NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Report
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ADMINISTRATIVE LAW, ATTORNEYS FEES, EQUAL ACCESS TO JUSTICE ACT.

ALTHOUGH THE VAPING ASSOCIATION PREVAILED IN ITS ACTION FOR A PRELIMINARY INJUNCTION STAYING THE ENFORCEMENT OF THE DEPARTMENT OF HEALTH'S REGULATIONS BANNING FLAVORED VAPING LIQUIDS, THE DEPARTMENT'S ACTION WAS "SUBSTANTIALLY JUSTIFIED;" THEREFORE THE VAPING ASSOCIATION WAS NOT ENTITLED TO ATTORNEY'S FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the respondent Public Health and Planning Council (within the NYS Department of Health) (the council) should not have been ordered to pay attorney's fees to petitioner Vapor Technology Association (the vaping association) pursuant to the State Equal Access to Justice Act. The respondent council had adopted emergency regulations prohibiting flavored vaping liquids targeting young people. The petitioner vaping association brought a combined Article 78 and declaratory judgment action challenging the emergency regulations as exceeding the council's regulatory authority. The Third Department granted the vaping association's request for a temporary restraining order and Supreme Court granted a preliminary injunction. The matter was rendered moot when the legislature banned the sale of the flavored electronic cigarette products. Because the vaping association had prevailed prior to the legislature's prohibition, it sought and was awarded attorney's fees:

CPLR 8601 (a) "mandates an award of fees and other expenses to a prevailing party in any civil action brought against the state, unless the position of the state was determined to be substantially justified or that special circumstances render an award unjust" … . * * *

Petitioners capably disputed respondents' arguments and obtained a temporary restraining order and a preliminary injunction barring enforcement of the emergency regulations, but a grant of temporary injunctive relief is not "an adjudication on the merits," and we need not decide who would have prevailed had this matter proceeded to a final judgment … .. Upon our review, we are satisfied that respondents articulated a reasonable factual and legal basis for their arguments that the Council and the Commissioner acted within their rule-making authority by adopting the emergency regulations … . Thus, Supreme Court abused its discretion in finding that those arguments were not "substantially justified" within the meaning of CPLR 8601 (a), and petitioners were not entitled to an award of counsel fees and expenses as a result … .Matter of Vapor Tech. Assn. v Cuomo, 2022 NY Slip Op 02171, Third Dept 3-31-22

Practice Point: Even though a party which prevails against a state agency is generally entitled to attorney's fees pursuant to the State Equal Access to Justice Act, if the agency's actions are deemed "substantially justified" attorney's fees will not be awarded. Here the Department of Health's adoption of emergency regulations banning the sale of flavored vaping liquids (targeting young people as a market) was deemed "substantially justified" by the appellate court. The award of attorney's fees by Supreme Court was reversed.

AMEND COMPLAINT, CIVIL CONSPIRACY.

PLAINTIFF'S MOTION TO AMEND THE COMPLAINT SHOULD NOT HAVE BEEN GRANTED; THE ADDED DEFENDANT DID NOT HAVE ANY INTEREST IN THE PROPERTY IN DISPUTE; AND THE CIVIL CONSPIRACY CAUSE OF ACTION PLAINTIFF SOUGHT TO ADD IS NOT RECOGNIZED IN NEW YORK; THEREFORE THE PROPOSED AMENDMENTS WERE PATENTLY DEVOID OF MERIT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the motion to amend the complaint to add a defendant (Fu) and a cause of action for civil conspiracy should not have been granted. Plaintiff did not allege that Fu had any interest in the property in dispute. And New York does not recognize civil conspiracy as a tort:

It is well settled that leave to amend a pleading shall be freely given, provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit . . . , and the decision to permit an amendment is within the sound discretion of the court" … . Initially, plaintiff clarified in the amended complaint that the first cause of action, which is asserted against all defendants and seeks to set aside the deed and mortgage, was brought under RPAPL article 15. Pursuant to RPAPL article 15, an action may be maintained against any "person [who] . . . may have an . . . interest in the real property which may in any manner be affected by the judgment" (RPAPL 1511 [2]). Here, plaintiff failed to allege in the amended complaint any interest that Fu may have in the property and, thus, she is not a proper party to that cause of action … . Furthermore, New York does not recognize civil conspiracy to commit a tort, such as fraud or conversion, as an independent cause of action … . Therefore, the proposed amendments with respect to Fu are patently devoid of merit. Landco H & L, Inc. v 377 Main Realty, Inc., 2022 NY Slip Op 01695, Fourth Dept 3-11-22

Practice Point: New York does not recognize civil conspiracy as a tort. This case is an example of what it means to find proposed amendments to a complaint "patently devoid of merit."

APPEALS, FUGITIVE DISENTITLEMENT DOCTRINE.

ALTHOUGH THE APPELLANT WAS IN JAPAN, THE 1ST DEPARTMENT REFUSED TO DISMISS THE APPEAL PURSUANT TO THE FUGITIVE DISENTITLEMENT DOCTRINE IN THIS FAMILY COURT CIVIL-CONTEMPT MATTER; APPELLANT HAD APPEARED VIRTUALLY IN COURT PROCEEDINGS AND STATED HE WOULD RETURN TO NEW YORK TO COMPLY WITH ANY COURT ORDER (FIRST DEPT).

The First Department refused to dismiss the appeal of this Family Court civil contempt matter pursuant to the fugitive disentitlement doctrine (which authorizes the dismissal of an appeal if the appellant has left the jurisdiction). Here father was in Japan:

Although the father is in Japan, we decline to dismiss the appeal pursuant to the fugitive disentitlement doctrine. There is no "nexus" connecting the father's fugitive status and these proceedings … . The father has continued to appear virtually in court, communicate with his counsel, and consent to relief sought by the mother. He has complied with the terms of his probation and submitted an affidavit stating that he will return to New York to comply with any court order. Under these circumstances, we find that the father has not "flout[ed] the judicial process," frustrated the operation of the courts, or prejudiced the mother's rights by leaving the jurisdiction to warrant dismissal of the appeal … .Matter of Hilary C. v Michael K., 2022 NY Slip Op 01512, First Dept 3-10-22

Practice Point: If an appellant leaves the court's jurisdiction (here father went to Japan), the appeal may be dismissed pursuant to the fugitive disentitlement doctrine. The doctrine was not applied in this Family Court civil contempt case because father participated in court proceedings virtually and stated he would return to New York to comply with any court order.

ARBITRATION, ISSUES FOR THE COURT.

WHETHER THE AGREEMENT TO ARBITRATE IS VALID IS A THRESHOLD ISSUE FOR THE COURT, NOT THE ARBITRATOR (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that the validity of an agreement to arbitrate is a threshold issue which must be determined by the court, not the arbitrator:

… [T]he petitioners raised a threshold issue regarding the validity of the purported agreement to arbitrate, as they contended that they did not sign, and that neither Graves nor AMF had the authority to sign, any contract on their behalf concerning the purported transaction involving the respondents. Thus, this threshold issue was for the Supreme Court, rather than an arbitrator, to determine … . Matter of Northeast & Cent. Contrs., Inc. v Quanto Capital, LLC, 2022 NY Slip Op 01791, Second Dept 3-16-22

CHILD VICTIM'S ACT, FIDUCIARY DUTY.

IN THIS CHILD VICTIM'S ACT PROCEEDING PLAINTIFF ALLEGED ABUSE BY A PRIEST AND TEACHER IN ELEMENTARY SCHOOL; PLAINTIFF ALLEGED THE SCHOOL WAS OVERSEEN BY DEFENDANTS PARISH AND DIOCESE; THE 2ND DEPARTMENT HELD THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE THERE WAS NOTHING UNIQUE ABOUT THE RELATIONSHIP BETWEEN DEFENDANTS AND PLAINTIFF, AS OPPOSED TO THE RELATIONSHIPS WITH THE OTHER PARISHIONERS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the parish and diocese defendants' motions to dismiss the breach of fiduciary duty cause of action in this Child Victims Act case should have been granted. Plaintiff alleged he was

sexually abused when he was 10 in 1973 by a priest and teacher in elementary school. Plaintiff alleged the parish and the school were overseen by the diocese:

"[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendants misconduct" … .. A cause of action to recover damages for breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b) … .

"A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" … .Two essential elements of a fiduciary relationship are de facto control and dominance … .

Here, the amended complaint did not allege facts that would give rise to a fiduciary relationship between the plaintiff and the defendants. The amended complaint failed to allege facts that demonstrated that the plaintiff's relationship with the defendants was somehow unique or distinct from the defendants' relationships with other parishioners generally … . J. D. v Roman Catholic Diocese of Brooklyn, 2022 NY Slip Op 01766, Second Dept 3-16-22

Practice Point: Here the breach of a fiduciary duty cause of action against the parish and diocese which oversaw the elementary school where plaintiff allegedly was sexually abused was dismissed. There was nothing unique about the relationship between the defendants and plaintiff which set it apart from the relationships with the other parishioners.

CIVIL RIGHTS LAW, RETROACTIVE APPLICATION OF STATUTE.

THE 2020 AMENDMENTS TO CIVIL RIGHTS LAW 70, THE ANTI-SLAPP LAW, DO NOT APPLY RETROACTIVELY TO THE PLAINTIFF'S PENDING DEFAMATION ACTION AGAINST DEFENDANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (Civil Rights Law section 70) should not be applied retroactively to cover plaintiff's

defamation claims against defendant. Therefore defendant's motion for a ruling that the anti-SLAPP amendments applied retroactively should not have been granted:

… [T]here is insufficient evidence supporting the conclusion that the legislature intended its 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (see Civil Rights Law § 70 et seq.) to apply retroactively to pending claims such as the defamation claims asserted by plaintiffs in this action.

The Court of Appeals has stated, in general terms, that "ameliorative or remedial legislation" should be given "retroactive effect in order to effectuate its beneficial purpose" … . * * * … "[C]lassifying a statute as remedial does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law" … . …

In light of …. the factual evidence that the amendments to New York's anti-SLAPP law were intended to better advance the purposes of the legislation by correcting the narrow scope of the prior anti-SLAPP law, we find that the presumption of prospective application of the amendments has not been defeated. The legislature acted to broaden the scope of the law almost 30 years after the law was originally enacted, purportedly to advance an underlying remedial purpose that was not adequately addressed in the original legislative language. The legislature did not specify that the new legislation was to be applied retroactively. The fact that the amended statute is remedial, and that the legislature provided that the amendments shall take effect immediately, does not support the conclusion that the legislature intended retroactive application of the amendments. Gottwald v Sebert, 2022 NY Slip Op 01515, First Dept 3-10-22

Practice Point: The fact that a statute is deemed "remedial" in nature does not necessarily support a retroactive application of the statute. Here the 2020 amendments to the anti-SLAPP law, although "remedial," were not applied retroactively to cover plaintiff's pending defamation action against the defendant. The defendant's motion for a ruling applying the amendments retroactively should not have been granted.

CORPORATION LAW, PROPER FORUM, FOREIGN LAW.

ALTHOUGH THIS SHAREHOLDERS' DERIVATIVE ACTION AGAINST A SWISS CORPORATION REQUIRES THE APPLICATION OF SWISS LAW, NEW YORK IS THE PROPER FORUM; MOST ON THE BOARD OF DIRECTORS ARE RESIDENTS OF NEW YORK AND THE ALLEGATIONS IN THE COMPLAINT REFLECT A SUBSTANTIAL NEXUS TO NEW YORK (FIRST DEPT).

The First Department, reversing Supreme Court, determined New York, not Switzerland, was the proper forum for this shareholders' derivative action against a Swiss corporation, despite the need to apply Swiss law:

Defendants did not establish that in the interest of substantial justice, this action should be heard in another forum, namely, Switzerland (see generally CPLR 327[a] …). Adjudication of plaintiffs' claims, which are undisputedly governed by Swiss law, will not place an undue burden on New York courts … . New York courts are frequently called on to apply the laws of foreign jurisdictions and in this case, there is no indication that the relevant law, which is from only one foreign jurisdiction, is in dispute or is distinctly abstruse … . That plaintiffs seek certain nonmonetary relief that may not be available or enforceable in Switzerland does not cut in favor of dismissal because defendants can seek to limit the damages sought and plaintiffs are now willing to withdraw their requests for nonmonetary relief as against [defendant corporation].

Defendants do not claim that litigation in New York will cause them any hardship and although this matter could be litigated in Switzerland, Swiss courts do not permit trial by jury, which could pose some hardship to plaintiffs … . Moreover, most of defendant-board members are residents of New York and none are residents of Switzerland … . The allegations in the complaint make clear that this action has a substantial nexus to New York and at this point, it appears that the majority of the witnesses and evidence will be located in the United States, principally New York … . Wormwood Capital LLC v Mulleady, 2022 NY Slip Op 01526, First Dept 3-10-22

Practice Point: Although this shareholders' derivative action is against a Swiss corporation and requires the application of Swiss law, New York is the proper forum. Most of the directors live in New York, most of the witnesses are in the US

and New York, most of the evidence is located in New York, and allegations in the complaint demonstrate a substantial nexus to New York. Defendants did not show they will suffer any prejudice if the suit is heard here.

DEBTOR-CREDITOR, ENFORCEMENT OF JUDGMENT AGAINST NON-DEBTORS.

IN AN ACTION SEEKING TO ENFORCE A JUDGMENT AGAINST NON-DEBTORS PURSUANT TO CPLR ARTICLE 52, THE PETITIONERS ARE NOT ENTITLED TO A JURY TRIAL; THE ACTION IS EQUITABLE IN NATURE, DESPITE THE DEMAND FOR MONETARY DAMAGES (FIRST DEPT).

The First Department determined petitioner's request for a jury trial in this action seeking to compel non-debtors to make assets accessible for execution should have been stricken. Even though money damages were demanded, the essence of the action is equitable:

Petitioners commenced a "turnover" special proceeding under CPLR article 52 and sought a judgment among other things, "seeking . . 'turnover' of [defendant] NYGFI assets to satisfy [p]etitioners' judgment . . . compelling the non-debtor [r]espondents to disclose, bring within the jurisdiction, and make accessible for execution . . . all cash, income, distributions and funds . . . including all membership interests in limited lability companies . . . and shares in corporations and interests in partnerships . . . and granting the appointment of a CPLR [a]rticle 52 receiver."

… "[A] [p]laintiff is not entitled to a jury trial . . . [when] he seeks to enforce a judgment against a party other than the judgment debtor, which is an equitable claim" … .

… "[T]he rule is fundamental that where a plaintiff seeks legal and equitable relief in respect of the same wrong, his right to trial by jury is lost" … . Moreover, "[i]nclusion of a demand for money damages in the [pleading] does not, in and of itself, guarantee entitlement to a jury trial. Rather, it must be determined whether the main thrust of the action is for legal damages or for equitable relief" … . Matter

of Uni-Rty Corp. v New York Guangdong Fin., 2022 NY Slip Op 01525, First Dept 3-10-22

Practice Point: An action pursuant to CPLR Article 52 to enforce a judgment against non-debtors is equitable in nature. A jury trial is therefore not available. The demand for money damages (legal relief) did not alter the fact that petitioners are primarily seeking equitable relief.

DEBTOR-CREDITOR, ENFORCEMENT OF JUDGMENT ENTERED IN PEOPLE'S REPUBLIC OF CHINA.

SUPREME COURT SHOULD NOT HAVE DISMISSED AN ACTION TO ENFORCE A MONEY JUDGMENT OBTAINED IN THE PEOPLE'S REPUBLIC OF CHINA (PRC) ON THE IMPLICIT GROUND THE DEFENDANTS WERE NOT AFFORDED DUE PROCESS IN THE PRC; THE US STATE DEPARTMENT DOCUMENTS UPON WHICH SUPREME COURT'S RULING WAS BASED DO NOT CONSTITUTE DOCUMENTARY EVIDENCE; THE COMPLAINT SUFFICIENTLY ALLEGED DEFENDANTS HAD AN OPPORTUNITY TO BE HEARD, WERE REPRESENTED BY COUNSEL AND HAD THE OPPORTUNITY TO APPEAL IN THE PRC ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the complaint sufficiently alleged that the money judgment obtained by plaintiff in the People's Republic of China (PRC) comported with the principles of due process. The complaint alleged the defendants had an opportunity to be heard, were represented by counsel, and had a right to appeal the underlying proceeding in the PRC. Plaintiff's action to enforce the foreign judgment should not have been dismissed based upon US State Department reports alleging a lack of judicial independence in the PRC:

The court should not have dismissed the action on the ground that the U.S. State Department's 2018 and 2019 Country Reports on Human Rights Practices (Country Reports) conclusively refuted plaintiff's allegation that the PRC judgment was rendered under a system that comported with the requirements of

due process. The Country Reports do not constitute "documentary evidence" under CPLR 3211(a)(1) … . In any event, the reports, which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters, do not utterly refute plaintiff's allegation that the civil law system governing this breach of contract business dispute was fair. Shanghai Yongrun Inv. Mgt. Co., Ltd v Maodong Xu, 2022 NY Slip Op 01523, First Dept 3-10-22

Practice Point: The complaint adequately alleged the money judgment obtained by plaintiff in the People's Republic of China (PRC) was procured in accordance with due process requirements. The defendant had the opportunity to be heard, was represented by counsel and had the right to an appeal. State department documents alleging a lack of judicial independence in the PRC did not constitute "documentary evidence" which would support a motion to dismiss.

DEBTOR-CREDITOR, FRAUD, INJUNCTION.

IF PLAINTIFFS IN A FRAUDULET-CONVEYANCE AND ENFORCEMENT-OF-MONEY JUDGMENT PROCEEDING CAN BE FULLY COMPENSATED BY MONEY DAMAGES, IT IS ERROR TO ISSUE A PRELIMINARY INJUNCTION (FIRST DEPT),

The Frist Department, reversing Supreme Court, determined plaintiffs in this fraudulent conveyance action can be fully compensated by money damages. Therefore the preliminary injunction was not available relief:

In this action to set aside alleged fraudulent conveyances and other relief in aid of enforcement of money judgments, plaintiffs can be fully compensated by a monetary award, and thus an injunction will not issue because no irreparable harm will be sustained in the absence of such relief … . Medallion Fin. Corp. v Tsitiridis, 2022 NY Slip Op 02090, First Dept 3-29-22

Practice Point: If a plaintiff can be fully compensated by money damages, an injunction is not an available remedy.

DEFAULT, CORPORATION LAW, LIMITED LIABILITY COMPANY LAW.

DEFENDANTS DID NOT DEMONSTRATE ACTUAL NOTICE OF THE SUMMONS WAS NOT RECEIVED IN TIME TO DEFEND THE ACTION, AND DID NOT PROVIDE A REASONABLE EXCUSE FOR THE DEFAULT; DEFENDANTS' MOTION TO VACATE THE DEFAULT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's did not demonstrate they did not receive notice of the summons in time to defend the action, and did not demonstrate a reasonable excuse for the default. Therefore defendants' motion to vacate the default judgment should not have been granted:

Pursuant to CPLR 317, a defaulting defendant that was "served with a summons, other than by personal delivery" may be permitted to defend the action upon a finding by the court that the defendant did not personally receive notice of the summons in time to defend and has a meritorious defense … . Service on a limited liability company by delivery of the pleadings to the Secretary of State does not constitute personal delivery … . "The mere denial of receipt of the summons and complaint is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317" … .

The affidavit … submitted by the … defendants in support of their motion, amounted to nothing more than a mere denial of receipt of the summons and complaint … . … [T]he … defendants did not contend that the address it had on file with the Secretary of State was incorrect … .

… [T]he … defendants' mere denial of receipt of the summons and complaint, without more, was insufficient to demonstrate a reasonable excuse for its default pursuant to CPLR 5015(a)(1) … .Andrews v Wartburg Receiver, LLC, 2022 NY Slip Op 01980, Second Dept 2-23-22

Practice Point: A denial of the receipt of the summons and complaint, without more, does not demonstrate actual notice of the summons was not received in time to defend, and does not demonstrate a reasonable excuse for a defaulting.\

DISCLOSURE OF TAX RETURNS.

PLAINTIFF COUNTY, ACTING ON BEHALF OF THE NURSING HOME WHERE DECEDENT WAS CARED FOR, WAS ENTITLED TO DISCLOSURE OF DECEDENT'S TAX RETURNS; THE RETURNS ARE RELEVANT TO WHETHER DECEDENT'S SON BREACHED THE "RESPONSIBLE PARTY AGREEMENT" WHICH REQUIRED HIM TO USE THE DECEDENT'S INCOME TO PAY THE NURSING HOME (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, plaintiff county (on behalf of the nursing home where decedent was cared for) was entitled to disclosure of decedent's tax returns in this action against decedent's son. The action alleged the son breached the "responsible party agreement" in which the son agreed to pay the decedent's nursing home costs from the decedent's income and resources:

Unlike a typical action where the assets of a defendant are irrelevant unless and until a judgment is obtained, here … the existence and value of decedent's assets are critical to the issue of whether Jeffrey Garry [decedent's son] breached the agreement by failing to use such assets to pay for decedent's care … . …

Although "tax returns are generally not discoverable unless the party seeking them shows that they are relevant to issues in the case, indispensable to the claim and unavailable from other sources" … , we are satisfied that plaintiff made the requisite showing here, particularly given defendants' reluctance to produce responsive documents or interrogatory responses that may have otherwise provided information contained in decedent's tax returns … . County of Warren v Swan, 2022 NY Slip Op 02169, Third Dept 3-31-22

Practice Point: Although tax returns are generally not discoverable until a judgment is obtained, here the decedent's returns were deemed relevant to whether decedent's son breached the "responsible party agreement" with the nursing home which cared for decedent. The agreement required decedent's son to pay the nursing home from decedent's income and resources.

DISMISSAL OF COMPLAINT, JUDGES, NO VALID 90-DAY NOTICE.

EVEN THOUGH PLAINTIFF DID NOT TIMELY FILE A NOTE OF ISSUE AND DID NOT COMPLY WITH A PRIOR DISCOVERY ORDER, THE JUDGE WAS WITHOUT AUTHORITY TO, SUA SPONTE, DISMISS THE COMPLAINT BECAUSE PLAINTIFF HAD NOT BEEN SERVED WITH A VAILD 90-DAY DEMAND TO FILE A NOTE OF ISSUE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint on the ground plaintiff failed to timely file a note of issue and failed to comply with a prior discovery order because plaintiff had not been served with a valid 90-day notice:

The Supreme Court improperly, sua sponte, directed dismissal of the complaint on the ground that the plaintiff failed to timely file a note of issue and failed to comply with a prior discovery order of the court. Because the plaintiff was not served with a valid 90-day demand to file a note of issue pursuant to CPLR 3216(b)(3), the court had no authority to dismiss the complaint based on the failure to timely file a note of issue … . Further, the plaintiff's alleged failure to comply with the discovery order did not constitute extraordinary circumstances warranting the sua sponte dismissal of the complaint … .Moreau v Cayton,, 2022 NY Slip Op 01450, Second Dept 3-9-22

Practice Point: The judge did not have the authority to, sua sponte, dismiss the complaint, even though plaintiff had not timely filed a note of issue and had not complied with a prior discovery order, because the plaintiff had not been served with a valid 90-day demand to file a note of issue.

FAMILY LAW, APPEALS, DEFAULT, ATTORNEYS.

THE MAJORITY HELD THE APPELLATE DIVISION PROPERLY REFUSED TO HEAR APPELLANT FATHER'S APPEAL IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING BECAUSE FATHER WAS IN DEFAULT (NO APPEAL LIES FROM A DEFAULT); THE DISSENT ARGUED FATHER WAS NOT IN DEFAULT BECAUSE HE APPEARED BY COUNSEL (CT APP).

The Court of Appeals, affirming the Appellate Division, over a strong dissent, determined the Appellate Division properly concluded it could not hear the appellant father's appeal in this termination-of-parental-rights proceeding because he was in default (no appeal lies from a default judgment). The dissent argued father appeared by counsel and therefore was not in default:

Before this Court, appellant does not dispute the Appellate Division's determination that his failure to appear constituted a default.

From the dissent:

The only reviewable issue before us is whether the Appellate Division properly dismissed appellant father's appeal from a Family Court order terminating his parental rights on the ground that appellant defaulted. That decision was in error because appellant appeared through counsel during the fact-finding and dispositional hearings, as acknowledged by Family Court, and in accordance with the Family Court Act and the CPLR (see Family Ct Act § 165; CPLR 3215 [a]). Matter of Irelynn S., 2022 NY Slip Op 01869, Ct App 3-17-22

Practice Point: No appeal lies from a default judgment. The dissent argued: A party who appears by counsel, as appellant father did in these termination-of-parental-rights proceedings, is not in default.

FAMILY LAW, JURISDICTION.

FAMILY COURT DID NOT HAVE JURISDICTION TO MODIFY A SEPARATION AGREEMENT WHICH WAS INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE; A PLENARY ACTION IS REQUIRED (FIRST DEPT).

The First Department, reversing (modifying) Family Court, determined Family Court did not have jurisdiction to modify the separation agreement by putting a cap on the child-support/spousal-support credit father was entitled to for his payment of the mortgage and apartment expenses:

A stipulation of settlement which is incorporated but not merged into the parties' judgment of divorce may be reformed only in a plenary action … . Family Court does not have jurisdiction to modify a separation agreement … . Under the terms of the parties' stipulation of settlement, the father is entitled to pay his $2,100 in monthly child support directly to the mortgagee of the parties' former marital apartment. However, the Family Court erred in capping the father's credit against support arrears at $25,200 per year based on this provision. Although Family Court found that there was no similar provision with respect to spousal support, in fact the parties' stipulation permits the father to also deduct the payment of apartment expenses, including the mortgage, from his spousal support. Accordingly, Family Court improperly amended the stipulation by imposing an annual maximum credit to which the father is entitled based solely on his child support obligation. Matter of Deborah K. v Richard K., 2022 NY Slip Op 01391, First Dept 3-3-22

Practice Point: Family Court did not have jurisdiction to amend a stipulation of settlement which was incorporated but not merged into the divorce judgment. A plenary action was necessary.

FAMILY LAW, VENUE FOR DIVORCE, SEASONAL HOME, COVID.

THE COUNTY WHERE PLAINTIFF AND DEFENDANT OWNED A SEASONAL SECOND HOME (WHERE DEFENDANT LIVED AFTER COVID REACHED NEW YORK CITY) WAS NOT THE PROPER VENUE FOR THE DIVORCE ACTION (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Lasalle, reversing Supreme Court, determined the county where plaintiff and defendant owned a seasonal second home, and where defendant moved when COVID reached New York City, was not the proper venue for the divorce action:

The parties to this divorce action primarily resided in New York County, while maintaining a seasonal second home in Suffolk County. In March 2020, when the COVID-19 pandemic first reached New York City, the defendant retreated to the Suffolk County residence along with her pregnant and immunocompromised daughter and began spending more time there in order to assist the daughter during the pregnancy and after the child's birth. In August 2020, the plaintiff commenced this action for a divorce and ancillary relief in Suffolk County, on the ground that the parties were residents of Suffolk County. The defendant moved pursuant to CPLR 510 and 511 for a change of venue, and the Supreme Court denied the motion.

This case presents the issue of whether sheltering in place in a seasonal home creates a sufficient degree of permanence to establish residency at that location. We hold that it does not under the circumstances of this case. Because the parties' stays in Suffolk County were only seasonal and temporary, we hold that neither of them were residents of Suffolk County at the time of the commencement of the action. Accordingly, the Supreme Court should have granted the defendant's motion pursuant to CPLR 510 and 511 to change the venue of the action from Suffolk County to New York County. Fisch v Davidson, 2022 NY Slip Op 01442, Second Dept 3-9-22

Practice Point: In this divorce action commenced in August 2020 (during the pandemic), the county were plaintiff and defendant owned a seasonal home, and where defendant moved when COVID reached New York City, was not the proper

venue. New York County, where the couple primarily resided, was deemed the proper venue for the divorce proceedings.

FAMILY LAW, JUDGES, ADOPTION OF PARTY'S FINDINGS OF FACT.

THE WIFE'S REQUEST FOR MAINTENANCE WAS REJECTED WITHOUT EXPLANATION AND THE HUSBAND'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE WHOLLY ADOPTED BY SUPREME COURT; THE THIRD DEPARTMENT AWARDED MAINTENANCE ON APPEAL (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the wife was entitled to maintenance in this divorce proceeding. The parties had been married for 44 years. The wife's income was around $31,000 and the husband's income was around $117,000. Both were retired. The Third Department noted that Supreme Court did not give any indication of its rationale for rejecting the wife's application and adopted the husband's findings of fact and conclusions of law:

"The amount and duration of a maintenance award are addressed to the sound discretion of the trial court, and will not be disturbed provided that the statutory factors and the parties' predivorce standard of living are considered" … .. "The court need not articulate every factor it considers, but it must provide a reasoned analysis of the factors it ultimately relies upon in awarding or declining to award maintenance" … .

Supreme Court wholly adopted verbatim the husband's proposed findings of fact and conclusions of law, without articulating the factors it considered or providing a reasoned analysis for its rulings on the proposed findings of fact and conclusions of law. "[F]indings of fact submitted pursuant to CPLR 4213 (a) cannot constitute the decision of the court [as] mandated by Domestic Relations Law § 236 (B) (5) (g)" … . Although Supreme Court failed to set forth its rationale for rejecting the wife's request for maintenance, "because our authority is as broad as that of the Supreme Court, we need not remit this issue" … . Louie v Louie, 2022 NY Slip Op 02172, Third Dept 3-31-22

Practice Point: Here in this divorce proceeding the judge did not give any indication of the rationale for rejecting the wife's request for maintenance and wholly adopted the husband's findings of fact and conclusions of law. Findings of fact cannot constitute a court's decision. Rather than remitting the matter, the Third Department awarded maintenance.

FAMILY LAW, JUDGES, ATTORNEYS, COURT-ACCESS BY NEWS OUTLET.

A LOCAL ONLINE NEWS OUTLET SHOULD NOT HAVE BEEN EXCLUDED FROM A FAMILY COURT HEARING REGARDING WHETHER A DEPUTY COUNTY ATTORNEY SHOULD BE DISQUALIFIED FROM A NEGLECT PROCEEDING ON CONFLICT OF INTEREST GROUNDS; THE OUTLET IS ENTITLED TO A TRANSCRIPT OF THE HEARING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined appellant, an online local news outlet, should not have been excluded from an attorney-disqualification hearing and was entitled to a transcript of the hearing. The respondent in a neglect proceeding had moved to disqualify the deputy county attorney on conflict of interest grounds. Appellant's owner deemed the motion newsworthy because the deputy county attorney had just been elected City-Court Judge. When appellant's owner attempted to attend the disqualification hearing he was denied entry:

… "[T]he general public may be excluded from any hearing under [Family Court Act] article [10] and only such persons and the representatives of authorized agencies admitted thereto as have an interest in the case" (§ 1043). In making that determination, however, "[a]ny exclusion of courtroom observers must . . . be accomplished in accordance with 22 NYCRR 205.4 (b)" … . That rule provides that "[t]he general public or any person may be excluded from a courtroom [in Family Court] only if the judge presiding in the courtroom determines, on a case-by-case basis based upon supporting evidence, that such exclusion is warranted in that case" … . The rule further provides certain nonexclusive factors that a Family Court judge may consider in exercising his or her discretion, and requires that the judge make findings prior to ordering any exclusion … .

… [T]he court abused its discretion in excluding appellant from the hearing on the underlying disqualification motion. … [T]he court violated 22 NYCRR 205.4 (b) by failing to make findings prior to ordering the exclusion, and … there is no indication … that the court rendered its determination based on … evidence or considered any of the relevant factors in exercising its discretion. Moreover, … the court lacked an adequate basis to exclude appellant from the hearing on the disqualification motion … . * * *

… [T]he release of the transcript is consistent with Family Court Act § 166 and 22 NYCRR 205.5. … [T]he statute provides in relevant part that although "[t]he records of any proceeding in the family court shall not be open to indiscriminate public inspection[,] . . . the court in its discretion in any case may permit the inspection of any papers or records" … . The statute thus "does not render Family Court records confidential, but merely provides that they are not open to indiscriminate public inspection" … . The statute makes clear that Family Court "has the discretionary statutory authority to permit the inspection of any record by anyone at any time … .Matter of Rajea T. (Niasia J.), 2022 NY Slip Op 01940, Fourth Dept 3-18-22

Practice Point: Although the general public can be excluded from Family Court Article 10 proceedings, the judge exercising the discretion to exclude an observer must make certain findings in accordance with 22 NYCRR 205-4 (b). Family Court here made no findings and abused its discretion by excluding the news outlet. The court proceeding concerned whether the county attorney handling the neglect case should be disqualified on conflict of interest grounds, and did not concern the underlying allegations of neglect. The new outlet is entitled to a transcript of the hearing.

FAMILY LAW, JUDGES, DEFAULT WARNING.

IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, ALTHOUGH FAMILY COURT THREATENED TO FIND RESPONDENT IN DEFAULT WHEN HE DID NOT PROVIDE PROOF HE FAILED TO APPEAR BECAUSE HE WAS HOSPITALIZED, FAMILY COURT DID NOT ULTIMATELY GIVE RESPONDENT A "DEFAULT WARNING;" RESPONDENT AND HIS COUNSEL WERE PRESENT AT THE FACT-FINDING BUT WERE PRECLUDED BY THE COURT FROM PARTICIPATING; RESPONDENT HAS A RIGHT TO BE HEARD ON THE ABANDONMENT ISSUE; REVERSED AND REMITTED (THIRD DEPT).

The Third Department, reversing Family Court, determined respondent father in this termination of parental rights proceeding was not in default and that he was entitled to present a defense. To explain his failure to appear, respondent said he was hospitalized but he did not provide any proof of hospitalization when the court requested it. The court then found respondent to be in default and precluded respondent and his counsel from participating in the termination hearing:

Petitioner and the attorney for the child argue that the appeal must be dismissed because the challenged order was entered upon respondent's default. We disagree. In its written decision, Family Court stated that it had advised respondent's counsel at the December 18, 2019 appearance that, if the requested medical documentation was not timely provided, it "would find [respondent] in default" and "the trial would be an [i]nquest." Our review of the record, however, confirms that no such warning was given. Instead, the court cautioned that if respondent failed to comply, it would "proceed with the proceeding with regard to the termination of his parental rights." This is not a default warning but notice that the hearing would go forward on January 15, 2020. However frustrating respondent's noncompliance with the court's reasonable directive to provide documentation of his hospitalization may have been, the key point here is that respondent and his counsel were in attendance at the fact-finding hearing. We fully appreciate that trial courts are vested with broad authority to maintain the integrity of their calendars. Under the circumstances presented, however, we conclude that Family Court abused its discretion in holding respondent to be in default and precluding any participation at the hearing … . Matter of Makayla NN. (Charles NN.), 2022 NY Slip Op 02165, Third Dept 3-31-22

Practice Point: Here Family Court never gave a "default warning" to respondent father when he failed to provide proof he did not appear because he was hospitalized. Father, who was present at the fact-finding, should not have been found to be in default and precluded from participating in the termination of parental rights proceeding.

FAMILY LAW, JUDGES, ORDER VS DECISION.

WHERE AN ORDER CONFLICTS WITH A DECISION, THE DECISION CONTROLS (FOURTH DEPT).

The Fourth Department, modifying Supreme Court in this post-judgment matrimonial case, determined the decision controls the discrepancy between the order and the decision:

… [B]oth parties expressly agreed in the oral stipulation that plaintiff's benefits would be distributed "[i]n accordance with the Majauskas formula." That oral stipulation was an unambiguous expression of the parties' intent to follow Majauskas, …

… [T]he amended order conflicts with the court's written decision insofar as the … amended order purports to award defendant 23.86% of a former spouse survivor annuity under 5 USC § 8341 (h) (1). The stated percentage represents defendant's share of plaintiff's gross monthly annuity, as calculated by the court pursuant to the Majauskas formula, but the court in its decision made no award to defendant of a former spouse survivor annuity, which, had it been awarded, would have expressly conflicted with the parties' agreement. Where, as here, there is a conflict between the decision and the order, the decision controls, and we therefore modify the amended order accordingly … . Reukauf v Kraft, 2022 NY Slip Op 01898, Fourth Dept 3-18-22

Practice Point: If there is a conflict between an order and a decision, the decision controls.

FAMILY LAW, MENTAL HYGIENE LAW, IMPROPER DEFAULT.

SUPREME COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT OF DIVORCE AGAINST THE HUSBAND, WHO WAS REPRESENTING HIMSELF, WHEN HE DID NOT APPEAR AT THE INQUEST; BOTH THE COURT AND THE WIFE WERE AWARE THE HUSBAND HAD BEEN DIAGNOSED WITH A SIGNIFICANT MENTAL HEALTH CONDITION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judgment of divorce should not have been entered after the husband, who was representing himself, failed to appear at an inquest. Both the court and his wife were aware he had been diagnosed with a mental health condition, resulting in episodes when he could not care for himself or protect his interests:

… [A]t the conclusion of the inquest, the court explicitly acknowledged that the husband's absence was likely attributable to his mental health. Thus, before entering judgment upon the husband's default, there should have been an inquiry into whether a guardian ad litem was necessary (see CPLR 1201, 1203 …). Because there was no inquiry, the judgment must be vacated and the matter remanded for further proceedings, including, if necessary, an inquiry into the husband's current capacity … . Richard v Buck, 2022 NY Slip Op 02101, First Dept 3-29-22

Practice Point: Here both the court and the wife were aware the husband, who was representing himself and did not appear at the inquest, suffered from a significant mental health condition. The default judgment of divorce should not have been entered. The judgment was vacated. If necessary, Supreme Court should hold a hearing to determine the husband's capacity.

FIDUCIARY DUTY, BREACH OF, CONVERSION, FRAUD, STATUTE OF LIMITATIONS.

CAUSES OF ACTION ALLEGING BREACH OF FIDUCIARY DUTY DO NOT ACCRUE UNTIL THE FIDUCIARY DUTY IS OPENLY REPUDIATED; CAUSES OF ACTION FOR CONVERSION BASED UPON FRAUD ARE TIMELY SIX YEARS FROM THE CONVERSION OR TWO YEARS FROM DISCOVERY OF THE CONVERSION; THE RELEVANT CAUSES OF ACTION HERE, THEREFORE, SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined causes of action alleging defendant Filardo, plaintiff car dealership's employee, used fraudulent schemes to steal funds from plaintiff over a period of years, should not have been dismissed on statute of limitations grounds, and/or on the ground the causes of action were not adequately pled:

The plaintiff asserted causes of action against Filardo for breach of fiduciary duty (first cause of action), breach of the duty of loyalty (second cause of action), faithless servant doctrine (third cause of action), conversion (fifth cause of action), fraudulent concealment by fiduciary (sixth cause of action), and promissory estoppel (ninth cause of action), and causes of action against both defendants for aiding and abetting fraud (fourth cause of action), civil conspiracy (seventh cause of action), fraud and deceit (eighth cause of action), unjust enrichment (tenth cause of action), money had and received (eleventh cause of action), and fraud by non-disclosure (twelfth cause of action). …

"The statute of limitations for a cause of action alleging a breach of fiduciary duty does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated" … Here, the plaintiff alleged that its relationship with Filardo was not terminated until November 2017, and there is no allegation that Filardo openly repudiated his employment obligations prior to that time … .

… [W]hen the allegations of fraud are essential to a cause of action alleging conversion based upon actual fraud, the cause of action is governed by the limitations period for fraud set forth in CPLR 213(8). That statute provides that, in

an action based upon fraud, "the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it" … .Star Auto Sales of Queens, LLC v Filardo, 2022 NY Slip Op 01476, Second Dept 3-9-22

Practice Point: The statute of limitations for breach of fiduciary duty does not start running until the fiduciary openly repudiates the duty.

Practice Point: The statute of limitations for conversion based upon fraud is six years from the conversion or two years from discovery of the conversion.

FORECLOSURE, ATTORNEY'S FAILURE TO APPEAR, POSSESSION OF THE NOTE, STANDING.

DEFENDANT NEVER PHYSICALLY POSSESSED THE NOTE UNDERLYING THE MORTGAGE AND WAS NEVER ASSIGNED THE NOTE; THEREFORE DEFENDANT DOES NOT HAVE STANDING TO FORECLOSE ON THE MORTGAGE; AN ATTORNEY'S FAILURE TO APPEAR AT A FULLY BRIEFED MOTION ARGUMENT IS NOT A DEFAULT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant does not own the note underlying the mortgage and therefore has no right to foreclose. The Fourth Department noted that an attorney's failure to appear at a full briefed motion argument does not constitute a default:

… [D]efendant lacks noteholder standing because the promissory note upon which defendant relies is neither endorsed in blank nor specially endorsed to defendant … . … [E]ven had the note been endorsed in blank or specially endorsed to defendant, defendant's admitted failure to physically possess the original note would independently preclude it from foreclosing as a noteholder … . …

Nor does defendant have assignee standing. The affidavits submitted on defendant's behalf do not aver that the subject note was ever assigned to defendant … . …

… [A]n action to quiet title pursuant to RPAPL article 15 is a proper procedural vehicle for determining defendant's standing to foreclose (see RPAPL 1501 [1], [5] …). Hummel v Cilici, LLC, 2022 NY Slip Op 01690, Fourth Dept 3-11-22

Practice Point: An attorney's failure to appear at a fully briefed motion argument is not a default.

Practice Point: A party who never physically possessed the note underlying the mortgage does not have standing to foreclose.

FORECLOSURE, JURISDICTION, "LIMITED" ATTORNEY-APPEARANCE.

ALTHOUGH DEFENDANTS WERE NOT PROPERLY SERVED IN THIS FORECLOSURE ACTION AND THEIR MOTION TO VACATE THE JUDGMENT WAS GRANTED ON THAT GROUND, THE DEFENDANTS' ATTORNEY'S "LIMITED APPEARANCE" AT A SETTLEMENT CONFERENCE PROVIDED THE COURT WITH JURISDICTION OVER THE MATTER; THE MOTION TO VACATE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined an attorneys "limited appearance" at a foreclosure settlement conference provided the court with jurisdiction over matter despite the fact defendants demonstrated they were not properly served with the summons and complaint:

… [A]n attorney appeared in the action on behalf of the defendants by filing notices of appearance that represented that counsel was making "a limited appearance for the settlement conference pursuant to CPLR Rule 3408." However, neither the defendants nor counsel for the defendants raised any objection to personal jurisdiction at that time by either a timely motion to dismiss on that ground or by interposing a timely answer asserting lack of personal jurisdiction … . Although the notices of appearance purported to limit counsel's appearance to the

foreclosure settlement conferences, "such language 'is not a talisman to protect the defendant[s] from [their] failure to take timely and appropriate action to preserve [their] defense of lack of personal jurisdiction'" … . Since the defendants had waived the defense of lack of personal jurisdiction by failing to timely assert it, that defense was not a proper basis on which to vacate the order and judgment of foreclosure and sale … . US Bank N.A. v Chkifati, 2022 NY Slip Op 02151, Second Dept 3-30-22

Practice Point: Here defendants proved they were not properly served with the summons and complaint in this foreclosure action and Supreme Court granted their motion to vacate the judgment. However the appellate court reversed because the defendants' attorney's "limited appearance" for the settlement conferenced provided the court with jurisdiction (just as if defendants had been properly served).

FORECLOSURE, NEGLECT TO PROSECUTE.

THE CONDITIONAL ORDER OF DISMISSAL DID NOT MEET THE REQUIREMENTS OF CPLR 3216 BECAUSE ISSUE WAS NEVER JOINED IN THIS FORECLOSURE ACTION; THE ACTION SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO PROSECUTE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the conditional order of dismissal of this foreclosure action did not meet the requirements of CPLR 3216 because issue was never joined. Therefore the action should not have been dismissed:

"'A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met'" … , including that issue has been joined in the action (see CPLR 3216[b][1] …). Here, the dismissal of the action pursuant to the conditional order of dismissal was improper, since none of the defendants had submitted an answer to the complaint and, thus, issue was never joined … . Central Mtge. Co. v Ango, 2022 NY Slip Op 01286, Second Dept 3-2-22

Practice Point: If issue was never joined, a dismissal for failure to prosecute (CPLR 3216) is not available.

FORECLOSURE, SETTLEMENT CONFERENCE, ABANDONMENT.

DEFENDANTS' PARTICIPATION IN A SETTLEMENT CONFERENCE DID NOT WAIVE THEIR RIGHT TO MOVE TO DISMISS THE FORECLOSURE ACTION AS ABANDONED PURSUANT TO CPLR 3215 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure complaint should have been dismissed as abandoned because the plaintiff did not move for a default judgment within a year (CPLR 3215(c)). The fact that the defendants participated in a settlement conference did not waive their right to move to dismiss the complaint as abandoned:

… [T]he plaintiff failed to take steps to initiate proceedings for the entry of a default judgment against the defendants within one year after their default in the action, and has set forth no reasonable excuse for said failure … .

Contrary to the plaintiff's contention, the defendants did not waive their right to seek dismissal pursuant to CPLR 3215(c). The defendants' participation in a settlement conference did not result in a waiver of their right to seek dismissal pursuant to CPLR 3215(c) since they did not actively litigate the action before the Supreme Court or participate in the action on the merits … . Moreover, the defendants' failure to move to vacate their default in answering the complaint or appearing in this action did not operate as a waiver of their right to seek dismissal of the complaint pursuant to CPLR 3215(c) … . PennyMac Corp. v Weinberg, 2022 NY Slip Op 02010, Second Dept 3-23-22

Practice Point: Participation in a settlement conference does not waive a defendant's right to move to dismiss a foreclosure action as abandoned based on plaintiff bank's failure to move for a default judgment within a year.

FORECLOSURE, STANDING, STATUTE OF LIMITATIONS.

IF THE 2008 FORECLOSURE ACTION COMMENCED BY AEGIS WAS VALID, THE INSTANT FORECLOSURE ACTION BY A DIFFERENT BANK WOULD BE TIME-BARRED; PLAINTIFF BANK RAISED A QUESTION OF FACT BY SUBMITTING EVIDENCE THAT AEGIS DID NOT POSSESS THE NOTE AND MORTGAGE AT THE TIME THE 2008 ACTION WAS COMMENCED AND THEREFORE DID NOT HAVE STANDING TO FORECLOSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff raised a question of fact whether Aegis, the company which started a foreclosure action in 2008, had standing to commence that action. Therefore there was a question of fact whether the Aegis action accelerated the debt and started the running of the six-year statute of limitations:

… [P]laintiff proffered the affidavit of Sherry Benight, a document control officer for Select Portfolio Servicing, Inc. (hereinafter SPS), the servicer and attorney-in-fact for the plaintiff. Based upon her review of SPS's business records, Benight averred that pursuant to a pooling and servicing agreement (hereinafter PSA), dated January 1, 2006, the original note was transferred to SPS, in its capacity as servicer and attorney-in-fact, on May 14, 2008, and SPS has remained in physical possession of the note since that date. Benight attached to her affidavit copies of the PSA, and a mortgage loan schedule listing the subject loan, note, and mortgage. This evidence was sufficient to raise triable issues of fact as to whether Aegis lacked standing to commence the prior action, and whether this action is time-barred … . U.S. Bank N..A. v Nail, 2022 NY Slip Op 02034, Second Dept 3-23-22

Practice Point: If a bank did not possess the note and mortgage at the time it commenced a foreclosure action, the action is a nullity.

FORECLOSURE, STANDING.

THE LOST NOTE AFFIDAVIT SUBMITTED BY THE BANK WAS INSUFFICIENT; THEREFORE THE BANK DID NOT DEMONSTRATE STANDING TO BRING THE FORECLOSURE ACTION; DEFENDANTS' MOTION TO AMEND THE ANSWER TO ASSERT THE LACK OF STANDING DEFENSE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate standing to bring the action and Supreme Court should have granted defendant's motion to amend the answer to assert lack of standing as a defense:

… [I]n support of its motion for summary judgment, the plaintiff submitted … a lost note affidavit of a representative of the plaintiff's loan servicer, to which was annexed a copy of the consolidated note. However, the affidavit was insufficient to establish the facts preventing the production of the note … . …

… Supreme Court should have granted that branch of the defendant's cross motion which was pursuant to CPLR 3025(b) for leave to amend her answer to assert the affirmative defense of lack of standing … . Leave to amend a pleading should be freely granted (see CPLR 3025[b]). In the absence of prejudice or surprise to the opposing party, a motion to amend should be granted unless the proposed amendment is palpably insufficient or patently devoid of merit … .. "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" … …. [T]he defendant did not waive the affirmative defense of lack of standing (see RPAPL 1302-a). Deutsche Bank Natl. Trust Co. v Kreitzer. 2022 NY Slip Op 01441, Second Dept 3-9-22

Practice Point: The bank was unable to demonstrate standing to bring the foreclosure action because the lost note affidavit was insufficient. Even a late motion to amend an answer should be granted if there is no prejudice to the plaintiff. Here the motion to add the lack of standing defense to the answer should have been granted.

FORECLOSURE, STANDING, UNIFORM COMMERCIAL CODE.

THE BANK FAILED TO DEMONSTRATE STANDING TO BRING THE . FORECLOSURE ACTION; THERE WERE QUESTIONS OF FACT WHETHER THE "HOLDER (OF THE NOTE)" REQUIREMENTS OF THE UCC WERE MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to bring the foreclosure action:

… [T]here was no evidence that the plaintiff is the assignee of note, and triable issues of fact exist as to whether the plaintiff was the holder of the note at the time the action was commenced. A promissory note is a negotiable instrument within the meaning of the Uniform Commercial Code (see UCC 3-104[2][d] …). A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" (UCC 1-201[b][21][A] …). Where an instrument is endorsed in blank, it may be negotiated by delivery (see UCC 3-202[1]; 3-204[2] …). In the present case, there is a triable issue of fact as to whether the note was properly endorsed in blank by an allonge "so firmly affixed thereto as to become a part thereof" when it came into the possession of the plaintiff (UCC 3-202[2] …). …

The plaintiff's reliance on the assignments of the mortgage is misplaced "because the mortgage is not the dispositive document of title as to the mortgage loan" … . HSBC Bank USA, N.A. v Herod, 2022 NY Slip Op 01444, Second Dept 3-9-22

Practice Point: To establish standing, a bank has to prove it was the "holder" of the promissory note within the meaning of the UCC at the time the foreclosure action was commenced. Here there were questions of fact whether the note in the bank's possession was endorsed in blank by an attached "allonge" as required by the UCC.

JUDGES, REMARKS PREJUDICED THE JURY.

REMARKS BY THE JUDGE AND DEFENDANT'S COUNSEL PREJUDICED THE JURY IN THIS MEDICAL MALPRACTICE CASE; ALTHOUGH NOT PRESERVED, THE ISSUE WAS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE; DEFENSE VERDICT SET ASIDE (SECOND DEPT).

The Second Department, reversing the defendants' verdict in this medical malpractice action and considering the appeal in the interest of justice, determined the trial judge and a defendant's attorney made comments which prejudiced the jury:

… [T]he Supreme Court's repeated prejudicial comments and interjections prejudiced the plaintiff. For example, the court barred the plaintiff's counsel from referring to the growth at issue on the plaintiff's left foot as a tumor, ordered that the growth be referred to as a wart, and continued to refer to it as a wart through the trial. Thus, the court, in effect, determined a pivotal issue of fact that was properly for the jury to resolve … . In addition, the court opined multiple times before the jury that there was no proof that the plaintiff was misdiagnosed by the defendants, despite testimony by the plaintiff's expert to the contrary which had already been elicited. Although the court later directed the jury to disregard its remarks, the instruction was not sufficient to cure the prejudice caused by its improvident comments and interjections … .

The comments of [defendant] Oami's counsel also prejudiced the plaintiff. Oami's counsel made multiple improper and inflammatory comments about the relationship between counsel for the plaintiff and the plaintiff's expert pathologist during the cross examination of that expert and during his summation to the jury on behalf of Oami. Contrary to the Supreme Court's determination, these remarks were so inflammatory and unduly prejudicial as to have deprived the plaintiff of a fair trial … . Valenti v Gadomski, 2022 NY Slip Op 01342, Second Dept 3-2-22

Practice Point: Prejudicial comments by the judge and defense counsel required a new trial in this med mal case.

JURISDICTION, LANDLORD-TENANT, CIVIL PROCEDURE, MUNICIPAL LAW, TENANT HARASSMENT.

THE TENANT HARASSMENT CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED; SUPREME COURT HAD SUBJECT MATTER JURISDICTION FOR THAT CAUSE OF ACTION (SECOND DEPT).

The Second Department, reversing (modifying Supreme Court, determined the tenant harassment cause of action should not have been dismissed, noting that Supreme Court had subject matter jurisdiction for that cause of action:

… Supreme Court erred in granting that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the third cause of action, which alleged harassment in violation of Local Law No. 7 (2008) of City of New York (Administrative Code of City of NY § 27-2005[d]). Contrary to the court's determination, the plaintiffs sufficiently pleaded that cause of action. Furthermore, the court was vested with subject matter jurisdiction to make a determination on that cause of action … .Akter v Zara Realty Holding Corp., 2022 NY Slip Op 01434, Second Dept 3-9-22

Practice Point: Supreme Court has subject matter jurisdiction over a tenant harassment cause of action pursuant to the the NYC Administrative Code.

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

THE WORKERS' COMPENSATION BOARD RULED THE PLAINTIFF DID NOT HAVE "POST-CONCUSSION SYNDROME" OR A "CONCUSSION CONDITION;" PLAINTIFF WAS THEREFORE ESTOPPED FROM CLAIMING THOSE INJURIES IN THIS LABOR LAW ACTION (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the ruling by the Workers' Compensation Board that plaintiff did not have "post-

concussion syndrome" or a "concussion condition" collaterally estopped plaintiff from claiming those injuries in this Labor Law action:

We agree with defendant that the court erred in denying its motion insofar as it effectively sought summary judgment dismissing plaintiff's claims for damages related to PCS or a concussion condition as barred by the doctrine of collateral estoppel, but we conclude that plaintiff's claims for damages related to headaches and the alleged concussion itself are not so barred. The quasi-judicial determinations of administrative agencies, such as the Workers' Compensation Board (Board), "are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal" … and a determination whether a plaintiff actually sustained a physical injury causally related to an accident … , the Board in this case specifically found that plaintiff did not have "post-concussion syndrome" or a "concussion condition" that were causally related to the second work accident. Szymkowiak v New York Power Auth., 2022 NY Slip Op 01702, Fourth Dept 3-11-22

Practice Point: Here the Workers' Compensation Board's ruling plaintiff did not have "post-concussion syndrome" or a "concussion condition" precluded claims for those injuries in the plaintiff's Labor Law action pursuant to the doctrine of collateral estoppel.

MOTION TO RENEW.

PLAINTIFFS' MOTION TO RENEW ON THE GROUND THE DEFENDANTS' WINNING ARGUMENT WAS RAISED FOR THE FIRST TIME IN REPLY PAPERS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiffs' motion to renew should have been granted. Defendants' motion to dismiss was improperly granted based upon an argument first raised in reply papers:

The court granted defendants' motion to dismiss … based on defendants' argument raised for the first time in their reply to their motion to dismiss, that [the] operating agreement contained a provision wherein plaintiffs purportedly waived any past, present, and future conflicts of interest. Plaintiffs moved for leave to renew and reargue, claiming that the issue of the waiver provision was improperly raised for the first time in reply, and in substance was contradicted by another section of the operating agreement that provides, among other things, that no one other than the members can enforce any provision of the operating agreement against any member.

The motion to renew should have been granted. Plaintiffs' claim that the waiver issue was improperly raised in defendants' reply provides a reasonable justification for granting the renewal motion … . Upon renewal, defendants' motion should be denied with respect to plaintiffs' breach of fiduciary duty claim … . Dismissal is warranted only where documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" … . Mehra v Morrison Cohen LLP, 2022 NY Slip Op 01396, First Sept 3-3-22

Practice Point: Here the fact that the winning argument was first raised in reply papers was a proper ground for a motion to renew.

PRIVILEGE, PHYSICIAN-PATIENT, BREACH IS A TORT.

PLAINTIFF STATED A CAUSE OF ACTION FOR BREACH OF THE PHYSICIAN-PATIENT PRIVILEGE, A TORT (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff stated a cause of action for breach of the physician-patient privilege (CPLR 4504(a)). Plaintiff was a resident at the State College of Veterinary Medicine at Cornell University. During her residency plaintiff was treated by defendant Witlin, a psychiatrist. In a conversation with a staff psychologist at the college, Witlin said he was "aware of [plaintiff's] deterioration" and that she "was a mess the last time [he] saw her." Plaintiff was subsequently denied a second year of residency:

"The elements of a cause of action for breach of physician-patient confidentiality are: (1) the existence of a physician-patient relationship; (2) the physician's

acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment, in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages" … . …

… [P]laintiff's claimed damages are not limited to those related to the decision not to reappoint her. The complaint, as amplified by the bill of particulars, alleges that plaintiff suffered mental distress and related emotional harm as a direct result of the disclosure of her confidential medical information. Because a breach of physician-patient confidentiality is actionable as a tort … , plaintiff may recover for emotional harm so long as "the mental injury is a direct, rather than a consequential, result of the breach and . . . the claim possesses some guarantee of genuineness" … . Bonner v Lynott, 2022 NY Slip Op 02175, Third Dept 3-31-22

Practice Point: Here plaintiff stated a cause of action for breach of the patient-physician privilege which sounds in tort and includes damages as an element.

SANCTIONS, ATTORNEYS, JUDGES.

THE JUDGE DID NOT FOLLOW PROPER PROCEDURE FOR IMPOSING SANCTIONS, I.E., PLAINTIFF'S COUNSEL WAS ORDERED TO PAY $10,000 IN COUNSEL FEES TO DEFENDANT'S COUNSEL (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judge did not follow the procedural requirements for imposing sanctions, i.e., $10,000 in attorney's fees to defendant's counsel, to be paid by plaintiff's counsel:

The motion court's sua sponte award of sanctions against plaintiff's counsel did not satisfy the procedural requirements of the Rules of the Chief Administrator of the Court (22 NYCRR) § 130-1. That section provides that a court may award costs or impose sanctions "upon the court's own initiative, after a reasonable opportunity to be heard" … and "only upon a written decision setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate" … . DeSouza v Manhattan RX LLC, 2022 NY Slip Op 01875, First Dept 3-17-22

Practice Point: Before a judge can impose sanctions, here ordering plaintiff's attorney to pay counsel fees in the amount of $10,000 to defendant's attorney, the relevant rules in 22 NYCRR 130-1 must be complied with, i.e., affording an opportunity to be heard and issuing a written decision explaining the conduct, why it was found frivolous and the reasons for the amount awarded or imposed.

STATUTE OF LIMITATIONS DEFENSE ASSERTED IN COUNTERCLAIM.

ALTHOUGH THE MOTION TO DISMISS ON STATUTE OF LIMITATIONS GROUNDS WAS NOT TIMELY, THE ASSERTION OF THE DEFENSE IN THE REPLY TO THE COUNTERCLAIM WAS TIMELY; THE DEFENSE CAN BE RAISED IN A SUBSEQUENT SUMMARY JUDGMENT MOTION (FIRST DEPT).

The First Department noted that the statute of limitations affirmative defense was timely served in a reply to a counterclaim

[Defendant] NYCTA did not waive its affirmative defense under CPLR 3211(a)(5) because a defense based upon the statute of limitations is waived only if it is neither asserted in a responsive pleading or in a timely motion … . Here the affirmative defense was timely asserted in NYCTA's reply to the counterclaim. The motion to dismiss under CPLR 3211(a)(5), however, was not timely made, as required under CPLR 3211(e) … . … We note that NYCTA may pursue relief on its statute of limitations defense by way of a summary judgment motion in the normal course of the litigation … . Han v New York City Tr. Auth., 2022 NY Slip Op 01737, First Dept 3-15-22

Practice Point: Even if it is too late to move to dismiss on statute-of-limitations grounds, if the defense has been timely asserted, it can be the basis of a subsequent summary judgment motion.

TRUSTS AND ESTATES, TURNOVER OF ANNUITY FUNDS ALREADY DISTRIBUTED, STATUTE OF LIMITATIONS.

THE PETITION BROUGHT BY THE EXECUTOR PURSUANT TO SCPA 2103 SOUGHT DISCOVERY AND THE TURNOVER OF ANNUITY FUNDS WHICH HAD BEEN TRANSFERRED TO APPELLANT; THE SCPA 21O3 ACTION IS LIKE AN ACTION FOR CONVERSION OR REPLEVIN AND HAS A THREE-YEAR STATUTE OF LIMITATIONS; HERE THE MOTIONS TO AMEND THE ANSWERS TO ASSERT THE STATUTE OF LIMITATIONS DEFENSE AND FOR SUMMARY JUDGMENT ON THAT GROUND SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined the appellant's motion to amend their answers to assert the statute of limitations defense, and the summary judgment dismissing the petition on that ground should have been granted. The petition, brought by the executor pursuant to SCPA 2103, sought discovery and the turnover of funds from an annuity which had been distributed:

… [T]he Surrogate's Court should have granted that branch of the appellants' motion which was for leave to amend their answers to add the affirmative defense of the statute of limitations. The petitioner failed to demonstrate that she would be prejudiced or surprised by the proposed amendment. The petitioner also failed to demonstrate that the proposed amendment was palpably insufficient or patently devoid of merit.

"A discovery proceeding pursuant to SCPA article 21 has been likened to an action for conversion or replevin and a three-year statute of limitations has been applied" … . "A conversion cause of action accrues and the limitations period begins to run on the date the conversion allegedly occurred"… . Here, the appellants produced evidence … that the annuity funds at issue were withdrawn and deposited into a joint bank account … [and] then transferred into a personal account … on December 31, 2012, and January 3, 2013. Since the petition was not filed until June 23, 2016, the appellants demonstrated, prima facie, that the petitioner's claim was time-barred.

… [T]he petition did not allege a cause of action sounding in fraud or breach of fiduciary duty. Moreover, even if the petition had alleged breach of fiduciary duty, the applicable statute of limitations would still be three years because the petition sought money damages only and fraud was not essential to the claim … . Matter of Chustckie, 2022 NY Slip Op 01452, Second Dept 3-9-22

Practice Point: An action by an executor of an estate pursuant to SCPA 2103 seeking the turnover of funds already distributed is in the nature of a conversion or replevin action and has a three-year statute of limitations.

TRUSTS AND ESTATES, SURROGATE'S VS SUPREME COURT.

PETITIONER STARTED PROCEEDINGS CONCERNING THE EXECUTOR'S HANDLING OF DECEDENT'S ASSETS IN SURROGATE'S COURT; AFTER RELIEF WAS DENIED WITHOUT PREJUDICE PETITIONER STARTED SIMILAR PROCEEDINGS IN SUPREME COURT, A COURT OF CONCURRENT JURISDICTION; THE EXECUTOR'S MOTION TO TRANSFER THAT PROCEEDING TO SURROGATE'S COURT SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Garry, determined that Surrogate's Court, not Supreme Court, was the proper forum for this proceeding concerning respondent-executor's handling of decedent's assets. Both respondent and petitioner are decedent's children. Petitioner had commenced proceedings in Surrogate's Court, and, after the requested relief was denied without prejudice, petitioner commenced a similar proceeding in Supreme Court:

"Supreme Court and . . . Surrogate's Court have concurrent jurisdiction in matters involving decedents' estates" … . Generally, where courts share concurrent jurisdiction, "it should continue to be exercised by that one whose process was first issued. Moreover, wherever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in . . . Surrogate's Court" … .

Supreme Court's denial of a motion to transfer to Surrogate's Court will not be disturbed absent an abuse of discretion … . * * *

Petitioner challenges the propriety of transactions allegedly made in breach of respondent's fiduciary duty to decedent while decedent was alive, involving assets that would have become part of decedent's estate. This matter falls squarely within the purview of Surrogate's Court … . Since "all the relief requested may be obtained in . . . Surrogate's Court and . . . Surrogate's Court has already acted," we find that Supreme Court should have granted respondent's motion seeking to transfer the proceeding … . Matter of McNeil v McNeil, 2022 NY Slip Op 02173, Third Dept 3-31-22

Practice Point: Surrogate's Court and Supreme Court have concurrent jurisdiction. Here a matter concerning the executor's handling of decedent's assets was commenced in Surrogate's Court, and after relief was denied there, a second similar matter was commenced in Supreme Court. The executor's motion to transfer the second proceeding to Surrogate's Court should have been granted.

VENUE, DOCUMENTARY EVIDENCE.

A COMPUTER PRINTOUT FROM THE NYS DEPARTMENT OF STATE WEBSITE PURPORTING TO SHOW THE LOCATION OF DEFENDANT'S PRINCIPAL PLACE OF BUSINESS FOR VENUE PURPOSES WAS NOT ADMISSIBLE AS A BUSINESS RECORD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's submission of a computer printout from the NYS Department of State website was insufficient to prove defendant's principal place of business was in Kings County. Defendant had submitted its certificate of incorporation designating Richmond County as its principal place of business. Therefore plaintiff did not demonstrate the proper venue for this traffic accident case was Kings County. Plaintiff lived in New Jersey and the accident occurred in Ulster County:

… [T]he plaintiff failed to establish that the defendant's certificate of incorporation had been amended to designate a principal office located in Kings County … or

that the venue selected was otherwise proper. Contrary to the Supreme Court's conclusion, a computer printout from the website of the New York State Department of State, Division of Corporations, submitted by the plaintiff, did not conclusively establish that Kings County is a proper venue for this action. The printout was not certified or authenticated, and it was not supported by a factual foundation sufficient to demonstrate its admissibility as a business record … . Faulkner v Best Trails & Travel Corp., 2022 NY Slip Op 01770, Second Dept 3-16-22

Practice Point: Here a printout from the NYS Department of State purporting to show the location of defendant's principal place of business was not admissible in this dispute over proper venue. The printout was not certified or authenticated and was not supported by a factual foundation sufficient for admissibility as a business record.