NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Report
May 2022

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The Second Department, reversing Supreme Court, determined the defendant's affidavit that the address at which service of process was made was not his business address and the affidavit of service could not be amended to cure the address-error:

… [A]n affidavit submitted by [defendant] Harooni … was sufficient to demonstrate that the address where service was alleged to have been effected in the affidavit of service … , was not in fact the address of Harooni's 'actual place of business' (CPLR 308[2] …). … Pursuant to CPLR 305(c), a court, '[a]t any time, in its discretion and upon such terms as it deems just, . . . may allow any . . . proof of service of a summons to be amended, if a substantial right of a party against whom the summons is issued is not prejudiced' … . An 'erroneous address' contained in an affidavit of service affects a defendant's substantial right to notice of the proceeding against him or her, and may not be corrected by an amendment …". **Jampolskaya v Ilona Genis, MD, P.C., 2022 NY Slip Op 03104, Second Dept 5-11-22**

Practice Point: An affidavit of service may be amended, but not to correct the wrong address.

AMENDMENT OF BILL OF PARTICULARS.

PLAINTIFFS WERE ENTITLED TO AMEND THE BILL OF PARTICULARS TO THE EXTENT THE AMENDMENT AMPLIFIED THE ALLEGATIONS ALREADY MADE WITHOUT OBJECTION IN THE SUPPLEMENTAL BILL OF PARTICULARS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiffs were entitled to amplify the allegations in the supplemental bill of particulars in second and proposed third supplemental and amended bill of particulars:

The plaintiffs were entitled to amend their bill of particulars once as of right at any time prior to the filing of the note of issue … . Such amendment enables a party to include whatever could have been included in the original bill of particulars … . "'Whatever the pleading pleads, the bill must particularize since the bill is intended to [afford] the adverse party a more detailed picture of the claim . . . being particularized'" … . B. E. M. v Warwick Val. Cent. Sch. Dist., 2022 NY Slip Op 02990, Second Dept 5-4-22

Practice Point: Here plaintiffs were entitled to amend the supplemental bill of particulars to the extent the amendment amplified allegations already made without objection in the supplemental bill of particulars.

ATTORNEYS, FAILURE TO PROVIDE DISCOVERY, SANCTIONS.

A MONETARY PENALTY IMPOSED UPON PLAINTIFF'S ATTORNEY, AS OPPOSED TO DISMISSAL OF THE COMPLAINT, WAS THE APPROPRIATE SANCTION FOR PLAINTIFF'S FAILURE TO PROVIDE DISCOVERY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined sanctioning plaintiff's attorney for failing to provide discovery, rather than dismissal of the complaint, was the best way to handle plaintiff's inaction:

… [T]he plaintiff's attorneys failed to comply with the defendants' demands for a bill of particulars and discovery, did not object to those demands, and did not respond in any way to follow-up communications from the defendants' attorneys until opposition to the motions was filed. Moreover, in response to the motions, the plaintiff's attorneys failed to articulate any excuse for this series of failures … .

Notwithstanding this dereliction of responsibility, at the time the defendants moved … to dismiss the complaint insofar as asserted against each of them, the plaintiff was not in violation of any court-ordered deadlines … . In fact, the defendants also both moved … to compel the plaintiff to comply with their respective discovery demands by a date certain. And … not long after the defendants' motions were filed, the plaintiff began to produce the requested materials, albeit with some alleged deficiencies.

Under these circumstances, we are of the view that reinstatement of the complaint conditioned upon the payment of a penalty by the plaintiffs' trial counsel personally to both defendants would be more appropriate than the outright denial of the plaintiff's right to a day in court … . Cook v SI Care Ctr., 2022 NY Slip Op 03225, Second Dept 5-18-22

Practice Point: Here a monetary penalty imposed personally upon plaintiff's attorney, as opposed to dismissal of the complaint, was deemed the appropriate penalty for plaintiff's failure to provide discovery.

ATTORNEYS, CRIMINAL CONTEMPT.

PLAINTIFF'S COUNSEL SHOULD HAVE BEEN HELD IN CRIMINAL CONTEMPT FOR ISSUING SUBPOENAS IN DEFIANCE OF AN ORDER STAYING THE PROCEEDINGS; DIFFERENCE BETWEEN CIVIL AND CRIMINIAL CONTEMPT EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's counsel should have been found in criminal contempt for issuing subpoenas in defiance of Supreme Court order staying any further action in the case:

In contrast to civil contempt, because the purpose of criminal contempt is to vindicate the authority of the court, no showing of prejudice is required … . Instead, "[a]llegations of willful disobedience of a proper judicial order strike at the core of the judicial process and implicate weighty public and institutional concerns regarding the integrity of and respect for judicial orders" … . …

Notwithstanding [the court's order], the plaintiff's counsel issued subpoenas on six separate occasions. When … the Supreme Court reiterated the terms of the stay, both via interim relief granted in the order to show cause and in a separate order, the plaintiff's counsel did not desist but instead served four more subpoenas and moved to compel the production of subpoenaed documents. This conduct evidences a lack of "respect for judicial orders" and warranted holding the plaintiff's counsel in criminal contempt … . Under the circumstances of this case, we deem the statutory maximum sanction of $1,000 per offense warranted and therefore impose a total sanction of $10,000. Madigan v Berkeley Capital, LLC, 2022 NY Slip Op 03237, Second Dept 5-18-22

Practice Point: Criminal contempt seeks to vindicate the authority of the court. Therefore no showing of prejudice is required. Here plaintiff's counsel issued subpoenas in defiance of an order of the court. A $10,000 sanction for criminal contempt was imposed on the attorney by the appellate court.

CHANGE OF VENUE, PROPER PROCEDURE.

WHEN A PARTY BRINGS A MOTION TO CHANGE VENUE IN THE COUNTY TO WHICH THE PARTY WANTS VENUE CHANGED, AS OPPOSED TO THE COUNTY WHERE THE ACTION WAS STARTED, THE PARTY MUST USE THE SPECIAL PROCEDURE IN CPLR 511 (A) AND (B), WHICH REQUIRES MAKING A DEMAND ON THE OTHER PARTY BEFORE BRINGING A MOTION; HERE THE SPECIAL PROCEDURE WAS NOT USED, THE MOTION TO CHANGE VENUE WAS MADE IN THE "WRONG COUNTY" AND SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant nursing home's motion to change venue should have been denied. Unless a party follows the special procedure in CPLR 511(a) and (b), which requires making a demand on the other party before bringing a motion, a motion to change venue must be brought in the county where the action was started. Here the defendant did not use the special procedure and brought the motion to change venue in the county where defendant sought to move the proceedings. That was the wrong county for the motion:

This Court has stated that "[w]here . . . a motion to change venue . . . is made in the 'wrong county' and timely objection is raised to the improper venue of the motion itself, Special Term should deny the motion" … . Contrary to the defendant's contention, neither CPLR 501 nor CPLR 511(b) provided a basis for it to notice the motion in Nassau County. Allen v Morningside Acquisition I, LLC, 2022 NY Slip Op 03219, Second Dept 5-18-22

Practice Point: Here the party made a motion to change venue in the county to which the party wanted venue changed. That was deemed the "wrong county" and the motion was dismissed because the party did not first use the special procedure in CPLR 511 (a) an (b) which requires making a demand on the other party before bringing the motion.

CHILD VICTIMS ACT, NON-RESIDENT PLAINTIFF, STATUTE OF LIMIITATIONS, BORROWING STATUTE.

PLAINTIFF, A FLORIDA RESIDENT, ALLEGEDLY WAS ABUSED BY A PRIEST IN FLORIDA IN 1983 AND 1984; PLAINTIFF SUED THE DIOCESE OF BROOKLYN BECAUSE THE PRIEST WHO ALLEGEDLY ABUSED HIM WAS TRANSFERRED FROM BROOKLYN TO FLORIDA, ALLEGEDLY BECAUSE OF SEXUAL MISCONDUCT WITH CHILDREN; THE CHILD VICTIMS ACT DOES NOT APPLY TO THE NONRESIDENT PLAINTIFF AND THE BORROWING STATUTE DOES APPLY; THEREFORE FLORIDA'S FOUR-YEAR STATUTE OF LIMITATIONS RENDERED PLAINTIFF'S ACTION TIME-BARRED (SECOND DEPT).

The Second Department, in a full-fledged opinion, in a matter of first impression, by Justice Christopher, determined the New York Child Victims Act, CPLR 214-g, is not available to nonresident plaintiffs where the alleged acts of abuse occurred outside New York. CPLR 214-g extends the statute of limitations to allow lawsuits by plaintiffs who were children at the time of the abuse. The Second Department further determined CPLR 214-g does not preclude the application of the borrowing statute, CPLR 202. Here the plaintiff, a Florida resident, alleged the acts of abuse were committed in Florida in 1983 and 1984 by Father William Authenrieth. Plaintiff alleged Father Authenrieth was transferred from the Diocese of Brooklyn to the Florida Diocese of Orlando (Florida) in 1973 because of his sexual misconduct with children. Hence the suit by the Florida plaintiff against the Diocese of Brooklyn. Because CPLR 214-g does not apply and CPLR 202, the borrowing statute, requires the application of Florida's four-year statute of limitations, plaintiff's suit is time-barred:

… [U]nder the circumstances of this case, CPLR 214-g does not apply extraterritorially, where the plaintiff is a nonresident, and the alleged acts of sexual abuse were perpetrated by a nonresident outside of New York … . * * *

… [U]nder these circumstances the borrowing statute would apply, and since the plaintiff's action is time-barred in Florida, it would also be time-barred in New York, unless, as argued by the plaintiff, CPLR 214-g precludes the application of CPLR 202. … We answer that question in the negative. Therefore, even if CPLR

214-g applied extraterritorially, the plaintiff's action would be dismissed as time-barred pursuant to CPLR 202. S.H. v Diocese of Brooklyn, 2022 NY Slip Op 02982, Second Dept 5-4-22

Practice Point: The Child Victims Act, which extends the statute of limitations for plaintiffs who were abused as children, does not apply to this Florida plaintiff who was allegedly abused in Florida. Plaintiff sued the Diocese of Brooklyn under the theory that the priest who abused him in Florida in 1983 and 1984 was transferred to Florida from Brooklyn, allegedly because of sexual misconduct with children. New York's borrowing statute applied rendering the action time-barred under Florida's four-year statute of limitations.

COURT OF CLAIMS, LABOR LAW-CONSTRUCTION LAW, NOTICE OF CLAIM.

CLAIMANTS' MOTION FOR LEAVE TO FILE AND SERVE A LATE NOTICE OF CLAIM IN THIS CONSTRUCTION-ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined claimants' should have been allowed to file a late notice of claim in this construction accident case. The delay in filing was minimal, claimants made a sufficient showing the defendants were not prejudiced by the delay and defendants did not demonstrate prejudice:

The claimants showed that any delay in ascertaining actual notice of all of the essential facts underlying the claims was minimal … , and that the defendants were provided with an adequate opportunity to investigate the circumstances underlying the claims in light of, among other things, the information contained in an accident report and a medical release, which were both prepared by the defendants' general contractor on the date of the accident…. . …

… [T]he defendants failed to come forward with "a particularized evidentiary showing that [they] will be substantially prejudiced" if the late claims are

permitted … . Schnier v New York State Thruway Auth., 2022 NY Slip Op 03267, Second Dept 5-18-22

Practice Point: The claimants adequately demonstrated defendants in this construction-accident case were not prejudiced by the minimal delay in filing the notice of claim and defendants were unable to demonstrate any prejudice as they had time to investigate the incident after timely receiving the accident report. Claimants' motion for leave to file and serve a late notice of claim should have been granted.

CRIMINAL LAW, CIVIL DISCOVERY NOT PRECLUDED BY PARALLEL CRIMINAL INVESTIGATION.

SUPREME COURT PROPERLY REFUSED TO QUASH SUPBOENAS ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL (OAG) TO THE TRUMP ORGANIZATION IN THE OAG'S FRAUD INVESTIGATION; THE FACT THAT THERE IS A RELATED CRIMINAL INVESTIGATION DOES NOT PRECLUDE CIVIL DISCOVERY (FIRST DEPT).

The First Department, in this civil investigation by the Office of Attorney General (OAG) into whether the respondent Trump Organization committed fraud in their financial practices and disclosure, Supreme Court properly refused to quash the OAG's subpoenas seeking depositions and documents. The fact that there is also a criminal investigation does preclude civil discovery:

The existence of a criminal investigation does not preclude civil discovery of related facts, at which a party may exercise the privilege against self-incrimination … .. Individuals have no constitutional or statutory right to be called to testify before a grand jury under circumstances that would give them immunity from prosecution for any matter about which they testify; although subjects of a grand jury proceeding have a statutory right to appear and testify, this right is conditioned upon the witness waiving the right to immunity and giving up the privilege against self-incrimination (CPL 190.50[5] …). The political campaign and other public statements made by OAG about appellants do not support the claim that OAG initiated, or is using, the subpoenas in this civil investigation to obtain testimony

solely for use in a criminal proceeding or in a manner that would otherwise improperly undermine appellants' privilege against self-incrimination … . Neither does the record suggest that, in the absence of a civil investigation, OAG would be likely to grant immunity to appellants — the primary subjects of the criminal investigation — to secure their grand jury testimony. Thus, the subpoenas did not frustrate any right to testify with immunity. Matter of People of the State of New York v Trump Org., Inc., 2022 NY Slip Op 03456, First Dept 5-26-22

Practice Point: This case stems from the Office of Attorney General's (OAG's) fraud investigation of the Trump Organization. Supreme Court properly refused to quash the OAG's subpoenas. The fact that there is a related criminal investigation does not preclude civil discovery. There was no showing the appellants' privilege against self-incrimination was being undermined by the subpoenas seeking depositions and documents.

DISMISSAL WITHOUT PREJUDICE, BREACH OF FORUM SELECTION CLAUSE, ATTORNEY'S FEES.

A DISMISSAL WITHOUT PREJUDICE IS NOT A FINAL DETERMINATION ON THE MERITS AND IS NOT SUBJECT TO COLLATERAL ESTOPPEL; ATTORNEY'S FEES ARE APPROPRIATE DAMAGES IN AN ACTION FOR BREACH OF A FORUM SELECTION CLAUSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's (Wormser's) action for breach of the forum selection clause seeking attorney's fees could go ahead. The defendant's (L'Oreal's) New Jersey action had been dismissed "without prejudice," and therefore was not precluded by collateral estoppel:

After the New Jersey court had dismissed [defendant's] complaint "with prejudice within the jurisdiction of New Jersey," L'OrÉal commenced an action against Wormser in Supreme Court, New York County. Subsequently, a New Jersey appellate court amended the New Jersey trial court's orders to make the dismissal "without prejudice" … , and Wormser brought this action.

Wormser's claim is not barred by the doctrine of res judicata, because the dismissal was without prejudice by the New Jersey appellate court and therefore was not a final determination on the merits ,,, ,

Wormser's claim for attorneys' fees may proceed, as "damages may be obtained for breach of a forum selection clause, and an award of such damages does not contravene the American rule that deems attorneys' fees a mere incident of litigation" … . Wormser Corp. v L'Oréal USA, Inc., 2022 NY Slip Op 03093, First Dept 5-10-22

Practice Point: A dismissal without prejudice is not a final determination on the merits and is not therefore subject to collateral estoppel.

Practice Point: Attorney's fees are properly demanded as damages in an action for breach of a forum selection clause.

ELECTION LAW, VERIFICATION OF PETITION.

THE VALIDATING PETITION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THE PETITION WAS NOT VERIFIED; THE FAILURE TO RAISE THE OBJECTION WITH DUE DILIGENCE WAIVED IT; ALTHOUGH THE LANGUAGE IN THE PETITION WAS NOT EXACTLY THAT IN CPLR 3021, THE PETITION WAS IN FACT VERIFIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner's validating petition petition should not have been dismissed on the ground that the petition was not verified because: (1) the respondents waived the issue by not objecting with due diligence; and (2) although the exact words re: verification in CPLR 3021 were not used, the language used in the petition had the same effect as verification:

"Section 16-116 of the Election Law requires that a special proceeding brought under article 16 of the Election Law shall be heard upon a verified petition. The requirement is jurisdictional in nature" … . However, the objection to the alleged

lack of verification of the validating petition was waived by the objectors' failure to raise that objection with due diligence as required by CPLR 3022 … .

Moreover, the mere fact that a petition does not use the exact words set forth in CPLR 3021 does not mean that the petition is not verified, so long as the language used has the same effect as a verification … . Here, the language used in the validating petition had the same effect as a verification and, therefore, the validating petition was "verified" within the meaning of Election Law § 16-116. Matter of Francois v Rockland County Bd. of Elections, 2022 NY Slip Op 03190, Second Dept 5-12-22

Practice Point: Under the Election Law a validating petition must be verified and the absence of verification is a jurisdictional defect. The failure raise the issue with due diligence, however, waives the objection pursuant to CPLR 3021. In addition, to constitute a valid verification, the exact language in CPLR 3021 need not be used. Here he language in the validating petition. although not exactly as prescribed in CPLR 3021, was deemed sufficient to verify it.

EXPERT DISCLOSURE, TREATING PHYSICIAN, THIRD DEPARTMENT'S UNIQUE REQUIREMENTS.

CLAIMANT'S ATTORNEY WAS NOT AWARE OF THE THIRD DEPARTMENT'S UNIQUE REQUIREMENT OF FULL EXPERT-WITNESS DISCLOSURE FOR A TREATING PHYSICIAN; THAT WAS AN ADEQUATE EXCUSE FOR AN UNTIMELY DISCLOSURE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined claimant's treating physician (Hopson) in this personal injury case should have been allowed to testify as an expert, despite the failure to comply with full expert disclosure pursuant to CPLR 3101. The Third Department is the only department which requires such full expert disclosure by a treating physician and claimant's attorney had not practiced in the Third Department:

There is no dispute that claimant failed to comply with the expert disclosure requirements of CPLR 3101 (d) (1) (i) in identifying Hopson as a witness.

Nevertheless, we disagree with the Court of Claims' finding that claimant's excuse was unreasonable. The situation here mirrors that in Schmitt v Oneonta City Sch. Dist. (151 AD3d 1254), where we accepted the explanation of the plaintiffs' attorney that he was "unaware of this Court's interpretation of CPLR 3101 (d) (1) (i) and the corresponding need to file an expert disclosure for a treating physician, and the record [was] otherwise devoid of any indication that counsel's failure to file such disclosure was willful" … . The same holds true here, as claimant's attorney revealed that she practices law in a different judicial department and candidly conceded that she was unaware of this Court's interpretation that the statute requires expert disclosure for treating physicians. There is nothing in the record calling into question the veracity of counsel's representations and no basis to conclude that the noncompliance with CPLR 3101 (d) (1) (i) was willful. As such, the court erred in precluding Hopson's testimony as an expert witness…. . Freeman v State of New York, 2022 NY Slip Op 03559, Third Dept 6-2-22

Practice Point: Only the Third Department requires full expert-witness disclosure for a treating physician.

FAMILY LAW, DEFAULT, ATTORNEYS, APPEALS.

ALTHOUGH FATHER FAILED TO APPEAR, HIS COUNSEL APPEARED AND FATHER WAS THEREFORE NOT IN DEFAULT; BECAUSE FATHER WAS NOT IN DEFAULT, APPEAL IS NOT PRECLUDED (FOURTH DEPT).

The Fourth Department, vacating the portions of the order entered on default, determined father's failure to appear was not a default because his counsel appeared. Because father was not in default, appeal is not precluded:

We agree with the father that Family Court erred in entering the order upon his default based on his failure to appear in court. The record establishes that the father "was represented by counsel, and we have previously determined that, [w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" … . Matter of Akol v Afet, 2022 NY Slip Op 03641, Fourth Dept 6-3-22

Practice Point: When counsel appears in Family Court, the party represented by counsel is not in default. An appeal is available to a party not in default.

FORECLOSURE, BANK'S STANDING.

TO CHALLENGE THE BANK'S STANDING TO FORECLOSE THE DEFENDANT MUST ASSERT THE LACK OF STANDING AS AN AFFIRMATIVE DEFENSE; MERELY DENYING THE RELEVANT ALLEGATIONS IN THE COMPLAINT IS NOT ENOUGH (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the bank in this foreclosure action was not required to affirmatively demonstrate standing, the defendant, to raise the issue, must assert lack of standing as an affirmative defense, and merely denying the relevant allegations in the complaint is not enough:

… [T]he plaintiff was not required to show its standing to maintain the action. "[W]here, as here, standing is not an essential element of the cause of action, under CPLR 3018(b) a defendant must affirmatively plead lack of standing as an affirmative defense in the answer in order to properly raise the issue in its responsive pleading" … . The mere denial of the allegation that the plaintiff was the owner and holder of the note and mortgage in the answer of Republic First Bank, without more, was insufficient to assert that the plaintiff lacks standing … . Aurora Loan Servs., LLC v Jemal, 2022 NY Slip Op 02970, Second Dept 5-4-22

Practice Point: Lack of standing in a foreclosure action must be raised as an affirmative defense. It is not enough to deny the relevant allegations in the foreclosure complaint.

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), STATUTE OF LIMITATIONS, ONLY AN EXPLICIT ACKNOWLEDGMENT OF THE MORTGAGE DEBT WILL REVIVE AN EXPIRED STATUTE OF LIMITATIONS.

ONLY AN EXPRESS ACKNOWLEDEMENT OF THE MORTGAGE DEBT PURSUANT TO GENERAL OBLIGATIONS LAW 17-105 COULD REVIVE OR TOLL THE STATUTE OF LIMITATIONS IN THIS FORECLOSURE ACTION; THE REFERENCES TO THE MORTGAGE DEBT IN FINANCIAL STATEMENTS AND TAX RETURNS PROVIDED TO THE MORTGAGOR BY THE MORTGAGEE WERE NOT ENOUGH (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over an extensive two-judge dissent, determined that the statute of limitations on the underlying foreclosure action was not tolled based upon acknowledgments of the mortgage debt in financial statements and tax returns. Rather, pursuant to General Obligations Law 17-105, only and express promise to pay the debt would revive an otherwise expired statute of limitations:

The primary question presented by this appeal is which section of article 17 of the General Obligations Law governs the tolling or revival of the statute of limitations period in an action pursuant to Real Property Actions and Proceedings Law (RPAPL) § 1501 (4). RPAPL § 1501 (4) allows a party to cancel a mortgage where the limitations period for commencing a foreclosure action has expired. We hold that General Obligations Law section 17-105, not section 17-101, governs whether the statute of limitations has been tolled or revived in such an action. * * *

Under General Obligations Law § 17-105 (1), the Partnership's (mortgagee's) actions in this case could only toll or revive the statute of limitations for the Council (mortgagor) to bring a foreclosure action if the Partnership made an "express" "promise to pay the mortgage debt." Accordingly, the Appellate Division correctly concluded that the Partnership's delivery of its financial statements and tax returns to Council did not meet the requirements of section 17-105 (1) because they were not express promises to pay the mortgage debt (189 AD3d at 28). Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co., Inc., 2022 NY Slip Op 03361, CtApp 5-24-22

Practice Point: Here references to the mortgage debt in financial statements and tax returns provided to the mortgagor by the mortgagee did not revive or toll the statute of limitations on the underlying foreclosure action. Pursuant to General Obligations Law 17-105, only an express acknowledgement of the mortgage would revive the action.

GOOD FAITH EFFORT TO FILE AND SERVE OPPOSITION PAPERS.

PETITIONER DEMONSTRATED A GOOD FAITH EFFORT TO TIMELY FILE AND SERVE HIS OPPOSITION PAPERS AND DEMONSTRATED A POTENTIALLY MERITORIOUS CAUSE OF ACTION; SUPREME COURT HAD REFUSED TO CONSIDER THE OPPOSITION PAPERS BEFORE ISSUING ITS ORDER DISMISSING THE PETITION; THE ORDER SHOULD HAVE BEEN VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner's motion to vacate an order dismissing the petition issued after Supreme Court refused to consider petitioner's opposition papers should have been granted. Petitioner had made a good faith effort to timely file and serve the papers and demonstrated a potentially meritorious cause of action:

The petitioner, who had until July 13, 2018, to submit opposition papers to the respondents' motion, filed pro se opposition papers with the court on July 13, 2018. He failed, however, to properly serve the respondents with a copy of the opposition papers, or to provide the court with proper proof of service. Nonetheless, the petitioner did file with the court a defective affidavit of service, in which dates of service were blank and which was neither signed nor notarized. Moreover, a copy of the opposition papers that the petitioner had emailed to the respondents was later discovered in the "junk" email folder of the respondents' counsel. "Clearly, the [petitioner] made a good faith, albeit unsuccessful, attempt to timely . . . respond to the motion," and the court "should have considered the absence of any evidence that the [petitioner's] default was intentional, made in bad faith, or with an intent to abandon the action" … .

… [T]he petitioner's arguments in support of the amended petition demonstrate a potentially meritorious cause of action … . Lastly, the respondents have "neither alleged nor established that [they] would be prejudiced by vacating the default and hearing the matter on the merits" … . Matter of Brennan v County of Rockland, 2022 NY Slip Op 03240, Second Dept 5-16-22

Practice Point: Here petitioner's good faith effort to timely file and serve his opposition papers demonstrated he did not intend to abandon the action. Supreme Court should not have refused to consider his opposition papers before issuing its order dismissing the petition. The order should have been vacated.

JUDGES, SUA SPONTE DISMISSAL.

ABSENT "EXTRAORDINARY CIRCUMSTANCES," A JUDGE DOES NOT HAVE THE AUTHORITY TO, SUA SPONTE, DISMISS A COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the complaint because there were no "extraordinary circumstances:"

The Supreme Court erred … in, sua sponte, directing dismissal of the complaint … . "'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal'" … . Here, although the plaintiff's submissions were insufficient to demonstrate his entitlement to a default judgment, no extraordinary circumstances existed to warrant dismissal of the complaint … . Binder v Tolou Realty Assoc., Inc., 2022 NY Slip Op 03223, Second Dept 5-18-22

Practice Point: Absent so-called "extraordinary circumstances." a judge does not have the authority to, sua sponte, dismiss a complaint. Here plaintiff's evidence was not sufficient to support a default judgment, but that insufficiency did not justify dismissing the complaint.

LIMITED LIABILITY COMPANY LAW, REAL PROPERTY LAW, DEFAULT, LIS PENDENS.

THE LLC'S FAILURE TO CHANGE THE ADDRESS ON FILE WITH THE SECRETARY OF STATE IS NOT A SUFFICIENT EXCUSE FOR A DEFAULT; PARTIES TO WHICH THE SUBJECT PROPERTY WAS TRANSFERRED AFTER THE LIS PENDENS WAS FILED ARE NOT NECESSARY PARTIES BECAUSE THEY ARE BOUND BY THE RESULT IN THIS ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined (1) defendant E&A did not show a reasonable excuse for its default, and (2) the parties to which the property was transferred after the lis pendens was filed were not necessary parties because they are bound by the result of the instant action:

E&A asserted that it did not receive the summons and complaint, which had been served on the Secretary of State, because it had failed to keep its address updated. However, where a defendant does not receive service of process because it failed to keep a current address on file with the Secretary of State, courts will not find a reasonable excuse for a default … . …

Supreme Court should have denied E&A's cross motion insofar as it sought to join as defendants Yuanqing Liu (who purchased the property from E&A) and NYC Happy Housing LLC (which purchased the property from Liu), as Liu and NYC Happy Housing are not necessary parties. On the contrary, Liu and NYC Happy Housing need not be joined to accord complete relief or to avoid an inequitable effect (CPLR 1001[a]); rather, they are "bound by all proceedings taken in the action . . . to the same extent as a party" because their conveyances were recorded after the filing of the notice of pendency (CPLR 6501 …). Majada Inc. v E&A RE Capital Corp., 2022 NY Slip Op 03476, First Dept 5-31-22

Practice Point: A limited liability corporation's (LLC's) failure to change the address on file with the Secretary of State is not an acceptable excuse for a default. Because a lis pendens was filed against the defendant's property here, the parties to which the property was subsequently transferred are bound by the result of this action and are not, therefore, necessary parties.

LONG-ARM JURISDICTION.

NEW YORK DID NOT HAVE LONG-ARM JURISDICTION OVER A BAVARIAN STEM DONOR REGISTRY INVOLVED IN DECEDENT'S PHYSICIANS' SEARCH FOR A BONE-MARROW MATCH TO TREAT LEUKEMIA (FIRST DEPT).

The First Department, reversing Supreme Court, determined New York did not have jurisdiction over BSB, a Bavarian stem donor registry:

BSB was contacted through a chain of interactions between donor registries that began with decedent's New York physicians reaching out to the National Marrow Donor Program in Minnesota to find a match for decedent so that she could undergo a bone marrow transplant to treat her leukemia. When no match was found there, the search was expanded, including to Republic of German's central registry, and ultimately a donor was located in the BSB registry. BSB did not engage in a regular course of conduct, nor did it purposefully avail itself of the privilege of conducting activities within New York State … . Furthermore, BSB, a 20-employee not-for-profit organization, was reimbursed with a set sum by a German entity for providing the donation to decedent's transplant center's courier in Germany, and reimbursement was not contingent on decedent's ability to pay, insurance, or the like. There is no evidence that BSB derived substantial revenue from the transaction or from New York, where it has no offices, employees, agents, marketing, registrations, or presence … . Even if the long-arm statute applied, BSB does not have the minimum contacts necessary such that it should have reasonably expected to be brought into court here … .Aloisio v New York-Presbyt./Weill Cornell Med. Ctr., 2022 NY Slip Op 03205, First Dept 5-17-22

Practice Point: A Bavarian stem donor registry did not have sufficient contacts with New York to allow New York to exercise long-arm jurisdiction over the registry. The registry played a role in decedent's physicians' search for a bone-marrow match to treat decedent's leukemia. The registry had no presence in New York and did not purposely conduct activities in New York. Even if the long-arm statute applied, the registry did not have the minimum contacts with New York required under a due-process analysis.

LONG-ARM JURISDICTION.

PLAINTIFF, A TEXAS RESIDENT WHO WAS A FLIGHT ATTENDANT FOR 30 YEARS WITH MONTHLY STAY-OVERS IN NEW YORK, DEMONSTRATED NEW YORK HAD LONG-ARM JURISDICTION OVER THE NEW JERSEY COMPANY WHICH MANUFACTURED AND DISTRIBUTED TALCUM POWDER PLAINTIFF USED; THE TALCUM POWDER ALLEGEDLY CAUSED PLAINTIFF'S MESOTHELIOMA (FIRST DEPT).

The First Department determined New York had specific long-arm jurisdiction of defendant Shulton, the manufacturer and distributor of talcum powder alleged to have cause plaintiff's peritoneal mesothelioma. Plaintiff (English) was a fight attendant for 30 years who used the talcum powder when she stayed in New York. Shulton has its principal place of business in New Jersey but has an office in New York and markets the product in New York:

English, a Texas resident, was employed as a flight attendant for 33 years, from 1966 to 1999. During a substantial part of that time, she used Desert Flower on a daily basis after showering. From 1966 to 1984, English was regularly assigned to flights into New York and flew into this state two to four times a month. She usually remained in New York on two- or three-day layovers. When English travelled, she packed Desert Flower in her luggage, so she would have it available for use when she showered. There is no claim that the Desert Flower English used in New York was purchased in New York.

Shulton is incorporated in New Jersey, where it had its principal place of business during the time that English claims to have used Desert Flower. Shulton never manufactured Desert Flower in New York, and in the mid-1970s the manufacture of its talc products shifted from Tennessee to New Jersey. Desert Flower was marketed nationally, including in New York. During the relevant period of time, Shulton maintained a New York office from which it conducted its marketing activities for its Cosmetics and Toiletries Division. The New York office was also headquarters for its International Division. * * * Shulton's maintenance of its own New York office satisfies the first prong under CPLR 302(a)(1). * * * Desert Flower was marketed and sold nationally, and English used Desert Flower when she travelled to and while she stayed in New York. Shulton's activities and

contacts with New York and the allegedly hazardous talcum powder used by English are sufficient to support an assertion of specific jurisdiction over Shulton…. . English v Avon Prods., Inc., 2022 NY Slip Op 03571, First Dept 6-2-22

Practice Point: Even though plaintiff was a Texas resident and the company she was suing was based in New Jersey, she was able to sue using New York courts. Plaintiff was a flight attendant for 30 years with monthly stay-overs in New York. Defendant had an office in New York and marketed the talcum powder which allegedly cause plaintiff's mesothelioma nationwide.

MOTIONS TO RENEW, SUCCESSIVE SUMMARY JUDGMENT MOTIONS.

WHEN THE FAILURE TO PRESENT FACTS IN A PRIOR MOTION IS NOT JUSTIFIED, THE SECOND MOTION DOES NOT FIT THE CRITERIA FOR A MOTION TO RENEW OR AN ALLOWABLE SUCCESSIVE SUMMARY JUDGMENT MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion in this foreclosure action did not fit the criteria for a motion to renew or an allowable successive summary judgment motion. The judgment of foreclosure should not have been granted;

"When no reasonable justification is given for failing to present new facts on the prior motion, the Supreme Court lacks discretion to grant renewal" … . Here, the plaintiff failed to provide any justification for its failure to present the new evidence supporting its renewal motion as part of its prior motion.

Even considered as a successive motion for summary judgment, such a motion "should not be entertained in the absence of good cause, such as a showing of newly discovered evidence" … . Wells Fargo Bank, N.A. v Osias, 2022 NY Slip Op 03275, Second Dept 5-18-22

Practice Point: Attempting to bring a second motion which includes "new" facts, without a reasonable justification for leaving them out of the first motion, does not

fit the criteria for a motion to renew or an allowable successive summary judgment motion.

PLEADING, CONTRACT LAW, FRAUD, DUPLICATIVE CAUSES OF ACTION.

THE FRAUD CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE IT WAS NOT DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION; CRITERIA EXPLAINED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the fraud cause of action was not duplicative of the breach of contract cause of action and therefore should not have been dismissed:

The fraud claim is not duplicative of the contract claim … , this is not a case where "the only fraud alleged" was the defendant's "unkept promise to perform certain of its preexisting obligations under the parties' contract" … . Rather, plaintiff alleges, "Whenever ADP's services for Plaintiff[] proved to be deficient, ADP would purport to deal with the problem and then misrepresent to Plaintiff[] that the problem had been fixed, when . . . it had not." "Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract and therefore involves a separate breach of duty" … .

Moreover, plaintiff seeks at least some damages on its fraud claim that it does not seek on its contract claim … . IS Chrystie Mgt. LLC v ADP, LLC, 2022 NY Slip Op 02950, First Dept 5-3-22

Practice Point: Fraud causes of action are often dismissed as duplicative of breach-of-contract causes of action. Here the fraud cause of action should not have been dismissed because the misrepresentations concerned present facts, not a future intent to perform. In addition, the complaint sought damages for fraud that were not sought for breach of contract.

PUNITIVE DAMAMGES, CONTRACT LAW, INSURANCE LAW.

PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES IN THIS BREACH OF AN INSURANCE CONTRACT ACTION SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the punitive damages claim against defendant insurer should have been dismissed. Plaintiff was struck by a vehicle when she was in a cross-walk. She settled with the driver's insurer, with her insurer's consent, for $25,000. She the brought this breach of contract action against defendant insurer for $225,000, plus punitive damages for a bad-faith breach of the insurance contract:

The elements required to state a claim for punitive damages when the claim arises from a breach of contract are: (1) the defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in Walker v Sheldon [10 NY2d 401]; (3) the egregious conduct must be directed to the plaintiff; and (4) it must be part of a pattern directed at the public generally. Where a lawsuit has its genesis in the contractual relationship between the parties, the threshold task for a court considering a defendant's motion to dismiss a demand for punitive damages is to identify a tort independent of the contract … .

… [T]he plaintiff failed to allege an independent tort. There is no separate tort for bad faith refusal to comply with an insurance contract … . While an insurer may be held liable for damages to its insured for the bad faith refusal of a settlement offer … , the plaintiff here failed to state such a cause of action. …

The plaintiff has not alleged any facts from which an inference can be drawn that the defendant's conduct constituted a gross disregard of the plaintiff's interests. …

The plaintiff failed to allege any facts from which an inference can be drawn that the defendant's conduct was of an egregious nature as set forth in Walker v Sheldon, such that it was morally reprehensible and of such wanton dishonesty as to imply a criminal indifference to civil obligations … . Schlusselberg v New York Cent. Mut. Fire Ins. Co., 2022 NY Slip Op 03539, Second Dept 6-1-22

Practice Point: The criteria for punitive damages for breach of contract are difficult to meet. The defendant's conduct must amount to an independent tort, be morally reprehensible, wantonly dishonest, and criminally indifferent to civil obligations. Here, those criteria were not met by the allegations of breach of an insurance contract.

REAL PROPERTY LAW, JOINT VENTURE, LIS PENDENS.

PLAINTIFF WAS SEEKING THE PROCEEDS OF A JOINT VENTURE, WHICH, UNDER PARTNERSHIP LAW, INVOLVES PERSONAL PROPERTY, NOT REAL PROPERTY; PLAINTIFF HAD NO INTEREST IN THE REAL PROPERTY WHICH WAS TO BE USED AS AN INN OPERATED AS A JOINT VENTURE; THERFORE THE LIS PENDENS FILED BY PLAINTIFF SHOULD HAVE BEEN CANCELLED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined there was no relationship between plaintiff's action seeking the assets of a joint venture and the ownership of the real property associated with the joint venture (to be used as an inn). Therefore defendants' motion to cancel the lis pendens should have been granted:

"A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). Because the provisional remedy of a notice of pendency is an " 'extraordinary privilege' " … , the Court of Appeals has held that to be entitled to that remedy, there must be a "direct relationship" between the relief sought in the complaint and the title to or possession of the disputed property … . In making that determination, a court must use "a narrow interpretation," and its "analysis is to be limited to the pleading's face" … . …

Supreme Court erred in denying their motion insofar as it sought to cancel the notice of pendency because there was no direct relationship between title to or possession of the property and the relief sought by plaintiff. We therefore modify the order accordingly. Reviewing the complaint on its face, we conclude that

plaintiff seeks merely to enforce her purported 50% share in the joint venture and does not assert an interest in the property itself. Indeed, the complaint alleges that title to the property was, at all relevant times, held by Properties LLC, of which plaintiff was not a member. It is well settled that " 'the legal consequences of a joint venture are equivalent to those of a partnership' " … , and thus a joint venturer's interest in a joint venture constitutes an interest in only personal property, not real property, thereby precluding recourse to a notice of pendency … . Renfro v Herrald, 2022 NY Slip Op 03593, Fourth Dept 6-3-22

Practice Point: Partnership law applies to joint ventures. Here the joint venture was the operation of an inn. Plaintiff sought the assets of the joint venture, which involves only personal property, not real property. Plaintiff had no interest in the real property (the inn). Therefore the lis pendens filed by the plaintiff should have been cancelled.

RELATION-BACK DOCTRINE, STATUTE OF LIMITATIONS.

THE RELATION-BACK DOCTRINE DID NOT APPLY TO SAVE THE AMENDED PETITION CHALLENGING A USE VARIANCE; THE INTITIAL PETITION FAILED TO NAME A NECESSARY PARTY WHO WAS KNOWN TO THE PETITIONERS AND WAS DISMISSED ON THAT GROUND; THE AMENDED PEITITION, WHICH NAMED THE NECESSARY PARTY, WAS DISMISSED AS TIME-BARRED; BECAUSE THE PETITIONERS HAD NO DOUBT ABOUT WHO THE NECESSARY PARTY WAS AND HAD NAMED HER IN A PRIOR PETITION, THE RELATION-BACK DOCTRINE COULD NOT BE INVOKED (SECOND DEPT).

The Third Department, over an extensive dissent, determined the relation-back doctrine did not save the petition challenging a use variance. The initial petition was dismissed for failure to name a necessary party, Rosa Kuehn. The subsequent amended petition, which included the necessary party, was dismissed as time-barred:

Supreme Court correctly determined that petitioners are not entitled to the benefit of the relation back doctrine. That doctrine "permits a petitioner to amend a petition to add a respondent even though the statute of limitations has expired at the time of amendment so long as the petitioner can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added respondent is united in interest with a previously named respondent, and (3) that the later-added respondent knew or should have known that, but for a mistake by petitioners as to the later-added respondent's identity, the proceeding would have also been brought against him or her" … .

… [P]etitioners simply cannot meet the third and final condition and therefore cannot avail themselves of the doctrine. Indeed, Rosa Kuehn was appropriately named as a respondent and identified as the landowner of the subject property in petitioners' successful challenge to the use variance issued in 2013 … ; "thus, this simply is not an instance where the identity of a respondent . . . was in doubt or there was some question regarding that party's status" … . Matter of Nemeth v K-Tooling, 2022 NY Slip Op 03034, Second Dept 5-4-22

Practice Point: Here a necessary party was not named in the petition and the petition was dismissed for that reason. The amended petition, which named the necessary party, was time-barred. The relation-back doctrine could not be invoked to save the amended petition because the identity of the necessary party was known to the petitioners who had named her in a related petition in 2013.

REPLIES, EVIDENCE FIRST PRESENTED IN REPLY, LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION.

PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR LAW 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DENIED BECAUSE IT WAS BASED ON EVIDENCE FIRST PRESENTED IN REPLY; PLAINTIFF WAS COLLATERALY ESTOPPED FROM CLAIMING TRAUMATIC BRAIN INJURY AND COGNITIVE DISORDER BY THE RULING IN HIS WORKERS' COMPENSATION CASE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this construction accident case, determined plaintiff's motion for summary judgment on his Labor Law 241(6) cause of action should not have been granted because it was based upon information raised for the first time in reply. The First Department noted that Supreme Court properly found that the ruling in plaintiff's Workers' Compensation case collaterally estopped plaintiff from claiming traumatic brain injury and cognitive disorder in this Labor Law action:

Supreme Court should have denied plaintiff's motion for summary judgment with respect to Labor Law § 241(6), which was based on an expert affidavit submitted in reply. The affidavit, which constituted the first time plaintiff asserted violations of 12 NYCRR 23-2.2(a) and (b), was not addressed to the arguments made in defendants' opposition, and instead sought to assert new grounds for the motion … .

Plaintiff is collaterally estopped from litigating his allegation that he sustained traumatic brain injury and cognitive disorder, since the allegation was previously raised and conclusively decided against him in a Workers' Compensation Board proceeding, where plaintiff had a full and fair opportunity to litigate the issue … . Douglas v Tishman Constr. Corp., 2022 NY Slip Op 03344, First Dept 5-24-22

Practice Point: Evidence first presented in reply and which does not address anything raised by the other party's opposition papers should not be considered by the court. A ruling in a Workers' Compensation case, here rejecting the worker's traumatic brain injury and cognitive disorder claims, may preclude the same claims in a Labor Law action pursuant to the collateral estoppel doctrine.

RES JUDICATA.

HERE THE DOCTRINE OF RES JUDICATA PRECLUDED PLAINTIFF'S FRAUDULENT CONVEYANCE ACTION; THE CAUSE OF ACTION COULD HAVE BEEN RAISED IN THE PRIOR ACTION WHICH WAS DISMISSED (FIRST DEPT).

The Frist Department, reversing Supreme Court, determined the fraudulent conveyance cause of action was precluded by the doctrine of res judicata. Although the fraudulent conveyance claim was not alleged in the prior action, which was dismissed, it could have been raised in the prior action:

In 2016, plaintiff sued NBC, NBF, and PIM, alleging — as she does in the instant action — that NBC and NBF were PIM's alter egos. In August 2018, Supreme Court (Gerald Lebovits, J.) granted NBC and NBF's motion to dismiss that action.

While the prior action did not allege fraudulent conveyance, the doctrine of res judicata bars plaintiff from raising that claim here because she could have raised it in the prior action … . Plaintiff learned on or about May 9, 2017 that nonparty Conquest Capital Group had repurchased the equity it had previously sold to PIM. She filed an amended complaint in the prior action on May 26, 2017. Although plaintiff alleges that she did not discover the price at which Conquest repurchased its equity until November 2018, she could have learned this fact earlier by making inquiries … . Aboelnaga v National Bank of Can., 2022 NY Slip Op 03467, First Dept 5-31-22

Practice Point: The doctrine of res judicata precludes causes of action which could have been investigated and raised in a prior action.

SECURITIES, THE STRICT PLEADING REQUIREMENTS FOR FRAUD DO NOT APPLY TO VIOLATIONS OF SECURITIES ACT.

PLAINTIFFS STATED CAUSES OF ACTION FOR VIOLATIONS OF THE SECURITIES ACT BASED UPON ALLEGEDLY MISLEADING INFORMATION IN THE SECONDARY PUBLIC OFFERING (SPO) (FIRST DEPT).

The First Department determined plaintiffs, who purchased securities based upon allegedly inaccurate information in defendants' secondary public offering (SPO), stated causes of action for violations of the Securities Act. The court noted that the heightened pleading requirements of CPLR 3015(b) do not apply to the Securities Act violations alleged in the complaint:

… [C]laims for violations of sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (15 USC §§ 77k, 77l[a][2], and 77o) are not subject to the heightened pleading requirements of CPLR 3016(b) … .

… [T]he alleged misstatements in the SPO cannot be deemed forward-looking or mere puffery as a matter of law because the complaint alleges that defendants knew at the time of the SPO that present facts rendered statements in the SPO misleading or false. The generic, boilerplate risk warnings in the offering documents do not shield defendants from liability … .

… [P]laintiff adequately]alleges that, once [defendant] spoke about its "significant exposure to emerging markets in Asia," it was obligated to disclose the "whole truth," namely that its mobile solutions business in China was actually experiencing a sharp decline at the time of the SPO … . Erie County Empls.' Retirement Sys. v NN, Inc., 2022 NY Slip Op 03473, First Dept 5-31-22

Practice Point: The heightened pleading requirements for fraud (CPLR 3016) do not apply to the causes of action here alleging violations of the Securities Act—allegedly misleading information in a secondary public offering (SPO).

SOVEREIGN IMMUNITY, NEGLIGENCE, TRAFFIC ACCIDENTS.

PLAINTIFF WAS STRUCK BY A NEW JERSEY TRANSIT CORP (NJT) BUS IN NEW YORK; NJT IS AN ARM OF THE STATE OF NEW JERSEY AND THE SOVEREIGN IMMUNITY DOCTRINE APPLIES; HOWEVER, UNDER NEW JERSEY LAW PLANTIFF CANNOT SUE IN NEW JERSEY BECAUSE THE CAUSE OF ACTION DID NOT ARISE THERE; APPLYING THE FORUM NON CONVENIENS DOCTRINE AS AN ANALYTICAL FRAMEWORK, PLAINTIFF'S NEW YORK LAWSUIT WAS ALLOWED TO GO FORWARD (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, over an extensive two-justice dissenting opinion, determined the doctrine of sovereign immunity did not require the dismissal of plaintiff's suit against the New Jersey Transit Corp. (NJT) in this bus-pedestrian accident case. Plaintiff was struck by the NJT bus in New York. The plaintiff, under New Jersey law, could not sue in New Jersey because the cause of action did not arise in New Jersey. The First Department held that the forum non coveniens criteria provided an appropriate analytical framework:

We have previously held that NJT is an arm of the State of New Jersey and that, as such, it is entitled to invoke the doctrine of sovereign immunity … . * * *

… Should we dismiss a personal injury action on the ground of sovereign immunity when the action cannot be commenced in the sovereign's own courts because the injury arose outside of the sovereign's borders?

We resolve this issue by analogizing it to the legal framework for the forum non conveniens doctrine. Among the factors to consider in determining whether to dismiss an action under this doctrine, with no single factor controlling, are the burden on New York courts, the potential hardship to the defendant, the availability of an alternate forum in which the plaintiff may bring suit, the residency of the parties, the forum in which the cause of action arose, and the extent to which the plaintiff's interests may otherwise be properly served by

pursing the claim in New York … . Colt v New Jersey Tr. Corp., 2022 NY Slip Op 03343, First Dept 5-24-22

Practice Point: A bus operated by the New Jersey Transit Corp (NJT) struck plaintiff in New York. NJT is an arm of the state of New Jersey to which the sovereign immunity doctrine applies. But, under New Jersey law, the suit cannot be brought in New Jersey. After analyzing the case using the forum non coveniens criteria, the First Department allowed the New York lawsuit to go forward.

UNTIMELY ANSWER AS NOTICE OF APPEARANCE.

DEFENDANT'S UNTIMELY ANSWER WAS REJECTED BY PLAINTIFF BUT PLAINTIFF DEEMED THE ANSWER TO BE A NOTICE OF APPEARANCE; DEFENDANT DID NOT OBJECT; AN APPEARANCE IS THE EQUIVALENT OF SERVICE OF A SUMMONS; THEREFORE DEFENDANT WAIVED THE LACK-OF-PERSONAL-JURISDICTION DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant waived any claim of a lack of personal jurisdiction. The plaintiff, rejecting defendant's answer as untimely, indicated the answer was deemed to be a notice of appearance, which is the equivalent of personal service of the summons:

An appearance of the defendant is equivalent to personal service of the summons upon him or her, unless an objection to jurisdiction pursuant to CPLR 3211(a)(8) is asserted by motion or in the answer … . Here, the plaintiff submitted evidence that the defendant served an answer upon it on or about January 20, 2015. That answer did not assert the defense of lack of personal jurisdiction. The plaintiff rejected the answer as untimely and advised the defendant that it would deem the untimely answer a notice of appearance by the defendant. The defendant did not object to the plaintiff treating her untimely answer as a notice of appearance . The defendant did not assert lack of personal jurisdiction until moving, inter alia, pursuant to CPLR 3211(a)(8) to dismiss the complaint more than two years later … . Therefore, she waived the defense of lack of personal jurisdiction … . Deutsche Bank Natl. Trust Co. v Muzac, 2022 NY Slip Op 02978, Second Dept 5-4-22

Practice Point: Here defendant's late answer was rejected but plaintiff informed defendant it considered the answer to be a notice of appearance. Defendant did not object. An appearance is equivalent to service of a summons. Therefore defendant waived the lack-of-personal-jurisdiction defense.