NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Report
June 2022

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AMENDMENT OF ANSWER.

ALTHOUGH DEFENDANT'S MOTION TO AMEND ITS ANSWER (ADDING AFFIRMATIVE DEFENSES) WAS MADE AFTER A TWO-YEAR DELAY, THE DELAY ALONE DID NOT DEMONSTRATE THE PLAINTIFF WAS PREJUDICED; THE MOTION TO AMEND SHOULD HAVE BEEN GRANTED (FIRST DEPT).R

The First Department, reversing Supreme Court, determined defendant's motion to amend its answer to add additional affirmative defenses should have been granted.

The two-year delay was not enough to show plaintiff was prejudiced. Discovery was ongoing:

The court should have granted defendant's motion to amend its answer to add the four affirmative defenses of RPAPL 1951, adverse possession, mutual breach, and unclean hands, as leave to amend is freely given and plaintiff did not show that it would be prejudiced by the delay in asserting the defenses (CPLR 3025[b] …). While over two years had passed since defendant served its original answer, discovery was still ongoing … . Plaintiff's claim of significant prejudice is unpersuasive, as all it points to is mere delay, which is insufficient to show prejudice … . Nor did plaintiff rebut defendant's showing that the proffered amendment is not palpably insufficient or clearly devoid of merit … . Board of Mgrs. of the Porter House Condominium v Delshah 60 Ninth LLC, 2022 NY Slip Op 03680, First Dept 6-7-22

Practice Point: Here defendant moved to amend its answer by adding affirmative defenses two years after the answer was served. Discovery was still ongoing. The delay alone was not enough to demonstrate the plaintiff was prejudiced. The motion to amend should have been granted.

AMENDMENT OF COMPLAINT AFTER APPELLATE DISMISSAL.

SUPREME COURT DID NOT HAVE THE DISCRETION TO GRANT PLAINTIFF LEAVE TO AMEND A COMPLAINT AFTER THE COMPLAINT HAD BEEN DISMISSED FOR LACK OF STANDING BY THE APPELLATE DIVISION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, over a two-justice dissent, determined Supreme Court did not have the discretion to grant leave to amend a complaint which had been dismissed by the First Department for lack of standing. After the appeal, plaintiff had cured the standing defect and Supreme Court allowed the amendment after the time-period to commence a new action (CPLR 205(a)) had expired:

This appeal raises the interesting question of whether a trial court has the discretion to grant a plaintiff leave to amend a complaint, pursuant to CPLR 3025 (b) … , after the Appellate Division has already ordered the complaint dismissed, with direction to enter judgment. We dismissed the complaint because plaintiffs, as non-managing members of a manager-managed Delaware limited liability company, lacked capacity … or standing to act on behalf of the Company when they obtained a Certificate of Revival of the Company before filing a second amended complaint. After plaintiffs purportedly remedied this deficiency of proper standing, they sought to revive the dismissed action by seeking leave to file a third amended complaint. As aforementioned, after we had already ordered the complaint dismissed, the motion court granted plaintiffs leave to file the third amended complaint. At the time plaintiffs sought leave to amend, the time to commence a new action had expired, including the six-month grace period provided by CPLR 205(a). … Under these circumstances, we find that the trial court lacked discretion to grant plaintiffs leave to amend a complaint that had already been dismissed by this Court. * * *

Given this Court's outright dismissal of the claims based on a finding of lack of standing, there was no action pending when plaintiffs moved for leave to file the third amended complaint. Thus, the trial court lacked any discretion or authority to grant plaintiffs such leave, where we had properly dismissed the second amended complaint before plaintiffs filed the motion to amend … .Favourite Ltd. v Cico, 2022 NY Slip Op 03987, First Dept 6-21-22

Practice Point: Once the complaint was dismissed for lack of standing by the First Department, there was no pending action. Once the time for commencing a new action pursuant to CPLR 205(a) had expired plaintiff was out of luck. Supreme Court did not have the discretion to grant plaintiff's motion to amend the complaint after it had been dismissed by the First Department.

AMENDMENT OF COMPLAINT.

THE COMPLAINT WAS NEVER PROPERLY AMENDED TO ADD DEFENDANT AS A PARTY PURSUANT TO CPLR 1003 OR CPLR 3025 REQUIRING DISMISSAL (FIRST DEPT).

The First Department, reversing Supreme Court, determined the action against defendant (Adam) must be dismissed because the complaint was never properly amended to add Adam as a party:

This action must be dismissed as against Adam Max (Adam) because the complaint was never properly amended to add him as a defendant. CPLR 1003 requires leave of court or a stipulation by all parties to add parties, at least where, as here, parties have previously been added. CPLR 3025(a)-(b) similarly requires leave of court or a stipulation by all parties to amend a complaint, at least when done so late in the case. Because this procedure was not followed, the amended complaint must be dismissed, at least as against the newly joined Adam … . ALP, Inc. v Moskowitz, 2022 NY Slip Op 03962, First Dept 6-16-22

Practice Point: Here the amendment of the complaint to add a party was not done by leave of court or a stipulation of all parties/ The action against the added party was dismissed.

COMPEL INDEPENDENT MEDICAL EXAMINATION, MENTAL CONDITION IN CONTROVERSY.

DEFENDANT'S MOTION TO COMPEL PLANTIFF TO APPEAR FOR A PSYCHIATRIC EXAMINATION (INDEPENDENT MEDICAL EXAMINATION [IME]) SHOULD HAVE BEEN GRANTED BECAUSE PLAINTIFF HAD PLACED HER MENTAL CONDITION IN CONTROVERSY; DEFENDANT'S MOTION TO VACATE THE NOTE OF ISSUE SHOULD HAVE BEEN GRANTED BECAUSE DISCOVERY WAS NOT COMPLETE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant's motions to compel plaintiff to appear for an independent medical examination (IME) and to vacate the note of issue should have been granted:

We find that plaintiff's mental condition is, in fact, in controversy. Plaintiff requests compensatory damages only for her alleged emotional distress, and she has testified that she experienced depression, anxiety, and dizziness, as well as headaches brought on by severe mental anguish (CPLR 3121[a]). As a result, a mental examination by a psychiatrist is warranted to enable defendants to rebut plaintiff's causes of action for emotional distress … .

… [W]e grant defendants' motion to vacate the note of issue. Contrary to the certificate of readiness, discovery had not been completed, as plaintiff had not yet complied with the court's directive to submit a Jackson affidavit detailing the process she had undertaken to search her social media post … . Lopez v Bendell, 2022 NY Slip Op 03990, First Dept 6-21-22

Practice Point: Plaintiff had placed her mental condition in controversy by testifying about depression, anxiety, dizziness and headaches caused by mental anguish. Defendant was therefore entitled to compel a psychiatric exam (an independent medical examination [IME]). Here defendant's motion to vacate the note of issue should have been granted because defendant's discovery was not complete.

COVID-RELATED COURT PROCEDURES.

PLAINTIFF'S ATTORNEY WAS NOT AWARE OF COVID-RELATED PROCEDURAL CHANGES FOR CONDUCTING COMPLIANCE CONFERENCES; PLAINTIFF'S MOTION TO VACATE DISMISSAL OF THE ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the COVID-related law office failure was an adequate excuse and plaintiff's motion to vacate the dismissal of the action should have been granted:

Supreme Court improvidently exercised its discretion in denying plaintiffs' motion to vacate the dismissal, as plaintiffs showed both a reasonable excuse for their default and a meritorious cause of action (see CPLR 2005 …). Under the circumstances, law office failure constitutes a reasonable excuse for the default, since plaintiffs' counsel was unaware that procedures for conducting compliance conferences had changed during the COVID-19 pandemic and, as a result, inadvertently failed to submit stipulations before a scheduled conference … .. Furthermore, plaintiffs demonstrated a meritorious cause of action by submitting the complaint, a bill of particulars, and the injured plaintiff's deposition testimony … . Defendants also were not prejudiced by plaintiffs' failure to appear, and indeed, did not oppose the motion to vacate … . Willner v S Norsel Realties LLC, 2022 NY Slip Op 04111, First Dept 6-23-22

Practice Point: Plaintiff's attorney was not aware of procedural changes related to COVID and the action was dismissed because counsel did not submit stipulations before the scheduled compliance conference. This "law office failure" was a "reasonable excuse." Plaintiff's motion to vacate the dismissal of the action should have been granted.

DOMICILE, FOREIGN WILLS.

IF GERMANY WAS DECEDENT'S DOMICILE, NEW YORK MAY RECOGNIZE THE GERMAN HOLOGRAPHIC WILL; MATTER SENT BACK TO SURROGATE'S COURT TO DEVELOP A RECORD ON THE DOMICILE ISSUE (THIRD DEPT).

The Third Department, reversing Surrogate's Court, determined a hearing should be held to determine decedent's domicile. Decedent was a world traveler who owned property in Germany and executed a holographic will in Germany. If Germany was his domicile, New York may recognize the holographic will:

… [D]ecedent was initially domiciled in New Jersey before he left the United States in 2014 … . Since decedent's domicile had been established, "unlike mere physical residency, [domicile] is presumed to continue until a new one is acquired and is controlled by the subjective intent of the party claiming domicile" … . This determination generally involves questions of both fact and law "and is based upon 'conduct manifesting an intent to establish a permanent home with permanent associations in a given location'" … . Where there are particularly unique facts, like here with decedent being a perpetual world traveler, domicile is often "a question of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals" … .

Domicile is particularly important where, like here, there is a petition to probate a holographic will. Although there are limited circumstances where a holographic will may be validly executed in New York (see EPTL 3-2.2), New York courts may nevertheless accept holographic wills that are "executed and attested in accordance with the local law of . . . [t]he jurisdiction in which the testator was domiciled, either at the time of execution or of death" (EPTL 3-5.1 [c] [3] …). In doing so, New York courts may take judicial notice of the laws of other countries and, as a matter of comity, may accept the findings of foreign courts (see CPLR 4511 [b] …).

… [T]he record was incomplete and must be further developed as it relates to the proceedings in Germany. Specifically, we are concerned over the omission of the certificate of inheritance — which petitioner argues established decedent's

domicile in Germany — as such document may, if afforded comity, be dispositive … . Matter of Noichl, 2022 NY Slip Op 03558, Third Dept 6-2-22

Practice Point: Determination of a person's domicile is a question of law and fact, depending in part on the person's intent. Here, if Germany was decedent's domicile at the time the holographic German will was executed, or at the time of death, New York may recognize the German holographic will. Matter sent back to develop a factual record on the domicile issue.

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, IMMIGRATION LAW, SPECIAL IMMIGRANT JUVENILE STATUS.

FAMILY COURT SHOULD HAVE MADE THE FINDING THAT PETITIONER'S REUNIFICATION WITH HER FATHER IN THE IVORY COAST WAS NOT VIABLE TO ENABLE HER TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) AND REMAIN IN THE US (SECOND DEPT).

The First Department, reversing (modifying) Family Court, determined Family Court should have found reunification with petitioner's father in the Ivory Coast was not viable. Petitioner, 16 years old, sought findings from Family Court which would allow her to apply for special immigrant juvenile state (SIJS) and remain in the United States:

Family Court erred in not making any findings of fact as to reunification with petitioner's father. Exercising our power to review the record and to make our own factual determinations … , we find that the record supports a finding that reunification of petitioner with her father, respondent Lassina D., is not viable due to neglect within the meaning of Family Court Act § 1012 (f)(i) (A)—(B). Petitioner's testimony shows that the father did not meet the minimal degree of care since he did not provide for her medical and emotional needs while she was in the Ivory Coast, and has not contributed to her financial support or maintained regular contact with her since she has been in the United States … Her uncontroverted testimony also supports a finding of neglect based on the father's excessive use of corporal punishment … .Matter of Sara D. v Lassina D., 2022 NY Slip Op 04119, First Dept 6-28-22

Practice Point: Family Court can be petitioned to make findings which will allow a juvenile to apply for special immigrant juvenile status in order to avoid deportation to the juvenile's home country. Here the court was asked to make findings that reunification with the petitioner's parents is not viable. The First Department found that father had neglected petitioner and she therefore could not be returned to his care.

FORECLOSURE, LACK OF STANDING, ACCELERATION OF DEBT.

BECAUSE THE PRIOR FORECLOSURE ACTION WAS DISMISSED FOR LACK OF STANDING, THE PRIOR ACTION DID NOT ACCELERATE THE DEBT; THEREFORE DEFENDANT DID NOT DEMONSTRATE THE INSTANT ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department noted that the defendant in this foreclosure action did not demonstrate the foreclosure action was time barred. The initial foreclosure action was dismissed for lack of standing. Therefore the debt was not accelerated by the prior action:

Since the prior action was dismissed for lack of standing, [defendant] failed to establish that the plaintiff had the authority to accelerate the debt through the complaint filed in the prior action … . Wells Fargo Bank, N.A. v Rutty, 2022 NY Slip Op 03926, Second Dept 6-15-22

Practice Point: If a prior foreclosure action was dismissed for lack of standing that action will not be deemed to have accelerated the debt. The prior action, therefore, will not have started the statute-of-limitations clock..

FORECLOSURE, SEVEN-YEAR DELAY IN MOVING FOR JUDGMENT, INTEREST TOLLED.

PLAINTIFF OFFERED NO EXPLANATION FOR THE SEVEN-YEAR DELAY BETWEEN THE ORDER OF REFERENCE AND THE MOTION FOR A JUDGMENT OF FORECLOSURE AND SALE; THE ACCRUAL OF INTEREST DURING THE DELAY SHOULD HAVE BEEN TOLLED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the defendant was prejudiced by the unexplained seven-year delay between the order of reference in 2009 and the motion for a judgment of foreclosure and sale in 2016, Therefore the accrual of interest during the delay should have been tolled:

… [A]pproximately seven years elapsed between the entry of the order of reference and the time the plaintiff moved for a judgment of foreclosure and sale. … [Plaintiff] failed to offer any explanation for this delay or establish that the defendant caused this delay, as the record demonstrates that the defendant's motions and the stays due to the defendant's bankruptcy petitions did not occur during the period for which the defendant sought to toll the accrual of interest. Since the defendant was prejudiced by the plaintiff's unexplained delay of approximately seven years, during which time interest had been accruing, the interest on the loan should have been tolled from October 9, 2009, … until September 21, 2016 … . GMAC Mtge., LLC v Yun, 2022 NY Slip Op 03887, Second Dept 6-15-22

Practice Point: Here the plaintiff could not explain the seven-year delay between the order of reference and the motion for a judgment of foreclosure and sale. Interest should not have accrued during the delay.

GOVERNMENTAL VERSUS PROPRIETARY FUNCTION, IMMUNITY, HARNESS RACING ACCIDENT.

THE NYS GAMING COMMISSION'S DUTIES TO INSPECT HORSES AND EQUIPMENT BEFORE A HARNESS RACE ARE PROPRIETARY, NOT GOVERMENTAL, IN NATURE; THEREFORE ORDINARY NEGLIGENCE PRINCIPLES APPLY AND THE IMMUNITY DEFENSE IS NOT AVAILABLE; DURING THE RACE A HORSE FELL AND CLAIMANT'S HORSE COLLIDED WITH THE FALLEN HORSE; THERE ARE QUESTIONS OF FACT ABOUT THE SAFETY OF THE FALLEN HORSE'S EQUIPMENT AND WHETHER THE HORSE EXHIBITED INDICATIONS HE WAS LAME; THERE ARE QUESTIONS OF FACT ABOUT THE APPLICABILTY OF THE ASSUMPTION OF THE RISK DOCTRINE; REGULATIONS RE: THE INSPECTION OF HORSES AND EQUIPMENT ALLOWED CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION TO BE IMPUTED (THIRD DEPT).

The Third Department, in a comprehensive decision which should be consulted on the issues of governmental immunity, assumption of the risk and constructive notice, reversing Supreme Court, determined the New York State Gaming Commission was exercising a proprietary, not governmental, function when its employees inspected a harness-racing horse's (Mister Miami's) equipment and failed to scratch the horse, which exhibited indications he was "lame," from the upcoming race. Claimant was injured when, during the race, claimant's horse collided with Mister Miami after Mister Miami fell. Because the state's alleged negligence stemmed from a proprietary function, ordinary negligence principles applied and there was no need to show a special relationship between claimant and the state, and the governmental immunity affirmative defense was not available. There were questions of fact whether the assumption-of-the-risk doctrine applied because the state may have acted to unreasonably increase the risk. As for notice, the regulations requiring the state to inspect the horses and equipment allowed the state's constructive notice of the dangerous condition to be imputed:

… [T]he duties of [the state's] officials are fundamentally intertwined with the operation of each and every race and, while such tasks may tangentially relate to the overall function of ensuring fair and honest gambling in this state, they are

more specifically directed to the goal of ensuring the safety of the participants in those races … . … [I]t is apparent that at least part of the Commission's role in harness racing is to work hand in hand with the private racing industry to further the state's goal of "deriv[ing] a reasonable revenue for the support of government" … . * * *

… [W]e find that there are triable issues as to whether Commission officials adequately performed their duties and whether their alleged failures unreasonably increased the risk beyond a level generally inherent in harness track racing … . …

Because [the inspection] duties were imposed upon the Commission officials by regulation, constructive notice of Mister Miami's health and equipment issues that would have been observable during those inspections may be imputed … . Bouchard v State of New York, 2022 NY Slip Op 04202, Third Dept 6-30-22

Practice Point: This opinion has valuable discussions of; (1) how to analyze whether a government is exercising a governmental function (to which the "special relationship" and "governmental immunity" doctrines apply) or a proprietary function (to which ordinary negligence principles apply); (2) the assumption of the risk doctrine; and (3) the imputation of constructive notice when there are regulations mandating inspections which allegedly would have revealed the dangerous condition. Here claimant was injured during a harness race when his horse collided with a fallen horse. The complaint alleged the NYS Gaming Commission did not inspect the fallen horse and the fallen horse's equipment prior to the race as required by the relevant regulations.

JOINT TRIAL, TRAFFIC ACCIDENTS.

PLAINTIFF'S TWO SEPARATE TRAFFIC ACCIDENTS SHOULD BE TRIED TOGETHER BECAUSE PLAINTIFF ALLEGED THE INJURIES FROM THE FIRST ACCIDENT WERE EXACERBATED BY THE SECOND ACCIDENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's two separate traffic accidents should be tried jointly because plaintiff claimed the second accident exacerbated the injuries from the first accident:

… [I]n view of the plaintiff's allegations that certain injuries which he sustained in the first automobile accident were exacerbated by the second automobile accident, in the interest of justice and judicial economy, and to avoid inconsistent verdicts, the two actions should be tried jointly … . The respondents failed to demonstrate prejudice to a substantial right if the actions are tried jointly … . Although the plaintiff moved to consolidate the two actions, the appropriate procedure is a joint trial, particularly since the actions involve different defendants … . Frank v Y. Mommy Taxi, Inc., 2022 NY Slip Op 04151, Second Dept 6-29-22

Practice Point: Here two separate traffic accidents should be tried together because plaintiff alleged the second accident exacerbated his injuries from the first accident.

LATE ANSWER, MOTION TO COMPEL ACCEPTANCE.

PLAINTIFF SERVED THE COMPLAINT ON NOVEMBER 27, 2018; DEFENDANT ATTEMPTED TO SERVE AN ANSWER, WHICH WAS REJECTED, ON JANUARY 9, 2019; DEFENDANT'S EXCUSE WAS "THE DELAY WAS CAUSED BY THE INSURANCE CARRIER;" THAT EXCUSE WAS INSUFFICIENT AND DEFENDANT'S MOTION TO COMPEL PLAINTIFF TO ACCEPT THE ANSWER SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant did not offer a reasonable excuse for serving a late answer (which was rejected) in this slip and fall case. Therefore, defendant's motion to compel plaintiff to accept the answer should not have been granted. Defendant was served with the complaint on November 27, 2018, and defendant attempted to serve the answer on January 9, 2019:

The bare allegation by the defendant's attorney that the delay was caused by the defendant's insurance carrier is insufficient to excuse the delay in answering the complaint … . The absence of a reasonable excuse for the defendant's default renders it unnecessary to determine whether she demonstrated the existence of a potentially meritorious defense … . Goldstein v Ilaz, 2022 NY Slip Op 04154, Second Dept 6-29-22

Practice Point: Here the defendant attempted to serve an answer, which was rejected, about a month and a half after plaintiff served the complaint. Defendant moved to compel the plaintiff to accept the answer. Defendant's excuse was that the "delay was caused by the insurance carrier" with no further explanation. The Second Department deemed the excuse insufficient and ruled that the motion to compel acceptance of the answer should not have been granted.

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.

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.

MUNICIPAL LAW, CONTRACT LAW, NOTICE OF CLAIM.

DEFENDANT DID NOT FILE A NOTICE OF CLAIM AGAINST PLAINTIFF VILLAGE IN THIS CONTRACT ACTION AS REQUIRED BY CPLR 9802; THEREFORE DEFENDANT'S ANTICIPATORY-REPUDIATION COUNTERCLAIM SHOULD HAVE BEEN DISMISSED; THE VILLAGE'S PARTICIPATION IN DISCOVERY WAS NOT DESIGNED TO MISLEAD THE DEFENDANT AND DID NOT TRIGGER THE ESTOPPEL DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant's failure to file a notice of claim required dismissal of its counterclaim (anticipatory repudiation of contract) against the village:

Pursuant to CPLR 9802, "no action shall be maintained against the village upon or arising out of a contract of the village . . . unless a written verified claim shall have been filed with the village clerk within one year after the cause of action shall have accrued." "'[S]tatutory requirements conditioning suit [against a governmental entity] must be strictly construed'" … . This is true even when the municipality "'had actual knowledge of the claim or failed to demonstrate actual prejudice'" … . …

… [T]he plaintiff's exchanging of discovery and participation in the depositions of witnesses did not estop it from raising a defense pursuant to CPLR 9802, as mere participation in litigation does not constitute action calculated to mislead or discourage the defendant from filing a notice of claim … . Incorporated Vil. of Freeport v Freeport Plaza W., LLC, 2022 NY Slip Op 03713, Second Dept 6-8-22

Practice Point: In a contract action against a municipality, here an anticipatory-repudiation-of-contract counterclaim, a notice of claim must be filed (CPLR 9802). No notice of claim was filed here and the counterclaim should have been dismissed. The fact that the municipality participated in discovery did not give rise to the estoppel doctrine because there was no intent to mislead the defendant with respect to the notice-of-claim requirement.

MUNICIPAL LAW, GENERAL MUNICIPAL LAW 207-A BENEFITS, ARBITRATION.

THE MANNER IN WHICH THE FIREFIGHTER'S GENERAL MUNICIPAL LAW 207-A INJURY CLAIM SHOULD BE PROCESSED IS ARBITRABLE BECAUSE THE ISSUE IS ADDRESSED IN THE COLLECTIVE BARGANING AGREEMENT (CBA); THE PETITION TO STAY ARBITRATION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition to stay arbitration in this General Municipal Law 207-a injury claim by a firefighter should not have been granted. The manner in which a section 207-a claim is processed is an arbitrable matter:

… [T]he union filed a grievance alleging, inter alia, that the City was in violation of the CBA [collective bargaining agreement] and the negotiated General Municipal Law § 207-a policy by failing to adhere to the required procedures in processing a claim by one of the union's members for General Municipal Law § 207-a benefits. . …

It is undisputed that there is no constitutional, statutory, or public policy provision prohibiting the arbitration of the dispute at issue in this matter…. [G]iven the breadth of the arbitration clause in this case, the dispute regarding the City's processing of claims for General Municipal Law § 207-a benefits bore a reasonable relationship to the general subject matter of the CBA, since Article 10 of the CBA expressly refers to the negotiated policy for the provision of such benefits … . "[T]he question of the scope of the substantive provisions of the CBA is a matter of contract interpretation and application reserved for the arbitrator" … . Matter of City of New Rochelle v Uniformed Fire Fighters Assn., Inc., 2022 NY Slip Op 03722, Second Dept 6-8-22

Practice Point: Here the issue (how a firefighter's General Municipal Law 207-a injury claim should be processed) was addressed in the collective bargaining agreement (CBA) was therefore arbitrable. The petition to stay arbitration should not have been granted.

MUNICIPAL LAW, LATE NOTICE OF CLAIM.

THE NOTICE OF CLAIM WAS SERVED ONLY FIVE DAYS LATE WHICH WAS DEEMED TIMELY NOTICE OF THE NATURE OF THE ACTION AND A SHOWING OF THE ABSENCE OF PREJUDICE; THE CITY DID NOT AFFIRMATIVELY DEMONSTRATE PREJUDICE; THE ABSENCE OF AN ADEQUATE EXCUSE WAS NOT FATAL; LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim should have been granted. The notice of claim was served five days after the expiration of the 90-day time-limit. The court

deemed that to constitute timely knowledge of the claim. The city did not demonstrate prejudice. The absence of an excuse was not a fatal defect:

… [T]he petitioner served the notice of claim upon the respondents five days after the 90-day period for service had expired and commenced the instant proceeding the next day. Under such circumstances, the respondents acquired actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day statutory period … . Since the respondents acquired timely knowledge of the essential facts constituting the petitioner's claim, the petitioner met his initial burden of showing a lack of prejudice … .

… [T]he respondents "failed to come forward with particularized evidence showing that the late notice had substantially prejudiced [their] ability to defend the claim on the merits" … . Rather, the respondents' counsel made only conclusory assertions that the petitioner's five-day delay in serving the notice of claim had hindered the respondents' ability to conduct a prompt and thorough investigation of the subject incident, which "were insufficient to rebut the petitioner's initial showing of lack of prejudice" … .

Although the petitioner failed to offer a reasonable excuse for his failure to timely serve the notice of claim, "the absence of a reasonable excuse is not fatal to the petition where there was actual notice and absence of prejudice" … . Matter of Gabriel v City of Long Beach, 2022 NY Slip Op 04169, Second Dept 6-29-22

Practice Point: Here the notice of claim was served only five days late. The city was thereby deemed to have had timely notice of the nature of the claim and the petitioner was deemed to have demonstrated a lack of prejudice. The fact that the petitioner did not have an adequate excuse was not a fatal defect. Leave to file a late notice of claim should have been granted.

PRELIMINARY INJUNCTIONS, EMPLOYMENT LAW, CIVIL PROCEDURE, RESTRICTIVE COVENANTS.

THERE ARE SUBSTANTIVE QUESTIONS OF FACT ABOUT THE NATURE OF THE AGREEMENTS BETWEEN PLAINTIFF EMPLOYER AND DEFENDANT EMPLOYEE RE: THE SALE OF DEFENDANT'S TAX PREPARATION BUSINESS TO PLAINTIFF AND WHETHER DEFENDANT SOLD HER CLIENT LIST TO PLAINTIFF; PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION ENFORCING THE RESTRICTIVE COVENANT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff-employer's motion for a preliminary injunction in this violation-of-a-restrictive-covenant case should not have been granted. There were too many issues of fact about the nature of the parties' agreement re: plaintiff's purchase of defendant's tax preparation business, including whether defendant turned over her client list to the plaintiff:

… [T]he plaintiff commenced this action against the defendant, its former employee, to recover damages for breach of contract. The plaintiff alleged … the parties entered into three agreements: a purchase agreement whereby the plaintiff purchased the defendant's tax preparation business, including her client list; an agreement whereby the plaintiff employed the defendant as a tax preparer; and a confidentiality, nonsolicit, and noncompete agreement which, inter alia, contained restrictive covenants that, among other things, prohibited the defendant from soliciting the plaintiff's clients. …

… [T]he plaintiff failed to demonstrate a clear right to relief and, thus, did not demonstrate a likelihood of success on the merits. "'[A] restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee'" … . An employer's interests justifying a restrictive covenant are limited "to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary" … . Here, there are issues of fact as to what

the parties agreed to, including whether the plaintiff purchased the rights to the defendant's clients pursuant to the parties' agreements and whether the plaintiff breached its own obligations pursuant to those agreements. Since these issues of fact exist, the plaintiff did not show a likelihood of success on the merits and, thus, failed to establish a clear right to preliminary injunctive relief … . R&G Brenner Income Tax Consultants v Fonts, 2022 NY Slip Op 04039, Second Dept 6-22-22

Practice Point: Where there are substantive questions of fact, a preliminary injunction should not be granted because a likelihood of success on the merits has not been demonstrated.

REAL PROPERTY TAX LAW, TENANT CAN CHALLENGE TAX ASSESSMENT.

THE TENANT (A NET LESSEE), WHICH WAS OBLIGATED BY THE TERMS OF THE LEASE TO PAY PROPERTY TAXES, CAN CHALLENGE A PROPERTY-TAX ASSESSMENT BY FILING A GRIEVANCE PURSUANT TO REAL PROPERTY TAX LAW (RPTL) 524 (3); THE APPELLATE DIVISION HAD RULED ONLY THE PROPERTY OWNER COULD CHALLENGE THE ASSESSMENT (CT APP).

The court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Division, determined a tenant who is obligated to pay property taxes can properly file a grievance contesting a property-tax assessment:

RPTL 524 (3) presents an ambiguity. The clause "person whose property is assessed" is not defined in the RPTL, and it lends itself to more than one reasonable interpretation … . * * *R

… [W]e … hold that a grievance complaint filed with the assessor or board of assessment review at the administrative level by a net lessee who is contractually obligated to pay real estate taxes on the subject property satisfies RPTL 524 (3). Matter of DCH Auto v Town of Mamaroneck, 2022 NY Slip Op 03929, CtApp 6-16-22

Practice Point: Clearing up an ambiguity in Real Property Tax Law RPTL section 524, the Court of Appeals held that a tenant (a net lessee), which is obligated by

the terms of the lease to pay the property taxes, can file a grievance challenging the property-tax assessment. The Appellate Division had held only the property owner could challenge an assessment.

RE-COMMENCEMENT OF DISMISSED LAWSUIT.

ONLY THE ORIGINAL PLAINTIFF CAN TAKE ADVANTAGE OF CPLR 205 (A) WHICH ALLOWS RE-COMMENCEMENT OF A LAWSUIT WITHIN SIX MONTHS OF A DISMISSAL WHICH WAS NOT ON THE MERITS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissenting opinion, determined the plaintiff, HSBC, could not take advantage of the six-month extension for commencing an action after a dismissal which was not on the merits (CPLR 205(a)) because HSBC was not the original plaintiff:

When a timely-commenced action has been dismissed on certain non-merits grounds, CPLR 205 (a) allows "the plaintiff" in that action "or, if the plaintiff dies," the "executor or administrator" of the plaintiff's estate, six months to commence a new action based on the same transaction or occurrence. The new action will be deemed timely based on the commencement of the prior action. Here, after the dismissal of a prior action brought by two certificateholders … —and after the statute of limitations expired—plaintiff HSBC Bank USA, National Association, in its capacity as trustee of a residential mortgage-backed securities (RMBS) trust, commenced this action against the sponsor, invoking CPLR 205 (a). Because HSBC was not "the original plaintiff" in the prior dismissed action … , we agree with the courts below that HSBC could not invoke CPLR 205 (a) to avoid dismissal of this time-barred claim … .* * *

HSBC is not "the plaintiff" in the prior action and the benefit of CPLR 205 (a) is unavailable to save its untimely complaint. … [T]his conclusion is consistent with the public policy underpinning the savings statute. CPLR 205 (a) is a remedial statute that … is "'designed to insure to the diligent suitor'" an opportunity to have a claim heard on the merits … when the suitor has "initiated a suit in time" … but the claim was dismissed on some technical, non-merits-based ground. While the savings statute undoubtedly has a "broad and liberal purpose" … to "ameliorate the potentially harsh effect of the [s]tatute of [l]imitations" … , "[t]he important

consideration is that, by invoking judicial aid [in the first action], a litigant gives timely notice to [the] adversary of a present purpose to maintain [its] rights before the courts" … . Where, as here, the litigant commencing the second action is not the original plaintiff, application of CPLR 205 (a) would protect the rights of a dilatory—not a diligent—suitor. By failing to bring the action within the statute of limitations, HSBC signaled that it had no intention to pursue its claims in court. CPLR 205 (a) does not apply and HSBC's failure to commence an action within the statute of limitations is fatal. ACE Sec. Corp. v DB Structured Prods., Inc., 2022 NY Slip Op 03927, CtApp 6-16-22

Practice Point: Only the original plaintiff can take advantage of CPLR 205 (a) which allows re-commencement of a lawsuit within six months of a dismissal which was not on the merits.

STATUTE OF LIMITATIONS, INSANITY TOLL.

QUESTIONS OF FACT ABOUT WHETHER THE INCAPACITATED PERSON (IP) WAS "INSANE" WITHIN THE MEANING OF THE CPLR WHEN HE WAS REPRESENTED BY THE DEFENDANT ATTORNEY MUST BE DETERMINED AT THE LEGAL MALPRACTICE TRIAL; IF THE IP WAS INSANE, THE MALPRACTICE STATUTE OF LIMITATIONS WILL BE TOLLED; IF NOT THE MALPRACTICE ACTION IS UNTIMELY (FIRST DEPT).

The First Department determined questions about the incapacitated person's (IP's) sanity should be part of the legal malpractice trial. If the IP is determined to have been "insane" at the time he was represented by defendant attorney, the statute of limitations for the legal malpractice action would have been tolled, if not, the action was not timely:

The parties do not dispute that [defendant attorney] established prima facie that this action asserting breach of fiduciary duty and related causes of action (the malpractice action) was commenced after the applicable statutes of limitations had expired. However, plaintiff raised an issue of fact whether the statutes of limitations were tolled for "insanity" (… CPLR 208[a]). Viewed in the light most favorable to plaintiff, the record presents issues of fact as to the IP's ability to

protect his legal rights and his overall ability to function in society at the time his claims against [defendant attorney] accrued … . Matter of Verdugo v Smiley & Smiley, LLP, 2022 NY Slip Op 04138, First Dept 6-28-22

Practice Point: There is an "insanity" statute-of -imitations toll in the CPLR. Here there a question of fact whether an incapacitated person was insane when he was represented by defendant attorney such that the legal malpractice statute of limitations was tolled.

WORKERS' COMPENSATION, INADEQUATE RECORD FOR APPEAL.

THE BOARD FAILED TO ADEQUATELY EXPLAIN ITS DECISION TO DENY COVERAGE OF MEDICAL BILLS ON THE GROUND THEY WERE NOT CAUSALLY RELATED TO CLAIMANT'S MEDICAL CONDITION, MAKING APPELLATE REVIEW IMPOSSIBLE; MATTER REMITTED (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the Board did not explain its decision to deny coverage of 25 medical bills based on the conclusion the bills did not relate to claimant's medical condition:

Although, "the Board has the exclusive province to resolve conflicting medical opinions" and to evaluate medical evidence before it, and its factual determinations on causal relationship will not be disturbed if supported by substantial evidence in the record, its decision here fails to indicate what medical opinions or reports formed the basis for the conclusions reached regarding causal relationship … . It is further noted that many of the bills or supporting records include multiple diagnoses and charges, with some of the diagnoses appearing to match the established conditions, such as treatment for a urinary tract infection. No basis is provided for denying compensability for portions of the bills related to established conditions, i.e., for denying payment for the entire medical bill based upon the inclusion of non-compensable treatment in the bill or records.

By failing to provide the reasons for its rulings or the basis upon which the determination was made, the WCLJ [Workers' Compensation Law Judge] and the Board "failed to satisfy [their] obligation to provide some basis for appellate

review" … . Matter of Sequino v Sears Holdings, 2022 NY Slip Op 04070, Third Dept 6-23-22

Practice Point: When the Workers' Compensation Board fails to adequately explain its denial of coverage for medical bills it concluded were not related to claimant's medical condition, appellate review by a court is not possible and the matter must be remitted.