken from the complaint under CPLR 3024(b) where one or more causes of action includes, as a necessary element, what acts or propensities an institutional defendant knew or should have known by the time of the plaintiff's own abuse.

— Factual allegations about a defendant's concurrent-in-time sexual abuse of another person will not be stricken from the complaint under CPLR 3024(b) where one or more causes of action includes, as a necessary element, what acts or propensities an institutional defendant knew or should have known by the time of the plaintiff's own abuse.

— Factual allegations about a defendant's subsequent relevant statements or conduct that specifically relate back to the sexual abuse of the plaintiff will not be stricken from the complaint under CPLR 3024(b).

— Factual allegations about a defendant's statements or conduct involving a subsequent sexual abuse survivor, other than the plaintiff, may be stricken from a complaint under CPLR 3024(b) on the ground that they are scandalous or prejudicial and not necessary to the elements of the plaintiff's specific cause(s) of action. Pisula v Roman Catholic Archdiocese of N.Y., 2021 NY Slip Op 06872, Second Dept 12-8-21

Practice Point: This decision should be consulted before composing a Child Victims Act complaint to make sure the allegations are not vulnerable to a motion to strike scandalous and prejudicial matter.

DEBTOR-CREDITOR, SEIZURE OF PROPERTY, DEBTOR'S REMEDIES.

A JUDGMENT DEBTOR CANNOT BRING AN ACTION IN TORT AGAINST THE CREDITOR OR THE MARSHAL ALLEGING DAMAGES STEMMING FROM THE SEIZURE OF PROPERTY TO BE APPLIED TO THE DEBT; THE JUDGMENT DEBTOR'S REMEDIES ARE CONFINED TO THOSE DESCRIBED IN CPLR 5239 AND 5240 (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent, and an additional single-judge dissent, determined a judgment debtor cannot bring a action in tort against the creditor or the marshal stemming from the seizure of the judgment debtor's property. Any such claim must be made pursuant to CPLR 5239, 5240:

"[G]eneral provisions that permit 'any interested person'—including a judgment debtor—to secure remedies for wrongs arising under the statutory scheme" are set out in CPLR 5239 and 5240 … . CPLR 5239 provides that "[p]rior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt." In such a proceeding, "[t]he court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded" … . Section 5240 in turn lays out the court's power to, "at any time, on its own initiative or the motion of any interested person, and upon

such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." … CPLR 5240 grants the courts broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts'" … . … CPLR 5240 provides courts with the ability to craft flexible and equitable responses to claims that arise with respect to enforcement of valid money judgments. Plymouth Venture Partners, II, L.P. v GTR Source, LLC, 2021 NY Slip Op 07055, CtApp 12-16-21

Practice Point: A judgment debtor cannot bring an action in tort stemming from the seizure of the debtor's property by the creditor and/or the marshal. CPLR 5230 & 5240 provide the only available remedies.

FAMILY LAW, CUSTODY, ARBITRATION, CONTRACT LAW.

CUSTODY MATTERS ARE NOT SUBJECT TO ARBITRATION, DESPITE A PROVISION TO THAT EFFECT IN THE STIPULATION OF SETTLEMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined: (1) despite the stipulation calling for arbitration, custody matters are not subject to arbitration; and (2) upon remittal the court must determine whether New York has jurisdiction and, if so, whether New York is an inconvenient forum. Plaintiff is a citizen of the US and defendant is a citizen of Israel. The parties lived together in New York:

The Supreme Court erred in declining to exercise jurisdiction over the parties' custody/parental access disputes on the basis that their stipulation of settlement, which was incorporated but not merged into their judgment of divorce, contained an arbitration clause … . "Disputes concerning child custody and visitation are not subject to arbitration as 'the court's role as parens patriae must not be usurped'" … .

Moreover, since the Supreme Court has made previous custody determinations concerning the parties' children, the court, prior to determining whether it has subject matter jurisdiction, must first determine whether the defendant and the

children have a significant connection with New York and whether there is substantial evidence in New York … . … If, upon remittal, the court determines … that it retains exclusive, continuing jurisdiction over the custody and parental access issues, it may exercise that jurisdiction, or it may decline to do so if it determines … that New York is an inconvenient forum … . Matsui v Matsui, 2021 NY Slip Op 06843, Second Dept 12-8-21

Practice Point: Custody is not subject to arbitration, even if a stipulation of settlement in a divorce proceeding purports to authorize it.

FAMILY LAW, JURISDICTION, FAMILY OFFENSE, AGE OF COMPLAINANT.

THE FACT THAT COMPLAINANT TURNED 21 DURING THE FAMILY OFFENSE HEARING DID NOT DEPRIVE FAMILY COURT OF JURISDICTION; NOR DID THE INCAPACITY OF THE COMPLAINANT (SECOND DEPT).

The Second Department, reversing Family Court and remitting the matter, determined Family Court did lose jurisdiction over the family offense proceeding when complainant turned 21. The court noted that even if the complainant is incapacitated (but not judicially declared incompetent) Family Court has jurisdiction:

In the context of a family offense proceeding, the question of subject matter jurisdiction is generally confined to whether a qualifying offense has been committed between parties in a qualifying relationship (see Family Ct Act §§ 115[e]; 812[1] …), irrespective of the complainant's age. Thus, the fact that the complainant attained the age of 21 during the hearing did not deprive the court of jurisdiction to hear and determine this matter.

To the extent the respondent's motion may be construed as challenging the petitioner's ability to prosecute this matter in a representative capacity for the complainant, this does not amount to a jurisdictional defect requiring dismissal of the proceeding … . Indeed, "[a]n incapacitated individual who has not been judicially declared incompetent may sue or be sued in the same manner as any other person" … , and courts must not "shut their eyes to the special need of

protection of a litigant actually incompetent but not yet judicially declared such" … . Rather, insofar as the record raises questions of fact as to whether the complainant may require the assistance of a guardian ad litem to protect her interests, the Family Court should have granted the petitioner's request to appoint a guardian to the extent of conducting a hearing to determine whether such an appointment was necessary pursuant to CPLR 1201… . Matter of Vellios v Vellios, 2021 NY Slip Op 07276, Second Dept 12-22-21

Practice Point: The fact that the complainant in this family offense proceeding turned 21 or was incapacitated did not deprive Family Court of subject matter jurisdiction.

FAMILY LAW, STATUTE OF LIMITATIONS, STIPULATION OF SETTLEMENT.

PLAINTIFF SOUGHT ARREARAGES FOR A PORTION OF DEFENDANT'S PENSION UNDER THE TERMS OF THE STIPULATION OF SETTLEMENT WHICH WAS INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE; THE ACTION WAS THEREFORE IN THE NATURE OF A BREACH OF CONTRACT AND WAS LIMITED BY THE SIX-YEAR STATUTE OF LIMITATIONS (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the calculation of the arrearages for plaintiff's potion of defendant's pension was restricted by the six-year statute of limitations for contact actions. The stipulation of settlement, which is the basis for plaintiff's right to a portion of the pension, was incorporated, but not merged, into the judgment of divorce such that a breach of the stipulation is a breach of contract:

It is well settled that "[a] stipulation of settlement that is incorporated, but not merged, into the judgment of divorce is a contract subject to the principles of contract construction and interpretation" … , and an action seeking money damages for violation of a separation agreement is subject to the six-year statute of limitations for breach of contract actions … . Contrary to the court's determination, it is irrelevant that plaintiff sought the arrearages by way of motion rather than by commencement of a plenary action. Although motions to enforce the terms of a

stipulation are not subject to the statute of limitations … , in this case plaintiff was seeking arrearages, or money damages, for the amounts that she did not receive because the QDRO was never received by Niagara Mohawk. When a party is seeking arrearages or a money judgment, the statute of limitations applies whether a party commences a plenary action … or, as here, simply moves for that relief … .

Thus, we conclude that plaintiff's claim is timely only to the extent that she seeks her share of pension payments made within six years prior to her motion filed on July 29, 2019. Mussmacher v Mussmacher, 2021 NY Slip Op 07413, Fourth Dept 12-23-21

Practice Point: An action pursuant to a stipulation of settlement which is incorporated in but not merged with a judgment of divorce is in the nature of a breach of contract subject to a six-year statute of limitations.

FORECLOSURE, VACATION OF STIPULATION OF DISCONTINUANCE.

WHERE A FORECLOSURE ACTION IS TERMINATED BY A STIPULATION OF DISCONTINUANCE WITH PREJUDICE, THE STIPULATION CANNOT BE VACATED BY A MOTION, A PLENARY ACTION MUST BE BROUGHT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank's motion to vacate the stipulation terminating the foreclosure action should not have been granted:

The Supreme Court improperly granted Deutsche Bank's motion to vacate the stipulations. The mortgage foreclosure action was terminated by the stipulation of discontinuance with prejudice and Deutsche Bank could only vacate that stipulation by commencing a plenary action … . Deutsche Bank Natl. Trust Co. v Goltz, 2021 NY Slip Op 06671, Second Dept 12-1-21

Practice Point: In a matter, here a foreclosure, which is terminated by a stipulation of discontinuance with prejudice, the stipulation can only be vacated by bringing a plenary action, a motion to vacate will not fly.

FORUM NON CONVENIENS.

THIS ACTION INVOLVED THE NAZIS' CONFISCATION OF A DEGAS PAINTING OWNED BY A GERMAN CITIZEN WHO SUBSEQUENTLY MOVED TO SWITZERLAND AND THEN FRANCE; SUPREME COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ACTION ON FORUM NON CONVENIENS GROUNDS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, over a dissent, determined the action involving a Degas painting confiscated by the Nazis from a German citizen, who then moved to Switzerland and France, was properly dismissed on forum non coveniens grounds. The dismissal presented a matter requiring the exercise of discretion by Supreme Court, which was not abused:

CPLR 327 (a) provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just." Generally, "a decision to grant or deny a motion to dismiss on forum non conveniens grounds is addressed to a court's discretion" … and, if the courts below considered the various relevant factors in making such a determination, "there has been no abuse of discretion reviewable by this [C]ourt," even if we would have weighed those factors differently … . * * *

… [T]he record reflects that the courts below painstakingly considered the relevant factors, including the public policies at issue, and determined that the balance of factors militated in favor of dismissal … . Thus, plaintiffs' argument that this is one of the "relatively uncommon" cases in which forum non conveniens can be resolved, and denied, as a matter of law ultimately fails … . Inasmuch as the courts below considered the various relevant factors, "there has been no abuse of discretion reviewable by this [C]ourt" … . Estate of Kainer v UBS AG, 2021 NY Slip Op 07056, CtApp 12-16-21

Practice Point: Whether the forum non conveniens doctrine should be applied is ordinarily a matter of discretion, not a question of law. As long as all the relevant factors are considered by the court, the discretion will not be deemed to have been abused.

INSURANCE LAW, CONTRACT LAW, CHOICE OF FORUM, CHOICE OF LAW.

THE INSURED, SPACE NEEDLE, LLC, IS LOCATED IN WASHINGTON STATE; ALTHOUGH THE INSURANCE POLICY NAMED NEW YORK AS THE FORUM AND REQUIRED THE APPLICATION OF NEW YORK LAW FOR ANY LAWSUITS, THE WASHINGTON INSURANCE CODE RENDERED SUCH PROVISIONS VOID; THEREFORE THE INSURER WAS NOT ENTITLED TO AN ANTI-SUIT PRELIMINARY INJUNCTION IN NEW YORK (FIRST DEPT).

The First Department determined plaintiff Elite Insurance Company did not demonstrate a likelihood of success or a balancing of the equities in its favor in its attempt to have a preliminary injunction issued in New York to prevent a suit by the insured, Space Needle of Seattle, Washington, after the COVID-related business-loss claim was denied: Although the insurance contract indicated New York would be the forum and New York law would apply, the Washington Insurance Code rendered such provisions void. The decision includes extensive discussions of the leading cases in these areas:

… [P]laintiff did not demonstrate either a likelihood of success on the merits of its claim for an anti-suit injunction based on the contractual choice-of-law and forum selection clauses of the parties' insurance contract, or a balancing of the equities in its favor. As an insurance company authorized to sell insurance in Washington, plaintiff was required to comply with the Washington Insurance Code's prohibition against choice-of-law and forum selection clauses in insurance policies sold in Washington (Wash Rev Code Chapter 48). The Code (RCW) expressly provides that no insurance contract delivered or issued for delivery in this state (Washington) . . .

"shall contain any condition, stipulation or agreement (a) requiring it to be construed according to the laws of any other state or country. . .; or (b) depriving the courts of this state of the jurisdiction of action against the insurer . . ." (RCW 48.18.200 [1]). RCW further specifies that any such agreement violating this prohibition "shall be void, but such voiding shall not affect the validity of the other provisions of the contract" (RCW 48.18.200 [2]). Thus, plaintiff has not demonstrated that the equities tip in its favor where it is attempting, as Supreme Court stated, "a blatant end run around" Washington's prohibition against choice-of-law and forum selection clauses. North Am. Elite Ins. Co. v Space Needle, LLC, 2021 NY Slip Op 06769, First Dept 12-2-21

Practice Point: Despite the language in the insurance policy naming New York as the forum and requiring the application of New York law, the statute in the insured's home state declaring such insurance-policy provisions void made it unlikely an anti-suit injunction would be issued in New York. Therefore the insurer's application for a preliminary injunction in New York prohibiting suit by the insured was denied. The out-of-state insured claimed business-loss due to COVID.

JUDGES, ADDING A PARTY, FAMILY LAW.

FAMILY COURT DID NOT HAVE THE AUTHORITY TO, SUA SPONTE, ADD A PARTY TO THIS PATERNITY PROCEEDING; APPLICABLE LAW EXPLAINED (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court did not have the authority to, sua sponte, add a person with whom mother had had a relationship, Rory EE, as a party in the paternity proceeding. All involved agreed Rory EE had no involvement with the child and equitable estoppel was not an issue:

… [A] court cannot, on its own initiative, add or direct the addition of a party … . Rather, the court may only summon a person who should be joined, if the court has jurisdiction over the person; if jurisdiction over the person can be obtained only by

his or her consent or appearance, the court must determine whether the proceeding should be permitted to proceed in that person's absence (see CPLR 1001 [b] …).

Family Court plainly did not have the authority to make Rory EE. a named party to this proceeding. … Family Court has also failed to obtain jurisdiction over Rory EE. No petition or summons, or supplemental summons, was filed against or served upon him … , no party has moved to add him as a necessary party and there has been no stipulation to that end (see CPLR 1003 …), and he has not appeared before Family Court or otherwise consented to the court's jurisdiction (see CPLR 320 [b] …). … [W]e reverse and remit for further proceedings, at which time the parties remain free to move for or stipulate to Rory EE. being added as a necessary party, or not, and, absent such a motion or stipulation, and if his joinder is deemed to be necessary, the court is limited to directing that reasonable efforts be made to join him as a party or considering whether this matter should proceed in his absence (see CPLR 1001 …). Matter of Schenectady County Dept. of Social Servs. v Noah DD., 2021 NY Slip Op 07587, Third Dept 12-30-21

Practice Point: Absent a motion from a party, a judge cannot add a party to the proceeding.

JUDGES, SUA SPONTE AMENDMENT OF ORDER, FAMILY LAW.

FAMILY COURT DID NOT HAVE THE AUTHORITY TO, SUA SPONTE, AMEND A DISMISSAL ORDER FROM "WITHOUT PREJUDICE" TO "WITH PREJUDICE" (THIRD DEPT).

The Third Department noted that Family Court did not have the authority to, sua sponte, amend a dismissal order from "without prejudice" to "with prejudice:"

… Family Court erred in sua sponte amending its October 13, 2020 dismissal order from "without prejudice" to "with prejudice." Family Court may, in its discretion, correct or amend an order, so as to cure mistakes, defects or irregularities in the order that do not affect a substantial right of a party (see CPLR 5019 [a] …) or to resolve any ambiguity in the order to make it comport with what the court's holding clearly intended … . However, in the absence of a motion pursuant to

CPLR 2221 (d) or 5015 (a), Family Court lacks the authority to issue an amended or corrected order that alters its dismissal of a petition from "without prejudice" to "with prejudice," as such alteration is one of substance … . Matter of Brian W. v Mary X., 2021 NY Slip Op 07332, Third Dept 12-23-21

Practice Point: Judges do not have the authority to change the substance of an order without a motion from a party. Here the sua sponte change from "with prejudice" to "without prejudice" was not authorized.

JUDGES, PRE-ANSWER MOTION TO DISMISS, PREMATURE RULING.

ALTHOUGH THE PRE-ANSWER MOTION TO DISMISS THE ARTICLE 78 PETITION WAS PROPERLY DENIED, THE COURT SHOULD NOT HAVE GRANTED THE PETITION WITHOUT AFFORDING THE RESPONDENTS THE OPPORTUNITY TO ANSWER IT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court. determined the granting of the Article 78 petition after denying a pre-answer motion to dismiss was not proper:

In a CPLR article 78 proceeding, once such a "motion is denied, the court shall permit respondent to answer, upon such terms as may be just" (CPLR 7804 [f]). Here, in denying the motion, the court essentially treated respondents' motion as one for summary judgment, searched the record, and granted summary judgment against respondents. It is well settled, however, that "if the court intends to treat the motion as one for summary judgment, it must give adequate notice to the parties that it so intends" … , and the court gave no such notice here. Additionally, only where "the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer" should a court grant the petition without permitting respondents to answer … . Mintz v City of Rochester, 2021 NY Slip Op 07389, Fourth Dept 12-23-21

Practice Point: A judge's denial of a pre-answer motion to dismiss an Article 78 petition does not allow the judge to grant the petition before the respondent answers it.

JURISDICTION, FAMILY LAW, CUSTODY.

FAMILY COURT SHOULD NOT HAVE DETERMINED, WITHOUT A HEARING, THAT NEW YORK DID NOT HAVE JURISDITION OVER THIS CUSTODY MATTER OR THAT NEW YORK WAS AN INCONVENIENT FORUM; MOTHER HAD RELOCATED TO HAWAII WITH THE CHILDREN (SECOND DEPT).

The Second Department, reversing Family Court, determined the court should not have summarily, without a hearing: (1) New York did not have jurisdiction over the custody proceeding; and (2) New York was in inconvenient forum. Mother had relocated to Hawaii with the children:

The court made the initial custody determination for the children in conformity with the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter UCCJEA) and, therefore, would ordinarily retain exclusive continuing jurisdiction pursuant to Domestic Relations Law § 76-a … . In order to determine the issue of whether it lacked exclusive continuing jurisdiction pursuant to Domestic Relations Law § 76-a(1)(a), the court should have afforded the parties an opportunity to present evidence as to whether the children had maintained a significant connection with New York, and whether substantial evidence was available in New York concerning the children's "care, protection, training, and personal relationships" … . …

If, upon remittal, the court determines that it does retain exclusive and continuing jurisdiction pursuant to Domestic Relations Law § 76-a, it may exercise that jurisdiction or it may decline to do so if it determines, upon consideration of all of the relevant statutory factors and after allowing the parties to be heard, that New York is an inconvenient forum … . Matter of Sutton v Rivera, 2021 NY Slip Op 07548, Second Dept 12-29-21

Practice Point: Whenever facts are disputed, a hearing is required. This species of error comes up a lot in Family Court cases.

JURORS, SUBSTITUTION OF ALTERNATE JUROR, CONSTITUTIONAL LAW, NEGLIGENCE.

WHEN SUBSTITUTING AN ALTERNATE JUROR AFTER DELIBERATIONS HAVE BEGUN, THE JURY MUST BE INSTRUCTED TO START THE DELIBERATIONS OVER AND DISREGARD THE PRIOR DELIBERATIONS; THE OVER $14 MILLION PLAINTIFF'S VERDICT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN SET ASIDE (SECOND DEPT).

The Second Department, reversing the over $14 million judgment and ordering a new trial on damages, in a full-fledged opinion by Justice Barros, determined defendants' motion to set aside the verdict in this traffic accident case should have been granted. An alternate juror was substituted after deliberations began. The jury should have been instructed to begin deliberations anew:

… [W]e address whether the 2013 amendments to CPLR 4106, which changed the statute to allow trial courts to substitute a regular juror with an alternate juror even after deliberations have begun, may be reconciled with the constitutional right to a trial by a six-member jury wherein each juror deliberates on all issues (see NY Const, art I, § 2 …). We hold that to reconcile CPLR 4106 with the constitutional and statutory requirements for a civil jury verdict, the trial court must, upon substituting an alternate juror in place of a regular juror after deliberations have begun, provide an instruction to the jury directing them, inter alia, to restart their deliberations from the beginning with the substituted juror and disregard and set aside all prior deliberations. Under the circumstances of this case, the Supreme Court's failure to give that instruction resulted in an invalid verdict which, among other things, deprived the defendants of their request to poll each of the jurors whose votes were counted as part of the verdict … , and their right to "a process in which each juror deliberates on all issues and attempts to influence with his or her individual judgment and persuasion the reasoning of the other five" … . Caldwell v New York City Tr. Auth., 2021 NY Slip Op 07537, Second Dept 12-29-21

Practice Point: A plaintiff in a civil jury trial is entitled under the NY Constitution to a verdict by a six-member jury. If an alternative juror is substituted after deliberations have started and the jury doesn't start over from scratch, that constitutional right is violated.

LABOR LAW-CONSTRUCTION LAW, SUMMARY JUDGMENT, PRIMA FACIE CASE, EVIDENCE.

PLAINTIFF IN A LABOR LAW 240 (1) AND 241 (6) ACTION NEED NOT SUBMIT AN AFFIDAVIT TO MAKE OUT A PRIMA FACIE CASE; THE HEARSAY STATEMENTS REFERENCING OR ATTRIBUTED TO PLAINTIFF DID NOT RAISE A QUESTION OF FACT (FIRST DEPT).

The First Department, reversing Supreme Court and granting plaintiffs' summary judgment motion on the Labor Law 240 (1) and 241 (6) causes of action, determined: (1) plaintiff need not submit an affidavit to make out a prima facie case; and (2) defendant's reliance on hearsay, including statements referenced in the certified medical records, did not raise a question of fact:

Plaintiffs established prima facie that defendant Choice is liable to them under Labor Law § 240(1) and Labor Law § 241(6) predicated on Industrial Code (12 NYCRR) § 23-1.7(b)(1)(i) through plaintiff Bledar Greca's (plaintiff) testimony that he was injured while working on the fifth floor of defendant Choice's property when a piece of wood that had been placed as a temporary path shifted, causing him to fall through an open area between beams. …

Although plaintiff's medical records were certified, Choice [defendant] did not establish that the statements contained in them on which it relied either were germane to plaintiff's diagnosis and treatment or are directly attributable to plaintiff … . The handwritten statement ostensibly by defendant Cekaj Construction Corp.'s principal and the affidavit by the owner of second third-party defendant Donato Plumbing Group, Inc. as to what Cekaj's principal told him about plaintiff's accident

are both inadmissible hearsay, and do not qualify as admissions by an opposing party … . Greca v Choice Assoc. LLC, 2021 NY Slip Op 06759, First Dept 12-2-21

Practice Point: At the summary judgment stage, a plaintiff in a Labor Law 240(1) action need not submit an affidavit to make out a prima facie case.

Practice Point: In a Labor Law 240(1) action, hearsay statements in medical records which do not relate to diagnosis and treatment and are not directly attributable to plaintiff will not defeat plaintiff's motion for summary judgment. In addition, hearsay statements which do not qualify as admissions will not defeat plaintiff's motion for summary judgment.

NECESSARY PARTIES, MUNICIPAL LAW.

THE NYC WATER BOARD DETERMINED PETITIONER WAS NOT ENTITLED TO A RETROACTIVE REDUCTION IN SEWER CHARGES BUT WAS NOT NAMED AS A RESPONDENT IN PETITIONER'S ARTICLE 78 ACTION; THE WATER BOARD MUST BE ADDED AS A NECESSARY PARTY (SECOND DEPT).

The Second Department noted that the NYC Water Board was a necessary party in the Article 78 contesting the Board's ruling on sewer charges. The Article 78 named only the NYC Department of Environmental Protection:

… [T]he appellants correctly contend that the Water Board should be joined as a necessary party to this proceeding. "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants" (CPLR 1001[a]). In a proceeding pursuant to CPLR article 78, the governmental agency which performed the challenged action must be a named party … . Since the instant petition challenged the Water Board's … final determination, and the Water Board is the entity which promulgates the rate schedule of sewer rents and wastewater allowances … in the discharge of its duties to fix and collect water and sewer charges in order for the City to maintain the

water system … , the Water Board was a necessary party to this proceeding. Indeed, the Water Board would be prejudiced by the judgment purporting to bind its rights when it had no opportunity to be heard … . … [B]ecause the Water Board should have been joined in this action and has not been made a party, and because it is subject to the jurisdiction of the court, the judgment must be vacated, and the Supreme Court should order the Water Board summoned in this proceeding so that it may be heard (see CPLR 1001[b] …). Matter of A&F Scaccia Realty Corp. v New York City Dept. of Envtl. Protection, 2021 NY Slip Op 06995, Second Dept 12-15-21

Practice Point: Where the action by a city agency, here the NYC Water Board, is the subject of an Article 78 proceeding, the agency is a necessary party.

PREEMPTION, NEGLIGENCE, PRODUCTS LIABILITY, MEDICAL MALPRACTICE.

THE PRODUCTS LIABILITY AND BREACH OF WARRANTY CAUSES OF ACTION ALLEGING THE FAILURE OF AN IMPLANTED MEDICAL DEVICE WHICH ASSISTS THE HEART WERE PREEMPTED BY FEDERAL LAW; THE CAUSES OF ACTION ALLEGING NEGLIGENCE ON THE PART OF THE ENGINEERS WHO REPLACED THE LEAD TO THE DEVICE WERE NOT PREEMPTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the products liability and breach of warranty causes action alleging decedent's death was caused by an implanted medical device which assisted the heart were preempted by the Federal Food, Drug, and Cosmetic Act as amended by the Medical Device Amendments of 1976 (MDA). But the causes of action alleging negligence of the engineers who replaced a lead on the device were not preempted by the MDA:

The MDA … includes an express preemption provision, prohibiting state requirements "with respect to a device intended for human use" (21 USC 360k[a]) which are "different from, or in addition to, any requirement" … applicable under

federal law and which "relate[ ] to the safety or effectiveness of the device" … . Pursuant to this provision, it has been held that common-law causes of action which "challenge the safety and effectiveness of a medical device and seek to impose requirements that are 'different from, or in addition to,' federal requirements," such as those sounding in products liability and breach of warranty, are preempted … .

… [P]laintiff … claims in her first and fifth causes of action that negligent acts or omissions of the engineers … , allegedly committed during the course of their replacement of the lead in the decedent's LVAD, were a proximate cause of his death. Those claims in those causes of action do not "challenge the safety and effectiveness of a medical device and seek to impose requirements" different or additional to federal law … . Accordingly, they are not preempted. Arnold v Lanier, 2021 NY Slip Op 06666, Second Dept 12-1-21

Practice Point: Federal law preempts products liability actions stemming from implanted medical devices, but does not preempt negligence actions stemming from the repair of such devices. Here engineers replaced a lead to the implanted device during the surgical procedure. The action against the engineers was not preempted by the federal Medical Device Amendments of 1976 (MDA).

Practice Point: A motion to vacate a default judgment based upon late submission of papers opposing a summary judgment should be granted if the delay was not long, it was not willful, the other party was not prejudiced, and the defense is meritorious.

PRIVILEGE, WAIVER.

SILENCE DOES NOT CONSTITUTE WAIVER; HERE THE NONPARTY DID NOT EXPRESSLY WAIVE THE COMMON INTEREST, WORK PRODUCT OR TRIAL PREPARATION PRIVILEGES WITH RESPECT TO SUBPOENAED DOCUMENTS (FIRST DEPT).

The First Department, reversing Supreme Court, determined silence did not constitute waiver of common interest, work product or trial preparation privileges with respect to subpoenaed documents:

"Waiver is an intentional relinquishment of a known right and should not be lightly presumed" … . Accordingly, waiver should not be found absent "evidence from which a clear manifestation of intent . . . to relinquish [the right in question] could be reasonably inferred" … . Waiver "will . . . [not] be implied unless the opposite party is misled to his or her prejudice into the belief that a waiver was intended" … ; hence, a finding of waiver cannot be based upon "mere silence or oversight," or upon "mistake, negligence or thoughtlessness" … . The burden of proving waiver rests with the party asserting it … . * * *

… [I]t is not alleged that appellant or his counsel expressly orally waived the privilege claims at issue, nor does the record reflect that appellant engaged in any gamesmanship with respect to his privilege claims or that he ever "misled [defendants-respondents] to [their] prejudice into the belief that a waiver was intended" … . Homapour v Harounian, 2021 NY Slip Op 07080, First Dept 12-21-21

Practice Point: Here silence did not constitute a waiver of common interest, work product or trial preparation privileges with respect to subpoenaed documents.

PRIVILEGE, MEDICAL MALPRACTICE, "QUALITY ASSURANCE" PROCEEDINGS, PRIVILEGE, EDUCATION-SCHOOL LAW, PUBLIC HEALTH LAW.

WHERE THE MINUTES OF A "QUALITY ASSURANCE" PEER-REVIEW COMMITTEE MEETING ASSESSING THE MEDICAL TREATMENT AFFORDED A PATIENT DO NOT IDENTIFY THE SPEAKERS, THE PARTY-STATEMENT EXCEPTION TO THE PUBLIC HEALTH LAW AND EDUCATION LAW PRIVILEGE APPLIES, MAKING ALL THE STATEMENTS BY UNIDENTIFIED SPEAKERS SUBJECT TO DISCOVERY BY THE PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Christopher, determined the party-statement exception to the privilege afforded statements made in a peer-review "quality assurance" committee's review of the medical treatment afforded a patient applied to all of the statements made by speakers who were not identified in the meeting minutes. The defendants, who were asserting the privilege, were unable to demonstrate the statements attributed in the minutes to the "committee" were not made by a party and therefore not subject to the party-statement exception to the privilege. In other words, the statements made at the meeting by unidentified speakers were discoverable by the plaintiff in this medical malpractice action:

Requiring a defendant who is asserting the quality-assurance privilege to identify who made the statements at a medical or quality assurance review meeting, so as to demonstrate that no party statements subject to disclosure are being withheld, will further the goals of the quality-assurance privilege … . By identifying the maker of the statements at the medical or quality-assurance review meetings, only those statements that are made by a party will be subject to disclosure, and only those statements entitled to protection from disclosure will be protected. … [I]n order to avail itself of the privilege afforded by Education Law § 6527(3) and Public Health Law § 2805-m(2), the party asserting the privilege must demonstrate that no party statements subject to disclosure are being withheld, and thus must identify who said what at the meeting. …

… [T]he party-statement exception applied to those statements in the peer-review committee meeting minutes that were attributed to the committee, and for which there was no indication as to who specifically made the statements, as they were not entitled to the quality-assurance privilege set forth in Education Law § 6527(3) and Public Health Law § 2805-m(2). Siegel v Snyder, 2021 NY Slip Op 07264, Second Dept 12-22-21

Practice Point: A "quality assurance" proceeding held by a healthcare provider to assess the treatment provided by its personnel is generally privileged except for statements made by a party to a lawsuit. In this case, the minutes of the proceeding did not identify the speakers and the court applied the party-statement exception to the privilege to the entire proceeding. All the statements made by unidentified participants were deemed discoverable by the plaintiff.

RES JUDICATA, INSURANCE LAW, SUBROGATION, NEGLIGENCE.

THE SUBROGATION ACTION BY THE INSURER OF THE PROPERTY OWNER IN THIS SLIP AND FALL CASE WAS NOT PRECLUDED BY THE RES JUDICATA DOCTRINE AFTER A GLOBAL SETTLEMENT WITH THE INJURED PARTY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the subrogation action by plaintiff-insurer of the property owner, 60 LBC, in this slip and fall case was not precluded by the res judicata doctrine:

The court determined that plaintiff is barred by res judicata from pursuing 60 LBC's [the property owner's] coverage claim against defendant [the insurer of the landscaping business hired by 60 LBC to remove ice and snow] because it was resolved in the global settlement [with the injured party] reached during mediation. We disagree. Defendant [insurer of the landscaping company] was not a party to the underlying personal injury action or the third-party action, and the release resulting from the settlement of those actions makes no mention of any claims directly against defendant by 60 LBC or anyone else. Nor does the stipulation of discontinuance. The breach of contract claim asserted by 60 LBC against Red Cedar [the landscaping company] in the third-party action is separate and distinct

from plaintiff's breach of contract cause of action against defendant [insurer of the landscaping company] here. Cincinnati Ins. Co. v Acadia Ins. Co., 2021 NY Slip Op 07351, Fourth Dept 12-23-21

SERVICE OF PROCESS, ALTERNATIVE METHOD, FORECLOSURE, JUDGES.

THE JUDGE SHOULD HAVE HELD A HEARING BEFORE GRANTING THE BANK'S MOTION FOR AN ALTERNATIVE METHOD OF SERVICE IN THIS FORECLOSURE ACTION; DEFENDANT AVERRED THE ADDRESS LISTED ON THE MORTGAGE WAS CORRECT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a hearing should have been held before allowing the bank to use an alternate method of court authorized service on defendant. Defendant's correct address was on the mortgage:

… [T]he defendant's submissions "raised a question of fact as to whether it was impracticable for the plaintiff to serve [him] with the summons and complaint pursuant to CPLR 308(1), (2), or (4), such that the plaintiff was entitled to an alternative method of court-authorized service pursuant to CPLR 308(5)" … . In particular, the mortgage listed an address for the defendant in Queens and the defendant averred that he lived at that Queens address at the time, and for several years after this action was commenced. Nothing in the plaintiff's submissions established or even addressed whether or why it was impracticable to serve the defendant at the address listed on the mortgage. Under these circumstances, the Supreme Court should not have determined the defendant's motion without holding a hearing … . U.S. Bank N.A. v Ming Kang Low, 2021 NY Slip Op 07572, Second Dept 12-29-21

SERVICE OF PROCESS, APPEARANCE, LACK OF JURISDICTION DEFENSE, INFANTS, FORECLOSURE.

A CROSS-MOTION TO DISMISS THE COMPLAINT PURSUANT TO CPLR 3215 (C) IS NOT AN APPEARANCE AND DOES NOT WAIVE THE LACK-OF-JURISDICTION DEFENSE; INFANT DEFENDANT IN THIS FORECLOSURE ACTION WAS NOT SERVED IN ACCORDANCE WITH CPLR 309; THE COMPLAINT SHOULD HAVE BEEN DISMISSED FOR LACK OF PERSONAL JURISDICTION (SECOND DEPT)

The Second Department, reversing Supreme Court, determined the infant defendant's (A.M.'s) cross-motion to dismiss the foreclosure complaint for lack of personal jurisdiction should have been granted:

The defendant James McGown purchased the subject property on January 25, 2006. On March 15, 2007, he executed a mortgage encumbering the subject property in favor of Mortgage Electronic Registration Systems, Inc. (… MERS) … . MERS subsequently assigned the mortgage to the plaintiff. McGown failed to make a payment due under the terms of the mortgage … . … McGown executed a deed purportedly conveying the subject property to his daughter, the infant A.M., who at the time was less than one year old. * * *

… A.M. did not waive the defense of personal jurisdiction by cross-moving to dismiss the complaint pursuant to CPLR 3215(c). "'A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss'" … . However, certain types of limited involvement in an action by a defendant do not waive jurisdictional defenses, including "cross-moving to dismiss the complaint pursuant to CPLR 3215(c), as such a motion by a defendant 'does not constitute an appearance in the action'" … . …

… [T]he process server attested that he served A.M. pursuant to CPLR 308(2) by delivering a copy of the summons and complaint to the "housekeeper" at A.M.'s dwelling place and then completing the requisite mailing. … [A]lthough McGown was served individually, he was not served … as an individual and representative of A.M. … . Since neither of these methods of service complied with the

requirements of CPLR 309, the present action was jurisdictionally defective as asserted against A.M. US Bank N.A. v McGown, 2021 NY Slip Op 06879, Second Dept 12-8-21

Practice Point: A cross-motion to dismiss a complaint pursuant to CPLR 3215 (c) is not an appearance and therefore does not waive a lack-of-jurisdiction defense.

Practice Point: The requirements of service of process on an infant in CPLR 308 and 309 must be complied with to establish jurisdiction over the infant.

STATUTE OF LIMITATIONS, ACCRUAL UPON ACQUITTAL CONTRACT LAW, CONVERSION, FIDUCIARY DUTY, FRAUD.

PLAINTIFF WAS ACQUITTED OF CHARGES STEMMING FROM THE ALLEGED APPROPRIATION OF INSURANCE PROCEEDS DUE OTHER BENEFICIARIES AND THEN SUED TWO INSURANCE COMPANIES; THE CAUSES OF ACTION FOR BREACH OF CONTRACT, CONVERSION AND BREACH OF FIDUCIARY DUTY DID NOT ACCRUE UPON ACQUITTAL AND WERE THERFORE TIME-BARRED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the causes of action that did not require plaintiff's innocence in a criminal matter were time barred. Plaintiff was acquitted of charges stemming from the allegation she appropriated life insurance proceeds which were due to other beneficiaries. Plaintiff then sued two insurance companies alleging breach of contract, breach of fiduciary duty, conversion, and aiding and abetting breach of a fiduciary duty. None of those causes of action accrued upon plaintiff's acquittal. All were therefore time-barred:

Contrary to … the court's conclusion, those causes of action did not accrue at the time the criminal proceeding terminated. The termination of a criminal proceeding is relevant for claims for malicious prosecution and legal malpractice arising out of a criminal proceeding … . For those claims, a plaintiff is required to make a showing of innocence, and thus the claims do not accrue until the plaintiff can

assert the element of his or her innocence on the criminal charges … . Plaintiff here does not need to assert her innocence on the criminal charges as an element of the causes of action for breach of contract, conversion, and breach of fiduciary duty … . Morrow v Brighthouse Life Ins. Co. of NY, 2021 NY Slip Op 07373, Fourth Dept 12-23-21

Practice Point: The statutes of limitations for the causes of action for malicious prosecution and legal malpractice were triggered by the acquittal of the underlying criminal charges, but the statutes of limitations for breach of contract, breach of fiduciary duty and conversion were not. Those causes of action were therefore time-barred here.

STATUTE OF LIMITATIONS, CRIMINAL LAW, CIVIL SUITS BY VICTIMS.

THE EXTENSION OF THE STATUTE OF LIMITATIONS IN CPLR 213-B(1) WHICH ALLOWS A VICTIM OF A CRIME TO SUE THE PERPETRATOR WITHIN SEVEN YEARS OF THE DATE OF CRIME APPLIES ONLY WHERE THE PERPETRATOR HAS BEEN "CONVICTED OF [THE] CRIME;" A PERPETRATOR WHO HAS BEEN ADJUDICATED A YOUTHFUL OFFENDER HAS NOT BEEN "CONVICTED OF A CRIME" WITHIN THE MEANING OF CPLR 213-B(1) (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Connelly, in a matter of first impression, determined CPLR 213-b(1) does not extend the statute of limitations for civil actions against someone "convicted of a crime" where that person has been adjudicated a youthful offender. Here plaintiff, Anthony Pitt, was accused of rape by Ericka Feagles. The charges against Pitt were resolved in his favor in October 2011. Although Feagles was subsequently charged with falsely reporting an incident and making a false written statement, she was adjudicated a youthful offender in connection with those charges in April 2012. Plaintiff's August 2016 suit against Feagles would only be timely if the seven-year extension of the statute of limitations in CPLR 213-b(1) applied. The Second Department determined being adjudicated a youthful offender does not equate to being "convicted of a crime." Therefore the extension in CPLR 213-b(1) did not apply

and plaintiff's suit was time-barred. The court noted the plaintiff could have brought an intentional tort action within the applicable one-year statute of limitations:

CPLR 213-b, entitled "Action by a victim of a criminal offense," provides, as relevant, that "an action by a crime victim . . . may be commenced to recover damages from a defendant: (1) convicted of a crime which is the subject of such action, for any injury or loss resulting therefrom within seven years of the date of the crime" … . * * *

… [W]e … must consider the competing legislative purpose of the youthful offender statute. In enacting the youthful offender statute, the legislature sought to relieve youthful offenders of the consequences of a criminal conviction and give them a "second chance" … . It would be inconsistent with that legislative purpose to allow plaintiffs to commence civil actions against youthful offenders long after the conduct underlying the adjudication occurred … .

Our determination does not prohibit civil actions against defendants for the conduct underlying youthful offender adjudications. We simply hold that plaintiffs must commence such actions within the applicable statutes of limitations, without the benefit of the seven-year extension provided in CPLR 213-b(1). We note that here, the plaintiffs commenced the prior action within the applicable one-year statute of limitations for intentional torts and would have had a timely action against Feagles had they properly served her. The plaintiffs did not do so. Pitt v Feagles, 2021 NY Slip Op 07299, Second Dept 12-22-21

Practice Point: The extended seven-year statute of limitations for actions by victims of sex offenders is triggered by the "conviction" of the sex offender. Here the defendant was adjudicated a youthful offender. Therefore the seven-year extension did not apply.

STATUTE OF LIMITATIONS, ACCELERATION OF DEBT, DEBTOR-CREDITOR.

IF A DEBT IS ACCELERATED, THE SIX-YEAR STATUTE OF LIMITATIONS FOR RECOVERY OF THE DEBT IS TRIGGERED; IF THE DEBT IS NOT ACCELERATED, THE INSTALLMENTS DUE WITHIN THE SIX YEARS PRIOR TO COMMENCING SUIT ARE RECOVERABLE (THIRD DEPT).

The Third Department determined that, because the debt was never accelerated, recovery of the installments due during the six years prior to commencement of the action is not time-barred:

The claim alleges that the [defendants] stopped making monthly payments as required by the 1988 agreement in December 2003, 15 years before the commencement of this action. "Without acceleration of the entire debt by" [plaintiff], however, "a cause of action for portions of the indebtedness" owed would only accrue when each of the individual installments became due … . The … defendants did not demonstrate that [plaintiff] accelerated the debt and, as a result, failed to sustain their burden of showing that the claim was time-barred to the extent that it sought to recover installments that became due after December 2012. DiCenzo v Mone, 2021 NY Slip Op 06734, Third Dept 12-2-21

Practice Point: Acceleration of a debt (calling the whole debt in) starts the six-year statute of limitations for commencing suit. If the debt is not accelerated, only the unpaid installments which came due in the six years before the suit was commenced are recoverable.

STATUTE OF LIMITATIONS, REAL PROPERTY LAW, EASEMENT BY NECESSITY, MUNICIPAL LAW.

THE OWNER OF THE OLD BRONX COURTHOUSE HAS A VALID CAUSE OF ACTION SEEKING AN EASEMENT BY NECESSITY OVER THE SIDEWALK/STREET ABUTTING THE COURTHOUSE, DESPITE THE "DEMAPPING" OF THE ABUTTING STREET AND THE CONVEYANCE OF THE "DEMAPPED" STREET TO THE DEFENDANT; THE ACTION IS NOT PRECLUDED BY THE STATUTE OF LIMITATIONS BECAUSE IT SEEKS TO QUIET TITLE TO THE OWNER'S LAND (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Renwick, determined the plaintiff's action claiming ownership of, or an easement over, the sidewalk/street area abutting plaintiff's property (the old Bronx courthouse) was properly dismissed, with exception of the claim of an easement by necessity. The street abutting the courthouse had been "demapped" by the city and conveyed to defendants before plaintiff purchased the courthouse property. The deed description of the courthouse property was unambiguous and was not altered by a hand-drawn circle around the property on the recorded tax map. The action was not precluded by the statute of limitations because it is an action to quiet title to the plaintiff's land:

… [W]here, like here, the owner is in possession, the right of action to remove a cloud on title is a continuous one accruing from day to day, and this right is not barred by the statute of limitations until the cloud is continued without interruption for a length of time sufficient to effect a change of title as a matter of law … . "The reason for this rule is that while the owner in fee continues subject to an action, proceeding, or suit on the adverse claim, he or she has a continuing right to the aid of a court of equity to ascertain and determine the nature of such claim and its effect on his or her title, or to assert any superior equity in his or her favor"… . Accordingly, the owner may wait until his or her possession is disturbed, or his or her title is attacked, before taking steps to vindicate his or her right … . "The requirement of prompt action is imposed as a policy matter upon persons who would challenge title to property rather than those persons who seek to quiet title to their land" … . * * *

… [T]he deed contains no reference to the altered Tax Map, with the hand-drawn circle, purportedly intended to change the boundaries of the property. Nor is there any indication on the altered Tax Map of the circle's purpose. If the parties wanted to change the boundaries of the property described in the deed and Current Tax Map to include a surrounding demapped street, they could easily have done so by making such notation on the deed and altered Tax Map. Liberty Sq. Realty Corp. v The Doe Fund, Inc., 2021 NY Slip Op 07082, First Dept 12-21-21

Practice Point: Access to a building over property deeded to another may be allowed pursuant to an easement by necessity.

Practice Point: With respect to the statute of limitations, a property owner may wait until its possession is disturbed or its title is attacked to take steps to quiet title.

STATUTE OF LIMITATIONS, TRUSTS AND ESTATES, REPUDIATION OF FIDUCIARY DUTY.

ALTHOUGH THE TRUSTEE DID NOT PROVIDE AN ACCOUNTING, HE NEVER REPUDIATED HIS FIDUCIARY DUTIES; THEREFORE THE SIX-YEAR STATUTE OF LIMITATIONS FOR AN ACCOUNTING WAS NOT TRIGGERED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the cause of action for an accounting of a trust should not have been limited to the six years before the filing of the complaint. Although the trustee did not provide a requested accounting. the trustee did not openly repudiate his fiduciary duties, so the six-year statute of limitations was never triggered:

The statute of limitations for a cause of action seeking an accounting is six years (see CPLR 213 [1] …). It is well settled that the limitations period begins to run only when " 'the trustee openly repudiates his [or her] fiduciary obligations' " and " 'a mere lapse of time is insufficient without proof of an open repudiation' " … . "The party seeking the benefit of the statute of limitations defense bears the burden of proof on the issue of open repudiation" … . Here, defendants "failed to sustain

their burden of establishing that [defendant] had openly repudiated [his] fiduciary obligations to [plaintiffs] so as to start the statute of limitations clock" … . Although defendant failed to provide plaintiffs with an accounting, he never outright refused to do so. Further, defendant continued to conduct his duties as trustee by handling the taxes and expenses for the trust, and making the necessary disbursements to plaintiffs as beneficiaries. Thus, the cause of action for an accounting had not accrued at the time plaintiffs commenced this action. Massey-Hughes v Massey, 2021 NY Slip Op 07405, Fourth Dept 12-23-21

Practice Point: The six-year statute of limitations for an accounting re: a trust is triggered by the trustee's open repudiation of his or her fiduciary duties. Merely refusing to provide an accounting is not such an open repudiation.

SUBJECT MATTER JURISDICTION, FAMILY LAW, INTIMATE RELATIONSHIP.

PETITIONER'S WAIVER OF HER RIGHT TO COUNSEL IN THIS FAMILY COURT ACT ARTICLE 8 PROCEEDING WAS NOT DEMONSTRATED TO HAVE BEEN VOLUNTARY; THE COURT SHOULD HAVE HELD A HEARING ON WHETHER THE RESPONDENT AND PETITIONER HAD BEEN IN AN INTIMATE RELATIONSHIP (THEREBY AFFORDING THE COURT SUBJECT MATTER JURISDICTION) (SECOND DEPT).

The Second Department, reversing Family Court in this Family Court Act article 8 proceeding, determined; (1) petitioner's waiver of her right to counsel was invalid, and (2) the finding that petitioner did not have an intimate relationship with respondent, thereby depriving the court of subject matter jurisdiction, was not supported by the record:

A party in a proceeding pursuant to Family Court Act article 8 has the right to be represented by counsel (see Family Ct Act § 262[a][ii] …). Although the right to counsel may be waived, the waiver must be knowing, voluntary, and intelligent … . In order to ensure that a waiver is made knowingly, voluntarily, and intelligently, the court "must conduct a searching inquiry" … and the record must reflect, among other things, "that the party was aware of the dangers and disadvantages of self-representation" … .

Here, the Family Court failed to conduct a searching inquiry of the petitioner to ensure that her waiver of her right to counsel was knowing, intelligent, and voluntary … . …

The Family Court also should have conducted a hearing prior to determining that it lacked subject matter jurisdiction on the ground that the parties did not have an intimate relationship within the meaning of Family Court Act § 812(1)(e) … . Matter of Minor v Birkenmeyer, 2021 NY Slip Op 07546, Second Dept 12-29-21

Practice Point: Making sure a waiver of the right to counsel is knowing, intelligent and voluntary is just as important in Family Court as in criminal cases.

TAX ESTOPPEL, TAX FORMS.

PURSUANT TO THE DOCTRINE OF TAX ESTOPPEL, TAX FORMS SIGNED BY DECEDENT INDICATING PROPERTY WAS TRANSFERRED WITHOUT CONSIDERATION PRECLUDED THE CONSTRUCTIVE TRUST CAUSE OF ACTION BASED UPON AN ALLEGED PROMISE TO PAY PETITIONERS PROCEEDS FROM THE SALE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the constructive trust cause of action should have been dismissed under the doctrine of tax estoppel. The claim that decedent, Joseph Scott, Jr. promised to pay petitioners the proceeds from the sale of property was belied by the tax forms signed by Scott which indicated the property was transferred without consideration:

The tax forms utterly refute petitioners' factual allegations that, in consideration for his interest in the Amagansett property, Joseph Scott, Jr. paid respondents more than $410,000 in his lifetime as an advance on the sale of his Woodbine property … . Since petitioners are precluded from arguing that there was an oral agreement that Joseph Scott, Jr. would pay respondents' decedents consideration for the Amagansett property, they cannot allege that a constructive trust should be imposed on the property … . The application of the tax estoppel doctrine prevents, as a matter of law, petitioners from establishing an essential element of a claim for a constructive trust: a promise by respondents' decedents to Joseph Scott, Jr.

regarding the Amagansett property. Matter of Chimsanthia, 2021 NY Slip Op 06796, First Dept 12-7-21

Practice Point: A party may be estopped from making a claim which is contradicted by a tax document under the doctrine of tax estoppel. Here the tax document indicated property was transferred without consideration. Therefore the claim of entitlement to the proceeds of the sale of the property was precluded.

VACCINES, APPEALS, DECLARATORY JUDGMENTS, PUBLIC HEALTH LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

AN APPELLATE COURT HAS THE POWER TO CONSIDER A REQUEST FOR A DECLARATORY JUDGMENT WHICH WAS NOT BEFORE THE MOTION COURT; THE REGULATION MANDATING CERTAIN VACCINES DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE OR EXCEED THE REGULATORY POWERS OF THE NYS DEPARTMENT OF HEALTH (FOURTH DEPT).

The Fourth Department, in a full-fledged, comprehensive opinion by justice NeMoyer which cannot be fairly summarized here, held the appellate court had the power to determine a request for a declaratory judgment which was not raised in the motion court, and the regulation mandating certain vaccines, 10 NYCRR 66-1.1(l) , does not violate the separation of powers doctrine or exceed the regulatory powers of the NYS Department of Health:

The legislature has determined that vaccines save lives. It has therefore established a mandatory "program of immunization . . . to raise to the highest reasonable level the immunity of the children of the state against communicable diseases" (Public Health Law § 613 [1] [a]). And by promulgating 10 NYCRR 66-1.1 (l), respondents-defendants-appellants (defendants) merely implemented the legislature's policy in a manner entirely consistent with the legislative design. We therefore hold that 10 NYCRR 66-1.1 (l) is valid, does not violate the separation of powers doctrine, and does not exceed the authority of its promulgator. Matter of Kerri W.S. v Zucker, 2021 NY Slip Op 07349, Fourth Dept 12-23-21

Practice Point: The NYS Department of Health has the authority to mandate certain vaccines.

Practice Point: An appellate court may determine a request for a declaratory judgment which was not raised in the motion court below.

VENUE, CORPORATION LAW, VENUE, PRINCIPAL PLACE OF BUSINESS.

DEFENDANT ALLEGED ITS PRINCIPAL PLACE OF BUSINESS WAS IN NASSAU COUNTY BUT NEVER AMENDED ITS CERTIFICATE OF INCORPORATION WHICH DESIGNATED ITS PRINCIPAL PLACE OF BUSINESS AS QUEENS COUNTY; DEFENDANT'S MOTION TO CHANGE THE VENUE OF THIS SLIP AND FALL CASE FROM QUEENS TO NASSAU COUNTY SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant in this slip and fall case (Valley Park) did not present sufficient evidence to support a change of venue from Queens County to Nassau County:

"To effect a change of venue pursuant to CPLR 510(1), a defendant must show that the plaintiff's choice of venue is improper and that its choice of venue is proper" … . To succeed on its motion, Valley Park was obligated to demonstrate that, on the date that this action was commenced, none of the parties resided in Queens County … . Only if Valley Park made such a showing was the plaintiff required to establish, in opposition, via documentary evidence, that the venue she selected was proper … .

… Although Valley Park claimed that its principal office was in Nassau County and that it no longer maintained its principal office in Queens County, it failed to prove that its certificate of incorporation had been amended to designate a county other than Queens … . The plaintiff's submission, in opposition, of a certified copy of Valley Park's certificate of incorporation, which stated that Valley Park's principal office was located in Queens County, further underscored that her choice of venue was proper. Green v Duga, 2021 NY Slip Op 06990, Second Dept 12-15-21

Practice Point: Here the corporation had never amended its certificate of incorporation to indicate its principal place of business was in Nassau County. Therefore the corporation's motion to change venue from Queens to Nassau was properly denied.