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APPEALS, DISMISSAL OF APPEAL FOR FAILURE TO PROSECUTE, MOTION TO REARGUE, LABOR LAW-CONSTRUCTION LAW.

APPEAL FROM A DENIAL OF A MOTION TO REARGUE CONSIDERED DESPITE THE DISMISSAL OF THE APPEAL FROM THE INITIAL DENIAL OF SUMMARY JUDGMENT FOR FAILURE TO PROSECUTE; PLAINTIFF'S LABOR LAW240(1) CAUSE OF ACTION STEMMING FROM A FALL INTO A PIT SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined: (1) the appeal from the denial of a motion to reargue would be considered even though the appeal from the initial denial of summary judgment was dismissed for failure to prosecute; (2) the Labor Law 240(1) cause of action stemming from plaintiff's fall into a pit should not have been dismissed:

"As a general rule, we do not consider any issue raised on a subsequent appeal that was raised, or could have been raised, in an earlier appeal that was dismissed for lack of prosecution, although we have the inherent jurisdiction to do so" … . Since the plaintiff appealed from an order superseding the prior order appealed from at a time before the prior appeal was deemed dismissed, we exercise that discretion here. …

… [T]he defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action … . Contrary to the defendants' contention, the risk of falling into a 16-foot pit on an excavation site is a type of elevation-related risk within the purview of protection of Labor Law § 240(1) … . Furthermore, the defendants failed to establish, prima facie, that the plaintiff's negligence was the sole proximate cause of his injuries. The deposition testimony of the plaintiff and the foreman, which were submitted in support of the defendants' motion, contain conflicting testimony raising a triable issue of fact as to whether the plaintiff received instructions not to stand within five feet of the pit. The defendants also did not establish, prima facie, that the installation of a protective device "would have been contrary to the objectives of the work" … . Thorpe v One Page Park, LLC, 2022 NY Slip Op 05053, Second Dept 8-24-22

Practice Point: Here the appellate court exercised its discretion to hear an appeal from the denial of a motion to reargue, even though the appeal from the initial denial of summary judgment was dismissed for failure to prosecute.

Practice Point: Plaintiff's Labor Law 240(1) cause of action stemming from his fall into a pit should not have been dismissed.

COLLATERAL ESTOPPEL, CHILD VICTIMS ACT, EVIDENCE, FAMILY LAW, COLLATERAL ESTOPPEL.

SEXUAL ABUSE FINDINGS IN A FAMILY COURT PROCEEDING COULD NOT BE THE BASIS FOR APPLYING THE COLLATERAL ESTOPPEL DOCTRINE IN THIS CIVIL ACTION UNDER THE CHILD VICTIMS ACT; HEARSAY ADMITTED IN THE FAMILY COURT PROCEEDING IS NOT ADMISSIBLE IN THIS CIVIL ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a substantial dissent, determined defendant in this Child Victims Act action was not collaterally estopped from disputing the sexual abuse allegations based upon the related Family Court proceedings. Hearsay evidence properly admitted in Family Court is not admissible in this civil action in Supreme Court:

… [A]lthough the burden of proof for both the Family Court proceeding and these personal injury actions is the same, i.e., preponderance of the evidence … , hearsay evidence that was admissible in the underlying Family Court proceeding would not be admissible in the instant personal injury actions … . Inasmuch as our determination in the prior Family Court proceeding was based largely on hearsay evidence that would not be admissible in these civil actions, we agree with defendant that he should not be collaterally estopped from defending these actions and that the court erred in granting plaintiffs' motions for partial summary judgment on liability. Of Doe 44 v Erik P.R., 2022 NY Slip Op 04839, Fourth Dept 8-4-22

Practice Point: Here the sexual abuse findings in a Family Court proceeding could not be the basis for collateral estoppel prohibiting defendant from disputing the

child abuse allegation in this Child Victims Act action. Hearsay admitted in the Family Court proceeding is inadmissible in this civil proceeding.

DEFAULT JUDGMENTS, FORECLOSURE.

TO AVOID DISMISSAL PURSUANT TO CPLR 3215 (C) THE PLAINTIFF NEED ONLY TAKE PROCEEDINGS FOR THE ENTRY OF A DEFAULT JUDGMENT WITHIN ONE YEAR AND NEED NOT OBTAIN A DEFAULT JUDGMENT WITHIN A YEAR; ANY DELAYS AFTER THE ONE-YEAR PERIOD ARE IRRELEVANT (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the complaint should not have been dismissed because plaintiff bank took steps to procure a default judgment within one year of the default. Any subsequent delays were irrelevant:

… [A]pproximately two months after the defendant's default, the plaintiff moved for an order of reference. The fact that the Supreme Court later "marked off the calendar" the motion was irrelevant for the purposes of satisfying CPLR 3215(c) because the plaintiff was only required to "take proceedings for the entry of judgment" within the one-year time frame, and not actually obtain the judgment … . "[I]t is enough that the plaintiff timely takes the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference to establish that it initiated proceedings for entry of a judgment within one year of the default for the purposes of satisfying CPLR 3215(c)" … . … [T]he plaintiff was not required to account for any additional periods of delay that may have occurred subsequent to the initial one-year period contemplated by CPLR 3215(c) … . Deutsche Bank Natl. Trust Co. v Khalil, 2022 NY Slip Op 04898, Second Dept 8-10-22

Practice Point: To avoid dismissal pursuant to CPLR 3215 (c) a plaintiff need only take proceedings for the entry of a default judgment within one year of the default and need not obtain a default judgment within a year; any delays after the one-year period are irrelevant.

DEFAULT JUDGMENTS, REASONABLE EXCUSE.

DEFENDANT DID NOT OFFER A REASONABLE EXCUSE FOR FAILING TO TIMELY ANSWER THE COMPLAINT; DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate the default judgment should not have been granted because defendant did not offer a reasonable excuse for the failure to timely answer:

Supreme Court should have denied the defendant's cross motion, in effect, to vacate its default in answering the complaint and to compel the plaintiff to accept its late answer … . "A defendant who has failed to timely answer a complaint and who seeks leave to file a late answer must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action" … . Here, the defendant failed to proffer any excuse, let alone a reasonable excuse, for failing to serve an answer prior to the tolling period created by the executive orders issued by former Governor Andrew Cuomo as a result of the COVID-19 pandemic … as well as its failure to serve an answer or move to compel acceptance of its late answer for months after the expiration of the executive orders. Since the defendant failed to demonstrate a reasonable excuse, it is unnecessary to consider whether it sufficiently demonstrated the existence of a potentially meritorious defense … . 195-197 Hewes, LLC v Citimortgage, Inc., 2022 NY Slip Op 05065, Second Dept 8-31-22

Practice Point: Here defendant's failure to offer a reasonable excuse for failing to timely answer the complaint required denial of defendant's motion to vacate the default judgment. Apparently the COVID toll of time limits did not suffice.

DISCOVERY, DEFAULTING DEFENDANT, INQUEST ON DAMAGES.

THE DEFAULTING DEFENDANT WHOSE ANSWER HAD BEEN STRUCK WAS NOT ENTITLED TO FURTHER DISCOVERY PRIOR TO THE INQUEST ON DAMAGES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defaulting defendant whose answer had been struck was not entitled to further discovery for the inquest on damages:

The Supreme Court erred in granting the defendant's motion to vacate the note of issue and certificate of readiness and to compel the plaintiff to provide additional discovery. "While a defaulting defendant is entitled to present testimony and evidence and cross-examine the plaintiff's witnesses at the inquest on damages, such a defendant is not entitled to any further discovery since its answer was stricken" … . Here, since the court struck the defendant's answer … the defendant "is not entitled to any further discovery" … . Brasil-Puello v Weisman, 2022 NY Slip Op 04893, Second Dept 8-10-22

Practice Point: A defaulting defendant whose answer has been struck is not entitled to discovery prior to the inquest on damages.

DISCOVERY, DEPOSITION OF EXPERTS, MEDICAL MALPRACTICE, CONTRACT LAW.

AN AGREEMENT SIGNED BY THE PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION REQUIRING THE DEPOSITION OF EXPERT WITNESSES 120 DAYS BEFORE TRIAL IS VOID AND UNENFORCEABLE AS AGAINST THE POLICY UNDERLYING THE EXPERT DISCLOSURE PROVISIONS OF THE CPLR (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Maltese, determined the agreement signed by plaintiff in this medical malpractice action which required

the deposition of expert witnesses 120 days before trial was void and unenforceable:

The issue on this appeal is whether the defendants Benjamin M. Schwartz, M.D., and Island Gynecologic Oncology, PLLC (hereinafter together the defendants), may enforce a provision in an agreement that the defendant physician's receptionist asked the injured plaintiff to sign among other routine medical releases prior to undergoing surgery. Pursuant to this provision, if a patient commenced a medical malpractice action against the defendant physician, each party's counsel would have the right to depose the other parties' expert witness(es) at least 120 days before trial. We hold that this provision is unenforceable as against public policy and, in any event, the defendants waived the right to enforce the provision. Furthermore, the entire agreement is unenforceable because the Supreme Court found certain other provisions to be unenforceable, the defendants do not challenge the court's holding regarding those provisions on appeal, and those provisions are not severable from the remainder of the agreement, including the provision at issue on appeal. * * *

Requiring experts to be made available for deposition 120 days before trial also directly contradicts the provision in CPLR 3101(d)(1)(i) that gives trial courts the discretion to "make whatever order may be just" in the event that a party retains an expert in an insufficient period of time before the commencement of trial to provide appropriate notice. This statutory provision reflects the important public policy of allowing courts to retain discretion in their role as gatekeeper in determining the admissibility of expert testimony … . For all of the foregoing reasons, we conclude that, here, the public policy in favor of freedom of contract is overridden by these other important and countervailing public policy interests … . Mercado v Schwartz, 2022 NY Slip Op 04962, Second Dept 8-17-22

Practice Point: An agreement sighed by a patient, who became a plaintiff in this medical malpractice action, which required the deposition of expert witnesses 120 days before trial is void and unenforceable as against the policy underlying the expert disclosure provisions of the CPLR.

DISCOVERY, NEGLIGENCE, TRAFFIC ACCIDENTS, CELL PHONES.

THE CELL PHONE RECORDS OF PLAINTIFF-DRIVER IN THIS TRAFFIC ACCIDENT CASE HAD BEEN PROVIDED TO DEFENDANTS BUT THERE ARE SEVERAL POSSIBLE USES OF THE CELL PHONE WHICH ARE NOT REVEALED BY THE RECORDS; DEFENDANTS WERE ENTITLED TO DISCOVERY OF THE CELL PHONE TO DETERMINE WHETHER PLAINTIFF WAS USING IT AT THE TIME OF THE ACCIDENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants in this traffic accident case were entitled to access to plaintiff-driver's (Farrell's) cell phone to determine whether the phone was being used at the time of the accident. There are certain uses of the phone which were not revealed by the cell phone records already provided to defendants:

Although the cell phone records subsequently obtained from the service provider established that Farrell was not talking on his phone at the time of the accident, they did not indicate whether he opened or sent text messages during the relevant time period. On the phone used by Farrell, texts were sent as encrypted "iMessages" that do not show up on phone records. Moreover, the phone records did not indicate whether Farrell was using any applications on his phone, such as Snapchat or Facebook. * * *

Defendants "satisfy[ied] the threshold requirement that the[ir] request [was] reasonably calculated to yield information that [was] 'material and necessary'— i.e., relevant—" to issues involved in the action … . "The test is one of usefulness and reason" … . In support of the motion … defendants submitted evidence that Farrell was traveling at close to 80 miles per hour seconds before the accident, which occurred on a residential road near an elementary school. Defendants also submitted evidence that Farrell did not brake before colliding with the school bus. Evidence concerning whether Farrell was distracted before the collision is relevant to the issues involved in this negligence action, and defendants' request for production of or access to his cellular phone is reasonably calculated to yield relevant information … , especially considering that Farrell is unable, due to his injuries, to provide any information regarding his activities in the moments before the accident … . Tousant v Aragona, 2022 NY Slip Op 04871, Fourth Dept 8-4-22

Practice Point: Here defendants were entitled to discovery of plaintiff-driver's cell phone to determine whether plaintiff was using it at the time of the traffic accident. Although defendants had already been provided with the cell-phone records, there are several uses of the phone which are not revealed by the records.

DISCOVERY, PRECLUSION ORDER.

THE CONDITIONAL PRECLUSION ORDER BECAME ABSOLUTE WHEN PLAINTIFF DID NOT COMPLY BY PROVIDING DEFENDANTS WITH MEDICAL AUTHORIZATIONS BY THE SPECIFIED DATE; BECAUSE PLAINTIFF OFFERED NO REASONABLE EXCUSE, PLAINTIFF SHOULD HAVE BEEN PRECLUDED FROM PRESENTING ANY MEDICAL EVIDENCE AT TRIAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the plaintiff should have precluded from presenting any medical evidence at trial because plaintiff failed to comply with the conditional order requiring plaintiff to provide defendants with medical authorizations by a specified date:

… [T]he plaintiff failed to comply with the conditional order by providing authorizations for the individuals and entities listed in the defendants' supplemental demands for authorizations. …

… [T]he conditional order became absolute on February 14, 2020, and to be relieved from the adverse impact of the conditional order, the plaintiff was required to demonstrate a reasonable excuse for failing to comply with the conditional order and a potentially meritorious cause of action … . The plaintiff failed to proffer a reasonable excuse for failing to comply with the conditional order, and thus, we need not reach the issue of whether he demonstrated the existence of a potentially meritorious cause of action … . Since the plaintiff failed to make the requisite showing to be relieved from the adverse impact of the conditional order, the Supreme Court should not have imposed a limitation on the directive in the conditional order precluding the plaintiff from presenting at trial any medical evidence on the issue of damages … . Martin v Dormitory Auth. of the State of N.Y., 2022 NY Slip Op 04907, Second Dept 8-10-22

Practice Point: Here the preclusion order became absolute when plaintiff failed to provide medical authorizations to defendants by the specified date. Plaintiff had no excuse for the failure to comply. Therefore plaintiff should have been precluded from offering any medical evidence at trial.

DISCOVERY, FAILURE TO PROVIDE DISCOVERY, SANCTIONS.

DEFENDANTS' REPEATED FAILURES TO COMPLY WITH DISCOVERY DEMANDS WARRANTED STRIKING THE ANSWER AND COUNTERCLAIMS; SUPREME COURT HAD IMPOSED LESS SEVERE SANCTIONS, BUT THE APPELLATE COURT REVERSED AND IMPOSED THE ULTIMATE SANCTION–A RARE EXAMPLE OF CONDUCT DEEMED "WILLFUL AND CONTUMACIOUS" (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants-landlords' answer and counterclaims in this lease-related dispute with the plaintiff-tenant. should have been struck as a sanction for defendants' repeated failures to comply with discovery demands:

Before imposing the "drastic" remedy of striking a pleading, there must be a clear showing that a party's failure to comply with discovery is willful and contumacious … .. "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time" ,,, ,

Here, contrary to the Supreme Court's assessment, the defendants' behavior was willful and contumacious. The tenant demonstrated that the defendants "repeated[ly] fail[ed] to comply with court-ordered discovery" over "an extended period of time[,]" and the court itself found that the defendants offered "inadequate explanations for their failures to comply" … . Under the circumstances presented here, we find that the court should have granted that branch of the tenant's motion which was pursuant to CPLR 3126 to strike the defendants' answer and counterclaims in its entirety … . 255 Butler Assoc., LLC v 255 Butler, LLC, 2022 NY Slip Op 05067, Second Dept 8-31-22

Practice Point: This is a rare case where Supreme Court's sanctions for defendants' failures to comply with discovery demands were deemed inadequate. The appellate court stuck defendants' answer and counterclaims finding defendants' conduct "willful and contumacious."

DOCTRINE OF VESTED INTERESTS, ZONING, LAND USE.

PETITIONER WAS ISSUED A PERMIT TO CONSTRUCT COMMERCIAL SPACE WITH 557 PARKING SPACES; THE PERMIT WAS REVOKED BECAUSE THE TOWN CODE REQUIRED 624 PARKING SPACES; BECAUSE THE PERMIT WAS INVALID, PETITIONER COULD NOT INVOKE THE "DOCTRINE OF VESTED RIGHTS" FOR A VARIANCE ALLOWING 557 SPACES (SECOND DEPARTMENT).

The Second Department, reversing Supreme Court, determined the petitioner was not entitled to a variance pursuant to the doctrine of vested rights. Petitioner had been issued a permit to build commercial space which included 557 parking spaces. The town subsequently revoked the permit because the town code required 624 parking spaces. Petitioner then applied for a variance arguing the permit which had been issued conveyed a vested right to the originally approved 557 parking spaces:

"The doctrine of vested rights is implicated when a property owner seeks to continue to use property, or to initiate the use of property, in a way that was permissible before enactment or amendment of a zoning ordinance but would not be permitted under a new zoning law" … . Such "a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development" … . However, "[v]ested rights cannot be acquired in reliance upon an invalid permit" … . "[T]he mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results" … . Here, as the ZBA [zoning board of appeals] soundly determined, the permit issued to the petitioner was invalid, since the Town Code plainly sets forth the method for calculating the nonresidential gross floor area according to which the number of

required parking spaces is set and pursuant to that method, the required number of spaces exceeded the 557 spaces planned by the petitioner … . Since the permit issued to the petitioner was invalid, it could not have conferred vested rights … . Matter of C & B Realty #3, LLC v Van Loan, 2022 NY Slip Op 05036, Second Dept 8-24-22

Practice Point: Here the petitioner was issued a permit for construction which was later revoked as invalid because it violated the town code. The "doctrine of vested rights" does not apply to the provisions in an invalid permit. Therefore petitioner's application for a variance to build according to the provisions of the revoked permit was denied. The "doctrine of vested rights" is explained in the decision.

FAILURE TO PROSECUTE.

AN ACTION CANNOT BE DISMISSED FOR FAILURE TO PROSECUTE PURSUANT TO CPLR 3216 WHEN ISSUE HAS NEVER BEEN JOINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure complaint should not have been dismissed pursuant to CPLR 3216 because issue had not been joined:

"A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met, including that issue has been joined in the action" … .. Here, dismissal of the action pursuant to CPLR 3216 was improper, since none of the defendants had interposed an answer to the complaint and, thus, issue was never joined … . Similarly, under the circumstances of this case, 22 NYCRR 202.27 did not provide a basis for dismissal of the action … . Wells Fargo Bank, N.A. v Frederic, 2022 NY Slip Op 04999, Second Dept 6-17-22

Practice Point: Where issue has not been joined the action cannot be dismissed for neglect to prosecute pursuant to CPLR 3216.

JURISDICTION, FAMILY LAW.

ALTHOUGH NEW YORK DID NOT HAVE JURISDICTION OVER THE MICHIGAN CUSTODY ORDER; FAMILY COURT SHOULD HAVE EXERCISED TEMPORARY EMERGENCY JURISDICTION AND HELD A HEARING ON THE CHILD'S SAFETY; THE CHILD WAS IN NEW YORK DURING FATHER'S PARENTING TIME WHEN FATHER BROUGHT A NEGLECT/CUSTODY PETITION IN NEW YORK (THIRD DEPT).

The Third Department, reversing Family Court, determined, although Family Court properly dismissed father's neglect/custody petition on the ground New York did not have jurisdiction over the Michigan custody order, Family Court should have ordered a hearing about the child's safety pursuant to the court's temporary emergency jurisdiction. The child was in New York during father's parenting time at the time father filed the petition:

Under the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act], a New York court has jurisdiction to make an initial child custody determination under certain limited circumstances … . Here, the parties agreed that, as Michigan is the home state of the child, none of these statutory factors apply. Nevertheless, Domestic Relations Law § 76-c provides that "New York courts have 'temporary emergency jurisdiction if the child is present in this state and it is necessary in an emergency to protect the child, a sibling or parent of the child'" … .

The AFC [attorney for the child] and the father contend that the allegations set forth in the petition were sufficient to warrant Family Court to conduct a hearing. We agree. Matter of Chester HH. v Angela GG., 2022 NY Slip Op 05002, Third Dept 8-18-22

Practice Point: Although New York did not have jurisdiction over a Michigan custody order and therefore properly dismissed father's neglect/custody petition brought in New York when the child was in New York, Family Court should have exercised its temporary emergency jurisdiction and held a hearing on the child's safety.

NOTICE OF CLAIM, MUNICIPAL LAW, NEGLIGENCE, LATE NOTICE OF CLAIM.

EVEN THOUGH THE CITY WAS NOT ABLE TO SHOW IT WAS PREJUDICED BY THE NINE MONTH DELAY BEFORE THE PETITION SEEKING LEAVE TO FILE A LATE NOTICE OF CLAIM, AND DESPITE THE FACT THAT A SLIP AND FALL INCIDENT REPORT WAS CREATED BY THE POLICE ON THE DAY OF THE INCIDENT, LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined leave to file a late notice of claim in this slip and fall case should not have been granted. There was a nine-month delay. There was an incident report prepared on the day of the accident but the Second Department found the report did not notify the city of a potential lawsuit stemming from the accident. The attorney affirmation submitted by the city was speculative and therefore did not demonstrate the city was prejudiced by the failure to timely file the notice of claim. Petitioner did not have a reasonable excuse for failing to timely file. Despite the city's failure to show prejudice, the petition should have been denied:

… [T]he appellants did not acquire actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter … . … [A] Yonkers Police Department incident report prepared on the day of the accident by a responding officer did not provide the appellants with actual knowledge of the essential facts constituting the claim. For reports to provide actual knowledge of the essential facts, "one must be able to readily infer from that report that a potentially actionable wrong had been committed" … . A police accident report prepared by a responding officer, establishing knowledge of the accident, generally does not, without more, provide actual knowledge to the municipal defendants of the essential facts underlying the claim against them … . Here, the Yonkers Police Department report indicated that the petitioner stated that she had slipped and fallen while exiting a ramp on the appellants' property and turning the corner, but there is no identification of the cause of the fall from which negligence on the part of the appellants could be inferred.

The petitioner asserts that there is no prejudice to the appellants' ability to conduct an investigation inasmuch as the transitory nature of the icy condition would be difficult to investigate whether 90 days later or months later … . In response, the appellants rely upon an attorney affirmation stating that their ability to conduct an investigation was substantially prejudiced by the delay because one of the responding officers retired and might not be available to testify, and the others could not be expected to recall the accident, given the passage of time. This affirmation, based solely on speculation and conjecture, is insufficient for the appellants to rebut the petitioner's showing of lack of prejudice with particularized evidence in the record … .

Nevertheless, weighing the appropriate factors, the Supreme Court should have denied the petition in light of the lack of reasonable excuse, the time elapsed, and the lack of actual knowledge of the essential facts giving rise to the claim … . Matter of Ortiz v Westchester County, 2022 NY Slip Op 04807, Second Dept 8-3-22

Practice Point: Here an incident report prepared by the police on the day of the slip and fall was deemed not to have provided the city with timely notice of a potential lawsuit. And the fact that the city did not demonstrate it was prejudiced by the delay did not prevent the Second Department from finding the petition for leave to file a late notice of claim should not have been granted.

NOTICE OF CLAIM, MUNICIPAL LAW, NEGLIGENCE, LATE NOTICE OF CLAIM.

THE CITY HAD TIMELY KNOWLEDGE OF THE POTENTIAL LAWSUIT FROM AN ACCIDENT REPORT AND THEREFORE WAS NOT PREJUDICED BY THE FAILURE TO FILE A NOTICE OF CLAIM; THE PETITION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED DESPITE THE ABSENCE OF A REASONABLE EXCUSE (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 accident alerted

the city to the potential lawsuit and the delay was minimal. The absence of a reasonable excuse for the delay was overlooked:

It was readily inferable from a police accident report, a line-of-duty injury report, and witness statements taken on the day of the subject accident "that a potentially actionable wrong had been committed by [an employee of] the public corporation" … . Thus, the defendant was not prejudiced by the petitioner's delay, which was, in any event, minimal. Accordingly, the court should have granted the petition notwithstanding the lack of a reasonable excuse … . Matter of Dautaj v City of New York, 2022 NY Slip Op 04802, Second Dept 8-3-22

Practice Point: Where a municipal defendant has actual timely notice of a potential lawsuit from an accident report, the delay is not long, and the city suffers no prejudice from the failure to timely file, a petition for leave to file a late notice of claim should be granted even when petitioner does not have a reasonable excuse.

NOTICE OF CLAIM, MUNICIPAL LAW.

THE COUNTY HAD TIMELY KNOWLEDGE OF THE NATURE OF PETITIONER'S EXCESSIVE-FORCE CLAIM AGAINST THE POLICE AND DID NOT DEMONSTRATE PREJUDICE FROM THE DELAY IN FILING A NOTICE OF CLAIM; THAT PETITIONER DID NOT HAVE AN ADEQUATE EXCUSE WAS NOT DETERMINATIVE; THE APPLICATION TO SERVE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner's application to file a late notice of claim in this "excessive force" action against the police should have been granted. The county had timely knowledge of the nature of the claim and the county did not demonstrate prejudice from the delay. The absence of an adequate excuse was not determinative:

… [T]he petitioner commenced this proceeding pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim upon the County of Suffolk and the SCPD, alleging, inter alia, that he had sustained personal injuries due to the use of excessive force by the arresting officers. …

In determining whether to grant an application for leave to serve a late notice of claim, the court is required to consider all relevant facts and circumstances, including whether the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, whether the claimant has a reasonable excuse for the failure to timely serve a notice of claim, and whether the delay would substantially prejudice the public corporation in maintaining its defense … . …

… [T]he respondents had timely actual knowledge of the essential facts constituting the petitioner's claim, since their employees participated in the acts giving rise to the claim and filed reports and prepared other documentation with respect to the subject incident from which it could be readily inferred that the respondents had committed a potentially actionable wrong … . Matter of Romero v County of Suffolk, 2022 NY Slip Op 04966, Second Dept 8-17-22

Practice Point: Here the county had timely knowledge of the nature of petitioner's excessive-force claim against the police and the county could not demonstrate any prejudice from petitioner's late filing. The absence of an adequate excuse for failure to file on time was not determinative. Petitioner's application to file a late notice of claim should have been granted.

PLEADINGS, AMENDMENT OF COMPLAINT, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), DEBTOR-CREDITOR.

ONCE PLAINTIFF'S FORECLOSURE ACTION WAS DISCONTINUED BY STIPULATION, THE FORECLOSURE COMPLAINT COULD BE AMENDED TO SEEK RECOVERY ON THE NOTE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff, after its foreclosure action was discontinued, could amend the foreclosure complaint to seek recovery on the note:

"'RPAPL 1301(3) . . . prohibits a party from commencing an action at law to recover any part of the mortgage debt while the foreclosure proceeding is pending

or has not reached final judgment, without leave of the court in which the foreclosure action was brought'" (… see RPAPL 1301[3]). Conversely, "'where a foreclosure action is no longer pending and did not result in a judgment in the plaintiff's favor, the plaintiff is not precluded from commencing a separate action without leave of the court'" … .

Here, pursuant to the so-ordered stipulation and the plaintiff's release of the mortgage, the cause of action to foreclose the mortgage was, in effect, discontinued, without the entry of any judgment in the plaintiff's favor … . Since the cause of action to foreclose the mortgage was no longer pending, the plaintiff was not precluded from seeking to recover on the note by RPAPL 1301(3), "'a statute which must be strictly construed'" … .

Furthermore, "there is no reason the plaintiff could not seek such relief by seeking leave to amend its complaint, rather than by commencing a new action" … . Stewart Tit. Ins. Co. v Zaltsman, 2022 NY Slip Op 05107, Second Dept 8-31-22

Practice Point: Here the foreclosure action was discontinued and plaintiff was allowed to amend the foreclosure complaint to seek recovery on the note.

PLEADINGS, LEGAL MALPRACTICE, "BUT FOR" ALLEGATION.

FAILURE TO ALLEGE THAT "BUT FOR" DEFENDANT ATTORNEY'S NEGLIGENCE PLAINTIFF WOULD HAVE PREVAILED REQUIRED DISMISSAL OF THE LEGAL MALPRACTICE COMPLAINT (FIRST DEPT).

The First Department determined plaintiff's legal malpractice complaint was properly dismissed for failing to allege that "but for" the attorney's negligence plaintiff would have prevailed:

Supreme Court properly dismissed plaintiff's legal malpractice cause of action in the original complaint because he failed to allege that "but for" defendant's negligent conduct, he would have prevailed in the underlying action … . Plaintiff's citation to a ruling in the underlying action denying dismissal of his fraud claim, among others, did not, without more, show that he would have prevailed in the underlying action had defendant timely commenced it by naming the proper parties

in the original complaint … . Markov v Barrows, 2022 NY Slip Op 04780, First Dept 8-2-22

Practice Point: To sufficiently allege legal malpractice, the complaint must allege that "but for" the attorney's negligence plaintiff would have prevailed.

PLEADINGS, MEDICAL MALPRACTICE.

IN THIS MEDICAL MALPRACTICE ACTION, THE PLAINTIFF WAS NOT REQUIRED TO IDENTIFY EACH ALLEGEDLY NEGLIGENT EMPLOYEE OF THE DEFENDANT MEDICAL CENTER TO SURVIVE SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff was not obligated to provide the name of every negligent employee of the defendant Erie County Medical Center Corporation (ECMC) to survive summary judgment in this medical malpractice action:

Contrary to the court's determination, plaintiff was not required to provide the name of every allegedly negligent actor engaging in conduct within the scope of employment for ECMC … inasmuch as ECMC was on notice of the claims against it based on the allegations in the amended complaint, as amplified by plaintiff's bill of particulars to ECMC, noting failures and omissions by ECMC's employees. Indeed, ECMC is in the best position to identify its own employees and contractors and, as the creator of decedent's medical records, ECMC had notice of who treated decedent and of any allegations of negligence by its nursing staff. Braxton v Erie County Med. Ctr. Corp., 2022 NY Slip Op 04866, Fourth Dept 8-4-22

Practice Point: In this medical malpractice action, the plaintiff was not required to identify each allegedly negligent employee of the medical center to survive summary judgment.

REPLIES, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE SUBMITTED IN REPLY.

PLAINTIFF BANK DID NOT DEMONSTRATE THE RPAPL 1304 NOTICE OF FORECLOSURE WAS PROPERLY MAILED AND THE DEFECT COULD NOT BE CURED BY THE SECOND AFFIDAVIT SUBMITTED IN REPLY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate compliance with the mailing requirements of RPAPL 1304 and the defect was not cured by an affidavit submitted in reply:

… [T]he plaintiff submitted the affidavit of Kolette Modlin, an authorized officer of Caliber Home Loans, Inc. (hereinafter Caliber), the loan servicer for the plaintiff's successor in interest. Modlin stated that she had reviewed the plaintiff's business records, which had been verified for accuracy, incorporated into Caliber's records, and relied upon by Caliber in the ordinary course of its business, and determined that 90-day notices were mailed by first-class and certified mail to the defendant at the mortgaged premises. The plaintiff also submitted copies of the 90-day notices that were allegedly sent to the defendant. However, the plaintiff failed to attach, as exhibits to the motion, any documents establishing that the notices were actually mailed … . Moreover, although Modlin attested that she had personal knowledge of Caliber's records, and that those records included the plaintiff's records, Modlin did not attest to knowledge of the mailing practices of the plaintiff, which was the entity that allegedly sent the 90-day notices to the defendant … . Contrary to the plaintiff's contention, although it submitted with its reply papers a second affidavit from Modlin, along with documentary evidence in the form of a letter log purportedly establishing the mailing of the 90-day notices, the plaintiff could not, under the circumstances, rely on the second affidavit to correct deficiencies inherent in the original one … . Ditech Fin., LLC v Cummings, 2022 NY Slip Op 04949, Second Dept 8-17-22

Practice Point: Plaintiff bank did not submit the records proving the notice of foreclosure was properly mailed and the affiant did not demonstrate familiarity with the mailing procedures used by the party which mailed the notice. The defects were not cured by a second affidavit submitted in reply. The bank's motion for summary judgment should not have been granted.

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SERVICE OF PROCESS, MISLEADING PROCESS SERVER.

DEFENDANT SHOULD HAVE BEEN ESTOPPED FROM CLAIMING THE ADDRESS IN THE AFFIDAVIT OF SERVICE WAS NOT HIS DWELLING PLACE; DEFENDANT TOOK AFFIRMATIVE STEPS TO MISLEAD THE PARTY ATTEMPTING TO SERVE HIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant should have been estopped from claiming the address in the affidavit of service was not his "dwelling plaice" because defendant misled the party attempting to serve him:

Estoppel, in this context, may preclude a defendant "from challenging the location and propriety of service of process if that defendant has engaged in affirmative conduct which misleads a party into serving process at an incorrect address" … . For example, "where a defendant willfully misrepresented his address or violated a statutory notification requirement … , or where he 'engaged in conduct calculated to prevent the plaintiff from learning his actual place of residence' … , he may be estopped from asserting the defense of defective service" … .

Here, the record established that the defendant engaged in "affirmative conduct which misl[ed] a party into serving process at an incorrect address" … . Hudson Val. Bank, N.A. v Eagle Trading, 2022 NY Slip Op 04956, Second Dept 8-17-22

Practice Point: A party who affirmatively takes steps to mislead the party attempting to serve him will be estopped from claiming the address in the affidavit of service is not his dwelling place.

STANDING, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

EVIDENCE OF COMPLIANCE WITH THE NOTICE-OF-FORECLOSURE MAILING REQUIREMENTS OF RPAPL 1304 FIRST SUBMITTED IN REPLY SHOULD NOT HAVE BEEN CONSIDERED; THE EVIDENCE THE BANK HAD STANDING TO BRING THE FORECLOSURE ACTION WAS INSUFFICIENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's proof of mailing of the foreclosure notice first submitted in reply should not have been considered, and plaintiff did not demonstrate it had standing to bring the foreclosure action:

… [T]he affidavits that the plaintiff appended to its moving papers failed to establish that the RPAPL 1304 notices were mailed by first-class mail in accordance with RPAPL 1304. While the plaintiff submitted an additional affidavit in reply, with proof of first-class mailing attached, this evidence should not have been considered in the determination of whether the plaintiff met its prima facie burden, as the issue which the new evidence was intended to address was not an issue raised for the first time in the defendants' opposition, and the defendants were not afforded an opportunity to submit a surreply in response to the plaintiff's newly submitted evidence in reply … . …

[Re; standing:] …[T]he plaintiff attached to the complaint copies of the 2003 note and 2004 note, which together constituted the consolidated note, and each note was accompanied by an undated purported allonge endorsed to the plaintiff. However, the plaintiff failed to demonstrate that the purported allonges, each of which was on a piece of paper completely separate from the corresponding note, was "so firmly affixed" to the corresponding note "as to become a part thereof," as required by UCC 3-202(2) … . Wells Fargo Bank, N.A. v Murray, 2022 NY Slip Op 05110, Second Dept 8-31-22

Practice Point: Evidence of compliance with the notice-of-foreclosure mailing requirements of RPAPL 1304 first submitted in reply should not have been considered.

Practice Point: The bank did not demonstrate standing to bring the foreclosure action.

STATUTE OF LIMITATIONS, BORROWING STATUTE, CHILD VICTIMS ACT.

HERE PLAINTIFFS ALLEGED THEY WERE SEXUALLY ABUSED DECADES AGO IN MASSACHUSETTS AND SUED UNDER THE CHILD VICTIMS ACT WHICH SERVES TO EXTEND THE STATUTE OF LIMITATIONS; ORDINARILY THE BORROWING STATUTE APPLIES TO OUT-OF-STATE TORTS REQUIRING THE ACTION TO BE TIMELY UNDER BOTH NEW YORK AND THE FOREIGN STATE'S LAWS; HERE THE "RESIDENT EXCEPTION" APPLIED BECAUSE THE PLAINTIFF'S WERE NEW YORK RESIDENTS AT THE TIME OF THE ALLEGED ABUSE; THEREFORE THE ACTION NEED ONLY BE TIMELY UNDER NEW YORK'S CHILD VICTIMS ACT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the "resident exception" to the borrowing statute applied to New-York-resident plaintiffs who allegedly were sexually abused decades ago at a camp in Massachusetts run by Syracuse University. Ordinarily New York's borrowing statute requires that an action for an out-of-state tort be timely under both New York's Child Victims Act and the foreign state's statute of limitations. However, there is an exception to that rule when the plaintiffs, abused in a foreign state, were New York residents at the time of the abuse:

"When a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation[s] periods of both New York and the jurisdiction where the cause of action accrued" … . In tort cases, the Court of Appeals has held that "a cause of action accrues at the time and in the place of the injury" … . Thus, for [such] claims to survive, they must be timely under both CPLR 214-g and the applicable [foreign state's] statute of limitations. …

… [Plaintiffs] were New York residents when the … causes of action accrued. Pursuant to the "resident exception" of the borrowing statute … , a claim that

accrues in favor of a New York resident will be governed by the New York statute of limitations regardless of where the claim accrued (see CPLR 202 … . … [Teh Child Victims Act] revival statute applies … . Shapiro v Syracuse Univ., 2022 NY Slip Op 04835, Fourth Dept 8-4-22

Practice Point: Ordinarily an action based on out-of-state sexual abuse of a child decades ago must be timely under both New York's Child Victim's Act and the foreign state's statute of limitations. However, if the child was a New York resident at the time of the out-of-state abuse, only the extended statute of limitations provided by the Child Victims Act applies.

STATUTE OF LIMITATIONS, FORECLOSURE, ACCELERATION OF DEBT.

THE LETTER SENT TO THE BORROWER BY THE BANK IN THIS FORECLOSURE ACTION DID NOT EXPLICITLY INDICATE THE DEBT WAS BEING IMMEDIATELY ACCELERATED; THEREFORE THE DEBT HAD NOT BEEN ACCELERATED AND THE FORECLOSURE ACTION WAS NOT TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the letter sent by the bank to the borrower in this foreclosure action did not accelerate the debt and therefore did not trigger the six-year statute of limitations:

… [A] " 'letter discussing acceleration as a possible future event, . . . does not constitute an exercise of the mortgage's optional acceleration clause'" … "The determinative question is not what the noteholder intended or the borrower perceived, but whether the contractual election was effectively invoked" … . Here, a letter sent to the defendants … , did not effectively accelerate the mortgage debt, as this letter merely discussed acceleration as a possible future event … . HSBC Bank USA v Pantel, 2022 NY Slip Op 04954, Second Dept 8-17-22

Practice Point: A letter from the bank to the borrower which discussed the acceleration of the mortgage debt but did not indicate the debt was in fact accelerated did not trigger the six-year statute of limitations on the foreclosure action. The foreclosure action was not, therefore, time-barred.

STATUTE OF LIMITATIONS, MEDICAL MALPRACTICE, CONTINUOUS TREATMENT DOCTRINE.

THE MOTION TO DISMISS ALLEGATIONS OF MEDICAL MALPRACTICE PRIOR TO APRIL 2013 AS TIME-BARRED WAS PROPERLY GRANTED BECAUSE THE CONTINUOUS TREATMENT DOCTRINE DID NOT APPLY; THERE WAS A SUBSTANTIVE DISSENT ARGUING THAT DOCUMENTS SUBMITTED BY THE DEFENDANTS SUPPORTED APPLYING THE CONTINUOUS TREATMENT DOCTRINE AND THE MATTER SHOULD PROCEED TO DISCOVERY (SECOND DEPT).

The Second Department, over an extensive dissent, determined the continuous treatment doctrine did not apply and defendants' motion to dismiss allegations of medical malpractice occurring before April 9, 2013, was properly granted. The decision is detailed and fact-specific and cannot be fairly summarized here:

Accepting the plaintiff's expansive view that the mere status of receiving treatment for menopausal symptoms necessarily encompasses all conditions related to menopause and aging, would undermine the sound policy reasons behind the continuous treatment doctrine … . Such a result is contrary to the foundational policy reasons for creating the continuous treatment doctrine, and could result in expanding it to virtually all the medical care a patient receives … . * * *

From the dissent:

The Supreme Court's determination, endorsed by my colleagues in the majority, that the records submitted by the defendants never reference or address osteoporosis is, in fact, belied by those medical records created and submitted by the defendants, which document, inter alia, that, during the relevant period, the defendants assessed, treated, and monitored the plaintiff's bone health, despite their failure to order a bone density test.

In sum, the majority's characterization of certain of the defendants' own documents fails to afford the plaintiff the favorable view through which the

documents should be read … . Moreover, no discovery has been conducted yet, and "[t]he resolution of the continuous treatment issue . . . should abide relevant discovery" … . Weinstein v Gewirtz, 2022 NY Slip Op 04997, Second Dept 8-17-22

Practice Point: Here the pre-discovery motion to dismiss medical malpractice causes of action as time-barred was affirmed. The dissenter argued the defendants' own documents demonstrated the possible applicability of the continuous treatment doctrine and the matter should proceed to discovery.

STATUTE OF LIMITATIONS, MEDICAL MALPRACTICE, NEGLIGENCE, BABY DROPPED IN DELIVERY ROOM.

THE ACTION, WHICH STEMMED FROM PLAINTIFF'S BEING DROPPED IN THE DELIVERY ROOM IMMEDIATELY AFTER BIRTH, SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, AND WAS THEREFORE TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's action, which stemmed from being dropped in the delivery room immediately after birth in 1999, sounded in medical malpractice, not negligence, and was therefore time-barred:

CPLR 208 provides that the statute of limitations is tolled throughout the period of infancy, but limits such toll to 10 years in medical malpractice actions … . In determining whether conduct should be deemed medical malpractice or ordinary negligence, the critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached … . A negligent act or omission by a health care provider that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician to a particular patient constitutes medical malpractice … .

Here, the defendant established … the conduct at issue derived from the duty owed to plaintiff by the defendant as a result of the physician-patient relationship and

was substantially related to the plaintiff's medical treatment … . Rojas v Tandon, 2022 NY Slip Op 04989, Second Dept 8-17-22

Practice Point: The infancy toll of the statute of limitations in CPLR 208 is limited to ten years in medical malpractice cases. Here plaintiff alleged she was dropped in the delivery room immediately after birth in 1999. The action would have been timely if it sounded in negligence. But the action was deemed to sound in medical malpractice rendering it time-barred.

SUA SPONTE DISMISSAL, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), NOTICE OF FORECLOSURE.

THE BANK DID NOT PROVE COMPLIANCE WITH THE RPAPL 1304 NOTICE-OF-FORECLOSURE MAILING REQUIREMENTS; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE FORECLOSURE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank in this foreclosure action did not prove compliance with the mailing requirements for mailing the RPAPL 1304 notice and the judge should not have, sua sponte, dismissed the complaint:

… [P]laintiff failed to submit sufficient evidence to demonstrate that the required RPAPL 1304 notice was sent by first-class mail. In an affidavit in support of its motion, Joanna M. Gloria, the plaintiff's vice president of loan documentation, neither attested that she had personal knowledge of the mailing, nor did she present proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed. "'[T]he mere assertion that the notice was mailed, supported by someone with no personal knowledge of the mailing, in the absence of proof of office practices to ensure that the item was properly mailed, does not give rise to the presumption of receipt'" … . …

… [T]he 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" … . No

extraordinary circumstances were present in this case, as the "failure to comply with RPAPL 1304 is not jurisdictional" … , the defendant did not present any proof as to the plaintiff's failure to comply with RPAPL 1304, and did not cross-move for summary judgment dismissing the complaint insofar as asserted against him. Wells Fargo Bank, N.A. v Cascarano, 2022 NY Slip Op 04998, Second Dept 8-17-22

Practice Point: The bank did not prove the notice of foreclosure was properly mailed, requiring denial of the bank's motion for summary judgment. But the judge should not have, sua sponte, dismissed the foreclosure complaint.

SUBPOENAS, NONPARTY SUBPOENAS, PROTECTIVE ORDERS.

THE NONPARTY SUBPOENA SHOULD NOT HAVE BEEN QUASHED AND THE RELATED PROTECTIVE ORDER SHOULD NOT HAVE BEEN ISSUED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the nonparty subpoena should not have been quashed and the related protective order should not have been issued. The nonparty, Bijari, listed for sale the real property where plaintiff was injured. Plaintiff sought information about the sale because the information could be relevant to whether the homeowner's exemption to Labor Law 240(1) and 241(6) applied:

CPLR 3101(a)(4), concerning disclosure from nonparties to an action, provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: . . . any other person, upon notice stating the circumstances or reasons such disclosure is sought or required" … .. Under that statute, the party who served the subpoena has an initial minimal obligation to show that the nonparty was apprised of the circumstances or reasons that the disclosure is sought … . Once that is satisfied, it is then the burden of the person moving to quash a subpoena to establish either that the requested disclosure "is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious" … . …

For a protective order to be issued, the party seeking such an order must make a "factual showing of 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice'" … . "'Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery. . . . [T]his discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind'" … . Here, Bijari failed to make the requisite showing pursuant to CPLR 3103(a) to warrant the issuance of a protective order with regard to the subpoena…. . Nunez v Peikarian, 2022 NY Slip Op 04969, Second Dept 8-17-22

Practice Point: Here in this Labor Law 240(1) and 241(6) action the plaintiff subpoenaed a nonparty who listed for sale the property where plaintiff was injured. The information plaintiff sought was relevant to whether the homeowner's exemption to Labor Law 240(1) and 241(6) applied. The subpoena should not have been quashed and the related protective order should not have been issued.

SUMMARY JUDGMENT, MEDICAL MALPRACTICE, EVIDENCE FIRST RAISED IN OPPOSITION TO SUMMARY JUDGMENT.

CONFLICTING EXPERT OPINIONS IN THIS MEDICAL MALPRACTICE ACTION REQUIRED DENIAL OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; THE FACT THAT THE ISSUE WHETHER ASPIRIN SHOULD HAVE BEEN ADMINISTERED AS TREATMENT FOR STROKE WAS RAISED IN A DEPOSITION (BUT NOT IN THE COMPLAINT OR BILL OF PARTICULARS) ALLOWED PLAINTIFF TO RAISE THE ISSUE IN OPPOSITION TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motions for summary judgment in this medical malpractice action should not have been granted. The was conflicting expert-opinion evidence about whether plaintiff should have been administered aspirin as treatment for a stroke. Although the aspirin-issue was first raised in opposition to defendants' motions, the issue had been raised in a deposition and was therefore properly raised in the opposition papers:

… [T]he plaintiffs raised triable issues of fact as to whether Nandakumar departed from the accepted standard of care in his neurological evaluation and treatment of the injured plaintiff's condition by failing to timely order and administer aspirin to the injured plaintiff, and whether such alleged departures proximately caused her alleged injuries … . Although the plaintiffs' theory regarding the administration of aspirin was not specifically alleged in the complaint or bill of particulars, this theory was referred to by the plaintiffs' counsel when deposing a … resident, and thus, was appropriately raised in opposition to [defendant's] motion … . Walker v Jamaica Hosp. Med. Ctr., 2022 NY Slip Op 04996, Second Dept 8-17-22

Practice Point: Summary judgment is not appropriate in a medical malpractice action where there are conflicting expert opinions. Here, whether aspirin should have bean administrated to treat stroke was raised in a deposition, but not in the complaint or bill of particulars. Because it was raised in a deposition, it was properly raised in opposition to the defendants' summary judgment motions.

SUMMARY JUDGMENT, NEGLIGENCE, TRAFFIC ACCIDENTS, COMPARATIVE NEGLIGENCE BETWEEN DEFENDANTS.

PLAINTIFF WAS A PASSENGER IN DEFENDANT MC RAE'S VEHICLE WHEN MC RAE'S VEHICLE WAS STRUCK FROM BEHIND; THE ALLEGATION THAT MC RAE STOPPED FOR NO APPARENT REASON RAISED A QUESTION OF FACT WHETHER MC CRAE WAS COMPARATIVELY NEGLIGENT; COMPARATIVE NEGLIGENCE WILL PRECLUDE SUMMARY JUDGMENT WITH RESPECT TO CROSS CLAIMS BETWEEN DEFENDANTS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendant driver's (McRae's) motion for summary judgment in this rear-end collision case should not have been granted. Plaintiff was a passenger in defendant McRae's vehicle. McRae alleged his vehicle was stopped when it was struck by defendant NYC Transit Authority's (NYCTA's) bus (driven by defendant Pena). Defendants NYCTA and Pena alleged McRae stopped his vehicle for no apparent reason raising a question of fact about whether defendant McRae was

comparatively negligent. Comparative negligence will preclude summary judgment with respect to cross claims between defendants:

… [T]he plaintiff established, prima facie, that NYCTA and Pena were negligent. In support of his motion, the plaintiff submitted, inter alia, the transcript of his deposition testimony, which demonstrated that the bus Pena was operating struck McRae's stopped vehicle in the rear. In opposition, the NYCTA defendants failed to raise a triable issue of fact. The NYCTA defendants submitted, among other things, an affidavit in which Pena averred that McRae made a right turn into the path of the bus and began to move forward, but then stopped short. In essence, this explanation amounts to nothing more than a claim that McRae's vehicle came to a sudden stop which, without more, failed to raise a triable issue of fact as to NYCTA and Pena's liability … .

The Supreme Court should have denied that branch of McRae's motion which was for summary judgment dismissing all cross claims insofar as asserted against him. In support of his motion, McRae submitted his affidavit, in which he averred that his vehicle, while stopped at a red light, was struck in the rear by the bus operated by Pena. Thus, McRae established, prima facie, that Pena was solely at fault in the happening of the accident … . In opposition, however, the NYCTA defendants raised a triable issue of fact as to whether McRae was comparatively at fault in the happening of the accident because he stopped suddenly for no apparent reason … . Thompson v New York City Tr. Auth., 2022 NY Slip Op 05052, Second Dept 8-24-22

Practice Point: Plaintiff was a passenger in defendant McRae's car which was struck from behind by a NYC Transit Authority (NYCTA) bus. Defendant NYCTA raised a question fact about Mc Rae's comparative negligence by alleging Mc Rae stopped suddenly for no apparent reason. Comparative negligent will preclude summary judgment with respect to cross-claims between defendants.

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