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The Second Department, reversing Supreme Court's sua sponte dismissal of the complaint, over an extensive dissent, determined plaintiff bank in this foreclosure action, by filing a motion for an order of reference within one year of defendant's default, demonstrated it did not intend to abandon the action and the matter, therefore, should be restored to the calendar. The facts that the motion was initially rejected and plaintiff delayed ten years before addressing the defects in the motion did not require a different result:

Supreme Court erred in, sua sponte, directing dismissal of the complaint in this action pursuant to CPLR 3215(c). The plaintiff demonstrated that it filed a motion, inter alia, for an order of reference on October 24, 2008, which was within one year of the defendants' default in the action. Presenting this motion to the court

was sufficient to demonstrate the plaintiff's intent to have the action proceed, notwithstanding that the motion papers were ultimately rejected by the court as defective … .. Although our dissenting colleague notes that the plaintiff thereafter failed to explain its failure to fix the defects that resulted in the motion papers being rejected for a period of 10 years, once a plaintiff establishes "compliance with CPLR 3215(c)," it is "not required, under the plain language of that subdivision, to account for any additional periods of delay that may have occurred subsequent to the initial one-year period contemplated by CPLR 3215(c)" ,,, ,Thus, because the plaintiff did not abandon the action, the court should have granted the plaintiff's motion to vacate the dismissal order and to restore the action to the active calendar … . Deutsche Bank Natl. Trust Co. v Lamarre, 2022 NY Slip Op 07056, Second Dept 12-14-22

Practice Point: The plaintiff bank in this foreclosure action made a defective motion for an order of reference within one year of defendant's default. That motion was sufficient to demonstrate plaintiff did not intend to abandon the action, even though motion was rejected and plaintiff did not correct the defects in the motion for ten years. The judge should not have, sua sponte, dismissed the complaint and the matter should have been restored to the calendar.

DECEMBER 14, 2022

COURT OF CLAIMS, FAILURE TO SERVE NOTICE OF INTENT TO FILE CLAIM ON NYS THRUWAY AUTHORITY.

CLAIMANT IN THIS LABOR LAW 240(1) AND 241(6) ACTION AGAINST THE STATE SERVED THE ATTORNEY GENERAL WITH THE NOTICE OF INTENTION TO FILE A CLAIM BUT NOT THE NEW YORK STATE THRUWAY AUTHORITY (NYSTA); ALTHOUGH THE EXCUSE (IGNORANCE OF THE LAW) WAS NOT VALID, THE ACTION HAD MERIT AND THE NYSTA HAD TIMELY KNOWLEDGE OF THE FACTS; THEREFORE CLAIMANT'S MOTION TO SERVE AND FILE A LATE CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined claimant's motion for leave to file a late claim in this Labor Law 240(1) and 241(6) action should have been granted. Claimant was injured working on the Tappan Zee Bridge and served a notice of intention to file a claim on the attorney general but not, as required, on the New York State Thruway Authority (NYSTA). The absence of a valid excuse (ignorance of the law) was not determinative. The action had merit and the NYSTA had timely knowledge of the facts underlying the claim:

Court of Claims Act § 10(6) permits a court, in its discretion, upon consideration of the enumerated factors set forth therein, to allow a claimant to file a late claim … . "In determining whether to permit the filing of a [late] claim . . . the court shall consider, among other factors, [1] whether the delay in filing the claim was excusable; [2] whether the state had notice of the essential facts constituting the claim; [3] whether the state had an opportunity to investigate the circumstances underlying the claim; [4] whether the claim appears to be meritorious; [5] whether the failure to file or serve upon the attorney general a timely claim . . . resulted in substantial prejudice to the state; and [6] whether the claimant has any other available remedy" … .. "No one factor is deemed controlling, nor is the presence or absence of any one factor determinative" … . Swart v State of New York, 2022 NY Slip Op 07088, Second Dept 12-14-22

Practice Point: The Court of Claims, pursuant to Court of Claims Act section 10(6), has the discretion to allow a claimant to file a late claim. Here the excuse, ignorance of the law, was not valid. But the claim was deemed to have merit and

the respondent had timely knowledge of the underlying facts. Therefore the Court of Claims should have granted claimant's motion to file a late claim.

DECEMBER 14, 2022

COURT OF CLAIMS, NOTICE OF INTENT TO FILE CLAIM, JURISDICTIONAL DEFECT.

STATING THE WRONG DATE FOR THE ALLEGED NEGLIGENCE IN THE NOTICE OF INTENTION TO FILE A CLAIM RENDERED THE NOTICE JURISDICTIONALLY DEFECTIVE; THE NOTICE THEREFORE DID NOT EXTEND THE 90-DAY PERIOD FOR FILING A CLAIM, RENDERING THE CLAIM FILED MORE THAN A YEAR AND A HALF LATER UNTIMELY; THE DENTAL MALPRACTICE ACTION WAS PROPERLY DISMISSED; THERE WAS AN EXTENSIVE DISSENT (SECOND DEPT).

The Second Department, over a dissent, determined the claimant's failure to set forth the correct date of the alleged dental malpractice in the notice of intention to file a claim was a jurisdictional defect, notwithstanding the correct date set forth in the subsequently filed claim: Because the notice of intention was jurisdictionally defective it did not extend the 90-day period for filing a claim rendering the claim filed more than a year and a half later untimely:

The claimant served the defendant with a notice of intention to file a claim dated January 9, 2017, which alleged that the claimant was injured when her mouth and lips were burned during the course of her treatment as a patient at a particular address where the defendant operated a school of dental medicine. The notice of intention to file a claim stated that "[t]he claim arose on or about October 15, 2016, the last date of continuous treatment and prior to said date."

In the subsequent claim, dated October 16, 2018, the claimant stated that she was injured on October 20, 2016, when hot wax was negligently spilled on her face and mouth while an employee of the defendant was attempting to make a wax mold for dentures. * * *

Section 10(3) of the Court of Claims Act sets forth time limitations for asserting "[a] claim to recover damages . . . for personal injuries caused by . . . negligence." Such a claim "shall be filed and served upon the attorney general within [90] days after the accrual of such claim" (id.). However, if the claimant serves "a written notice of intention to file a claim" within 90 days after the accrual of the claim, "the claim shall be filed and served upon the attorney general within two years after the accrual of such claim" … . * * * Since the claimant's notice of intention to file a claim was substantively deficient (see Court of Claims Act § 11[b]), it did not extend the claimant's time to file and serve a claim beyond the 90-day statutory period … . Under the circumstances, the claim was untimely (see Court of Claims Act § 10[3] …). "The claimant's failure to comply with the filing requirements of the Court of Claims Act deprived the Court of Claims of subject matter jurisdiction" … . Accordingly, the Court of Claims properly granted the defendant's motion pursuant to CPLR 3211(a)(2) to dismiss the claim for lack of subject matter jurisdiction. Sacher v State of New York, 2022 NY Slip Op 07087, Second Dept 12-14-22

Practice Point: Including the wrong date for the allegedly negligent act in the notice of intention to file a claim renders the notice jurisdictionally defective pursuant to the Court of Claims Act.

Practice Point: Ordinarily filing a notice of intention to file a claim extends the period for filing a claim from 90 days to two years. However, the extension is not triggered by a jurisdictionally defective notice of claim. The claim here, filed more than a year and a half after the notice of intention, was therefore untimely.

DECEMBER 14, 2022

DEFAULT, VACATE DEFAULT JUDGMENT.

DEFENDANT DID NOT MEET THE CRITERIA FOR VACATION OF A DEFAULT JUDGMENT UNDER EITHER CPLR 5015 OR 317; CRITERIA EXPLAINED (FIRST DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate the default judgment did not meet the criteria of either CPLR 5015(a)(1) or CPLR 317:

"A defendant seeking to vacate a judgment pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action" … . * * *

Here, the defendant failed to provide a "detailed and credible explanation" for the default … . Rather, the defendant submitted only an affidavit of an employee of its loan servicer averring that the defendant's agent for process had emailed the summons and complaint to the servicer, and the complaint had been "routed in error to the incorrect email address within" the servicer, which prevented the servicer from "timely notify[ing] its counsel of the [instant] action." That conclusory and nondetailed allegation does not constitute a reasonable excuse warranting vacatur of the default … . * * *

Although the defendant expressly moved pursuant to CPLR 5015(a)(1) only, the Supreme Court properly considered whether the defendant set forth grounds to vacate its default pursuant to CPLR 317 … . CPLR 317 provides, in relevant part, that a party served with a summons other than by personal delivery and who does not appear "may be allowed to defend the action within one year after he [or she] obtains knowledge of entry of the judgment . . . upon a finding of the court that he [or she] did not personally receive notice of the summons in time to defend and has a meritorious defense." A defendant moving pursuant to CPLR 317 is not required to set forth a reasonable excuse for the delay in answering the complaint … . However, "'to support a determination granting relief under CPLR 317, a party must still demonstrate, and the Court must find, that the party did not receive actual notice of the summons and complaint in time to defend the action'" … .

… [T]he defendant did not even deny receipt of the summons and complaint. 259 Milford, LLC v FV-1, Inc., 2022 NY Slip Op 06898, Second Dept 12-7-22

Practice Point: The criteria for vacation of a default judgment pursuant to CPLR 5015 and 317 are different and are explained in this decision. The defendant did not meet the criteria for either statute.

DECEMBER 7, 2022

DEFAULT, VACATE DEFAULT, JUDGMENT.

DEFENDANT DID NOT UPDATE ITS ADDRESS FILED WITH THE SECRETARY OF STATE FOR SERVICE OF PROCESS AND DID NOT HAVE A REASONABLE EXCUSE FOR DEFAULT IN THIS SLIP AND FALL CASE; HOWEVER, NO REASONABLE EXCUSE NEED BE SHOWN IN A MOTION TO VACATE A DEFAULT PURSUANT TO CPLR 317; DEFAULT VACATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant property-owner's (St. Andrews') motion to vacate the default judgment in this slip and fall case should have been granted. St. Andrews had not updated its address with the Secretary of State and did not have a reasonable excuse. However a reasonable excuse is not required by CPLR 317:

St. Andrews's principal demonstrated that he had received a letter notification of plaintiff's accident before commencement of the action which he forwarded to his insurance broker, but that he never received any further notice until he received the information subpoena. The principal of DP Realty [designated by St. Andrews to receive service of process] also averred that he was unaware of the summons and complaint ever having been received, and therefore it would not have forwarded any papers to St. Andrews. That evidence was sufficient under CPLR 317 to establish St. Andrews's lack of personal notice of the summons in time to defend. St. Andrews also demonstrated a meritorious defense in that the Yonkers City Code "does not expressly make the landowner liable for failure to perform" the duty to clean snow and ice from the sidewalk, and an abutting landowner is not liable in the absence of such a statute for failure to clear snow, ice and dirt … .

… [P]laintiff demonstrated that St. Andrews never updated its address with the Secretary of State, and thus could not show a reasonable excuse for its default under CPLR 5015(a)(1). However, no showing of a reasonable excuse is required under CPLR 317 … , and it cannot be inferred solely from the failure to update defendant's address with the Secretary of State that defendant was deliberately avoiding receiving notice … . In light of the strong public policy favoring resolution of cases on their merits … , we find that St. Andrews demonstrated entitlement to vacatur under CPLR 317… . Gomez v Karyes Realty Corp., 2022 NY Slip Op 07187, First Dept 12-20-22

Practice Point: No reasonable excuse for a default need be shown in a motion the vacate the default pursuant to CPLR 317, Here the defendant's failure to update its address for the service of process with the Secretary of State was not an attempt to avoid service. The motion to vacate the default should have been granted.

DECEMBER 20, 2022

JUDGMENTS, RESETTLEMENT OF JUDGMENT, FAMILY LAW.

RESETTLEMENT OF THE JUDGMENT OF DIVORCE WAS PROPER ONLY TO THE EXTENT OF CORRECTING A MISTAKE IN THE JUDGMENT; RESETTLEMENT SHOULD NOT HAVE BEEN USED TO AMEND THE JUDGMENT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judgment of divorce should have been resettled to the extent that the judgment conform with the stipulation. But the judgment should not have been modified to include a provision which was not in the stipulation. Resettlement cannot be used to amend the judgment, as opposed to correcting a mistake:

Resettlement of a judgment of divorce pursuant to CPLR 5019(a) is an appropriate remedy when the judgment does not accurately incorporate the terms of a stipulation of settlement … . Here, although the judgment of divorce provided that the defendant was responsible for providing health insurance for the parties' children, that provision was inconsistent with the terms of the stipulation.

Specifically, the stipulation contained a provision which set forth that the plaintiff was responsible for providing health insurance for the parties' children through her employer unless she became unemployed, and then the defendant would be responsible for providing health insurance for them through his employer. …

… Supreme Court should have denied that branch of the defendant's motion which was to resettle the judgment of divorce to the extent it sought to replace the provision requiring the defendant to provide health insurance for the parties' children with a provision requiring the plaintiff to be solely responsible to provide health insurance for the parties' children … . The amendment proposed by the defendant failed to comport with the terms of the stipulation regarding the responsibility of the parties as to the health insurance for their children and was a substantive modification beyond the court's inherent authority to correct a mistake, defect, or irregularity in the original judgment "not affecting a substantial right of a party" (CPLR 5019[a] …). Ferrigan v Ferrigan, 2022 NY Slip Op 07058, Second Dept 12-14-22

Practice Point: Here resettlement of the judgment of divorce pursuant to CPLR 5019 was appropriate only to the extent of correcting a mistake by conforming the judgment to the stipulation. Resettlement should not have been used to amend the judgment to include a provision which was not in the stipulation.

DECEMBER 14, 2022

LAW-OFFICE FAILURE.

DEFENDANT'S COUNSEL MISCALENDARED THE RETURN DATE FOR THE MOTION FOR SUMMARY JUDGMENT; THE MOTION TO VACATE THE JUDGMENT DUE TO LAW OFFICE FAILURE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate the judgment due to law office failure should have been granted. Plaintiff's unopposed motion for summary judgment had been granted:

The law office failure of miscalendaring dates has been deemed a reasonable excuse … . Here, defendant's counsel miscalendared the return date of plaintiff's summary judgment motion for July 1, 2021 rather than June 1, 2021. Counsel explained that it is his regular practice to calendar motion dates once a return date is set; to review his calendar daily and on or about the first of each month; and that he had been working part-time at home with a less robust system compared to his office … . Accordingly, defendant proffered a reasonable excuse in the form of law office failure and should not be deprived of its day in court for counsel's error … . First Am. Tit. Ins. Co. v Successful Abstract, LLC, 2022 NY Slip Op 07186, First Dept 12-20-22

Practice Point: Miscalendaring the return date for the motion for summary judgment was deemed a reasonable excuse for the default (law office failure).

DECEMBER 20, 2022

MEDICAID, PLENARY ACTION BY NURSING HOME TO DETERMINE RESIDENT'S ELIGIBILITY.

PLAINTIFF NURSING HOME CAN BRING A PLENARY ACTION TO DETERMINE A RESIDENT'S MEDICAID ELIGIBILITY WITHOUT BEING BOUND BY THE RESIDENT'S FAILURE TO REQUEST AN ADMINISTRATIVE APPEAL OR THE FOUR-MONTH STATUTE OF LIMITATIONS (SECOND DEPT).

The Second Department, reversing Supreme Court, held plaintiff nursing home can bring a plenary action in its own right to determined the Medicaid eligibility of a resident. The nursing home is not bound by the resident's failure to request an administrative appeal and is not constrained the the four-month statute of limitations in CPLR 217:

The plaintiff, an operator of a nursing home facility, commenced this action seeking a judgment declaring that one of its residents was entitled to Medicaid coverage for the period February 7, 2013, through August 31, 2014, with an appropriate transfer penalty. The defendant moved to dismiss the complaint on the

grounds, inter alia, that the plaintiff failed to exhaust its administrative remedies, the statute of limitations had expired, and the plaintiff failed to join a necessary party. In an order dated November 26, 2019, the Supreme Court granted the motion. The plaintiff appeals.

The Supreme Court erred in granting the defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint. "It is well established that a nursing home may, as here, bring a plenary action in its own right against the agency designated to determine Medicaid eligibility" … . In such a plenary action, the nursing home is "not bound by the patient's failure to request an administrative appeal of the local agency's denial of medical assistance" or "by the four-month Statute of Limitations contained in CPLR 217" … . Moreover, authorizations executed by the resident allowing designated employees of the plaintiff to represent him "during the Medicaid eligibility process" and during "any Fair Hearings" did not impair the plaintiff's right to commence its own plenary action … . Kings Harbor Multicare Ctr. v Pierre, 2022 NY Slip Op 06920, Second Dept 12-7-22

Practice Point: A nursing home can bring a plenary action in its own right to determine the Medicaid eligibility of its resident without regard for whether the resident pursued an administrative appeal and is not constrained by the four-month statute of limitations in CPLR 217.

DECEMBER 7, 2022

MEDICAL RECORDS, PRIVILEGE.

DEFENDANT IN THIS PERSONAL INJURY CASE DID NOT WAIVE THE PHYSICIAN-PATIENT PRIVILEGE BY SUBMITTING MENTAL HEALTH RECORDS TO THE SENTENCING COURT IN THE RELATED CRIMINAL CASE; THE RECORDS WERE SUBMITTED AS PART OF A MITIGATION REPORT WHICH IS DEEMED "CONFIDENTIAL" PURSUANT TO THE CRIMINAL PROCEDURE LAW; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant in this pedestrian-vehicle-accident case was not required to

disclose privileged medical (mental health) information which was provided to the sentencing court in the related criminal case as a "mitigation report:"

"CPLR 3121 (a) authorizes discovery of a party's mental or physical condition when that party's condition has been placed in controversy" … . Nevertheless, even where a defendant's mental or physical condition is in controversy, discovery will be precluded if the information falls within the physician-patient privilege and the defendant has not waived that privilege … . Where the physician-patient privilege has not been waived, the party asserting the privilege may "avoid revealing the substance of confidential communications made to [his or] her physician, but may not refuse to testify as to relevant medical incidents or facts concerning [himself or] herself" … .

We agree with defendant that he did not waive the physician-patient privilege by disclosing his mental health information in the sentencing phase of the related criminal proceeding. Here, defendant submitted the mitigation report in the criminal proceeding for the court's consideration in the determination of an appropriate sentence. Thus, this is not a case where a criminal defendant waived any privilege applicable to that defendant's mental health records by raising a justification or other affirmative defense to be litigated in the criminal proceeding … . Instead, the mitigation report was prepared for and "submitted directly to the court[] in connection with the question of sentence" and, as a result, the mitigation report is "confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court" (CPL 390.50 [1] …). Johnson v Amadorzabala,, 2022 NY Slip Op 07355, Fourth Dept 12-23-22

Practice Point: The defendant in this personal injury case did not waive the physician-patient privilege by submitting mental health records to the sentencing court in the related criminal case. Under the Criminal Procedure Law, the mitigation report was for the judge's eyes only and was confidential.

DECEMBER 23, 2022

MOOTNESS DOCTRINE.

THE SO-ORDERED STIPULATION BETWEEN THE PARTIES RENDERED THE RELATED CAUSE OF ACTION IN THE COMPLAINT MOOT; THE OTHER CAUSE OF ACTION RELIED ON SPECULATION ABOUT FUTURE EVENTS AND THEREFORE WAS NOT RIPE FOR JUDICIAL REVIEW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined; (1) the stipulation between the two parties rendered the related cause of action in the complaint moot' and (2) the other cause of action in the complaint was based on speculation about future events and therefore was not ripe for judicial review:

… [P]ursuant to the mootness doctrine, courts are precluded "from considering questions which, although once live, have become moot by passage of time or change in circumstances" … . By contrast, if an "anticipated harm is insignificant, remote or contingent the controversy is not ripe" for judicial review … . "To determine whether a matter is ripe for judicial review, it is necessary first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied" … .

… [T]he first cause of action was resolved by the parties' so-ordered stipulation. … [T]hat cause of action was rendered academic pursuant to the mootness doctrine … . … [T]he second cause of action relied on speculation about what the County and its various departments might do in response to future audits, and therefore the contemplated harm was both remote and contingent and the controversy was not ripe for judicial review … . Kennedy v Suffolk County, 2022 NY Slip Op 07226, Second Dept 12-21-22

Practice Point: If a cause of action has already been addressed by a so-ordered stipulation, the cause of action is precluded by the mootness doctrine. If a cause of action is based on speculation about future events, it is not ripe for judicial review.

DECEMBER 21, 2022

NOTICE OF SETTLEMENT AND PROPOSED JUDGMENT, ORDER TO SUBMIT, FAILURE TO SUBMIT WITHIN 60 DAYS.

AFTER DEFENDANT'S DEFAULT AND FOLLOWING AN INQUEST ON DAMAGES PLAINTIFF WAS AWARDED ABOUT $275,000; THE JUDGE ORDERED PLAINTIFF TO SUBMIT A NOTICE OF SETTLEMENT AND A PROPOSED JUDGMENT WITHIN 60 DAYS AS REQUIRED BY 22 NYCRR 202.48; PLANTIFF DID NOT DO SO FOR MORE THAN TWO AND A HALF YEARS; THE ORDER GRANTING THE DEFAULT JUDGMENT AND THE DECISION ON THE INQUEST WERE VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the order granting a default judgment and the decision awarding nearly $275,000 must be vacated because plaintiff did not submit a notice of settlement and a proposed judgment within 60 days as required by 22 NYCRR 202.48:

Pursuant to 22 NYCRR 202.48(a), "[p]roposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted." "Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown" (id. § 202.48[b]). Here, it is undisputed that, on January 10, 2017, the plaintiff was directed to settle a judgment on notice. Thus, pursuant to 22 NYCRR 202.48(a), the plaintiff was required to submit a notice of settlement and proposed judgment within 60 days after January 10, 2017 … . It is also undisputed that the plaintiff failed to submit a notice of settlement and proposed judgment until July 2, 2019, nearly 2½ years after the Supreme Court directed the plaintiff to settle a judgment on notice. Thus, the plaintiff failed to timely settle a judgment pursuant to the requirements of 22 NYCRR 202.48(a).

… [T]he plaintiff failed to show good cause for his lengthy delay in submitting a notice of settlement and proposed judgment in compliance with the Supreme Court's directive … . Thus, under the particular circumstances of this case, the court should have granted that branch of the defendant's motion which was pursuant to 22 NYCRR 202.48 to vacate the order dated July 23, 2014. … [T]he

decision rendered after the inquest must also be vacated. Cruz v Pierce, 2022 NY Slip Op 07054, Second Dept 12-14-22

Practice Point: Here plaintiff was granted a default judgment and, after an inquest of damages, was awarded nearly $275,000. The judge ordered plaintiff to submit a notice of settlement and a proposed judgment within 60 days as required by 22 NYCRR 202.48. Plaintiff failed to do so and the order granting the default judgment and the decision awarding damages were vacated.

DECEMBER 14, 2022

PRIMA FACIE TORT.

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION FOR PRIMA FACIE TORT BECAUSE IT DID NOT ALLEGE THE SOLE MOTIVATION OF DEFENDANTS WAS DISINETERESTED MALEVOLENCE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the complaint did not state a cause of action for prima facie tort:

"The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" … .. A plaintiff alleging prima facie tort must therefore allege that the defendant's "sole motivation was 'disinterested malevolence' " … . … Although the complaint alleges that defendants " 'acted maliciously' and 'with disinterested malice,' " … , it does not allege that defendants' "sole motivation was 'disinterested malevolence' " … . "There can be no recovery [for prima facie tort] unless a disinterested malevolence to injure [a] plaintiff constitutes the sole motivation for [the] defendant['s] otherwise lawful act" … . Spine Surgery of Buffalo Niagara, LLC v Geico Cas. Co., 2022 NY Slip Op 07343, Fourth Dept 12-23-22

Practice Point: The criteria for prima facie tort include an allegation that the "sole motivation" for a defendant's conduct was "disinterested malevolence."

DECEMBER 23, 2022

STATEMENT OF MATERIAL FACTS.

THE MOTION COURT ABUSED ITS DISCRETION BY DEEMING PLAINTIFF'S STATEMENT OF MATERIAL FACTS ADMITTED BECAUSE DEFENDANTS DID NOT SUBMIT A COUNTER STATEMENT OF UNDISPUTED FACTS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that defendants' failure to submit a counter statement of undisputed facts (22 NYCRR 202.8-g[b]) should not have been deemed an admission to plaintiff's statement of material facts. Therefore plaintiff's motion for summary judgment on the breach of contract cause of action should not have been granted:

Although the court had discretion under section 202.8-g (former [c]) to deem the assertions in plaintiff's statement of material facts admitted, it was not required to do so … . "[B]lind adherence to the procedure set forth in 22 NYCRR 202.8-g" was not mandated … .

Here, considering that plaintiff's statement of material facts did not fully comply with 22 NYCRR 202.8-g (d) and ignored the pivotal factual dispute arising from discovery, we conclude that, although it would have been better practice for defendants to "submit a paragraph-by-paragraph response to plaintiff's statement" … , "the court abused its discretion in deeming the entire statement admitted" … . On the Water Prods., LLC v Glynos, 2022 NY Slip Op 07320, Fourth Dept 12-23-22

Practice Point: Here plaintiff submitted a statement of material facts but defendants did not submit a counter statement of undisputed facts. The motion court was not required to deem the statement of material facts admitted and should not have done so under the specific circumstances of this case. Plaintiff's motion for summary judgment in this breach of contract action should not have been granted.

DECEMBER 23, 2022

VERDICTS, MOTION TO SET ASIDE VERDICT.

THE MOTION TO SET ASIDE THE VERDICT AS A MATTER OF LAW SHOULD NOT HAVE BEEN GRANTED; THE MOTION TO SET ASIDE THE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED; A NEW TRIAL IS NECESSARY BECAUSE AN APPELLATE COURT CANNOT MAKE NEW FINDINGS OF FACT IN A JURY TRIAL (SECOND DEPT).

The Second Department, reversing Supreme Court in this medical malpractice case. determined the motion to set aside the verdict as a matter of law should not have been granted. but the motion to set aside the verdict as against the weight of the evidence should have been granted, explaining the difference:

"'A motion for judgment as a matter of law pursuant to CPLR 4404(a) may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party'" … . "In considering such a motion, the facts must be considered in a light most favorable to the nonmovant" … . …

… "[A] motion to set aside a jury verdict as contrary to the weight of the evidence should be granted '[o]nly where the evidence so preponderates in favor of the unsuccessful litigant that the verdict could not have been reached on any fair interpretation of the evidence'" … . … "'Whether a particular factual determination is against the weight of the evidence is itself a factual question. In reviewing a judgment of the Supreme Court, the Appellate Division has the power to determine whether a particular factual question was correctly resolved by the trier of facts. If the original fact determination was made by a jury, as in this case, and the Appellate Division concludes that the jury has made erroneous factual findings, the court is required to order a new trial, since it does not have the power to make new findings of fact in a jury case'" … . * * *

As to the weight of the evidence, based on the record, we find that the verdict in favor of the plaintiffs could not have been reached on any fair interpretation of the evidence, and must be set aside (see CPLR 4404[a] …). Accordingly, we reverse the judgment, reinstate the complaint, grant that branch of the defendants' motion which was pursuant to CPLR 4404(a) to set aside the verdict as contrary to the weight of the evidence and for a new trial, and remit the matter to the Supreme Court, Queens County, for a new trial…. . Osorio v New York City Health & Hosps. Corp., 2022 NY Slip Op 07072, Second Dept 12-14-22

Practice Point: When an appellate court determines the verdict should be set aside as against the weight of the evidence in a jury trial it must order a new trial because an appellate court does not have the authority to make new findings of fact in a jury trial.

DECEMBER 14, 2022