NEW YORKK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Report
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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Civil Procedure, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in February 2023. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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The Second Department, reversing Supreme Court, determined defendant in this foreclosure action should have been allowed to amend the answer:

… Supreme Court … should not have denied that branch of the defendant's cross-motion which was for leave to amend his answer to assert an affirmative defense alleging lack of compliance with the condition precedent in the mortgage agreement requiring a notice of default. In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (see CPLR 3025[b] …). Lateness alone is not a barrier to the amendment … . "'It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine'" … . Moreover, although a defense is generally waived under CPLR 3211(e) where not raised in an answer or made the subject of a motion to dismiss, it can be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) … . Wall St. Mtge. Bankers, Ltd. v Berquin, 2023 NY Slip Op 01025, Second Dept 2-22-23

Practice Point: The court can grant a defendant leave to amend a complaint where the defendant did not make a pre-answer motion to dismiss on the ground which is the subject of the amendment. In other words, if the defendant fails to make a pre-answer motion to dismiss and the initial answer does not include the affirmative defense which could have been the basis of a motion to dismiss, the defendant gets another chance in an amendment of the answer by leave of court.

FEBRUARY 22, 2023

AMEND COMPLAINT, JOHN DOES, FORECLOSURE, TRUSTS AND ESTATES.

DEFENDANT WAS IMPROPERLY SUBSTITUTED AS A JOHN DOE IN THIS FORECLOSURE ACTION AND BECAUSE HE WAS SUED AS AN HEIR TO THE MORTGAGEE, AND NOT AS A REPRESENTATIVE OF THE MORTGAGEE'S ESTATE, THE ACTION WAS TIME BARRED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court in this foreclosure action, determined defendant was not properly substituted in the amended complaint for a John Doe in the original complaint and, because defendant was sued in his capacity as the heir of the decedent, and not as a representative of the decedent's estate, the action was time-barred:

Plaintiff commenced this mortgage foreclosure action … against … the mortgagee, David B. Bailey (decedent), and certain "John Does" and "Jane Does" defined in the complaint as "the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint." Plaintiff subsequently discovered that decedent had died in 2018 and made an ex parte application seeking … to substitute Arthur Bailey, in his capacity as heir to decedent's estate (defendant), as a John Doe defendant and for leave to file an amended complaint. …

We agree with defendant that his motion should be granted insofar as it seeks dismissal of the amended complaint against him. Defendant correctly contends that he was improperly substituted as John Doe #1 pursuant to CPLR 1024. Inasmuch as the original complaint "fail[ed] to mention decedent's death" and defendant is being sued in the amended complaint in his capacity as an heir to decedent's estate, defendant does not fit within the categories of John and Jane Does set forth in the original complaint and thus cannot be substituted therefor … . Further, although here plaintiff also filed and served an amended complaint on defendant solely in his capacity as heir to decedent's estate and not as a representative thereof (… see generally EPTL 3-3.6 [a], [b] …), … the relevant statute of limitations expired prior to the order granting plaintiff's ex parte application for leave to file the amended complaint (see generally CPLR 213 [4]). Citibank, N.A. v Bailey, 2023 NY Slip Op 00777, Fourth Dept 2-10-23

Practice Point: If a defendant does not fit any of the "John Doe" categories described in the original complaint, he cannot be added as a John Doe in an amended complaint.

FEBRUARY 10, 2023

AMEND COMPLAINT, JUDGES.

THE MOTION TO AMEND THE COMPLAINT SHOULD NOT HAVE BEEN DENIED ON THE GROUND THE PROPOSED CHANGES WERE NOT "REDLINED" (FIRST DEPT).

The First Department, reversing Supreme Court, determined the motion to amend the complaint should not have been denied on the ground the proposed changes were not "redlined" (apparently referring to the failure to mark the proposed changes to make them more visible):

The court improvidently exercised its discretion in denying plaintiff's cross motion solely on the technical basis that the proposed amended complaint was not redlined (see CPLR 3025[b]), since the proposed amendments to add the third-party defendants as direct defendants were sufficiently described in the moving papers and easily discerned on review of the proposed amended summons and complaint … . Herrera v Highgate Hotels, L.P., 2023 NY Slip Op 00729, First Dept 2-9-23

Practice Point: Although CPLR 3025 (b) requires that "Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." the motion to amend here should not have been denied because the proposed changes were not "redlined." The accompanying papers sufficiently described the proposed changes.

FEBRUARY 9, 2023

AMEND COMPLAINT, RELATION-BACK, MEDICAL MALPRACTICE, EMPLOYMENT LAW.

PLAINTIFF IN THIS MEDICAL MALPRACTICE ACTION SOUGHT TO ADD TWO PHYSICIAN'S ASSISTANTS (PA'S) AS DEFENDANTS AFTER THE STATUTE OF LIMITATIONS HAD RUN; PLAINTIFF DID NOT DEMONSTRATE THE DEFENDANT DOCTORS WERE THE PA'S EMPLOYERS OR SUPERVISORS; PLAINTIFF DID NOT DEMONSTRATE THE PA'S HAD TIMELY KNOWLEDGE OF THE ACTION; THEREFORE THE RELATION-BACK DOCTRINE SHOULD NOT HAVE BEEN APPLIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate the relation-back doctrine applied such that two physician's assistants (PA's) could be added as defendants after the statute of limitations had expired. There was no evidence the PA's and the doctors were united in interest and no evidence the PA's had timely notice of the suit:

In a negligence or malpractice action "the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other" … . … As the PA defendants were employed by the practice, not the individual doctor defendants, there is no vicarious liability based on respondeat superior … . … [T]he plaintiff failed to set forth sufficient facts to demonstrate that the PA defendants were directly supervised or controlled by the doctor defendants in their care and treatment of the decedent.

… The record is devoid of evidence that the PA defendants had notice that an action had been commenced against the doctor defendants prior to the expiration in 2014 of the statute of limitations for the medical malpractice and wrongful death causes of action. Sanders v Guida, 2023 NY Slip Op 00455, Second Dept 2-1-23

Practice Point: Here two of the three prongs of the relation-back doctrine should not have been applied to allow adding two physician's assistants (PA's) as defendants in this med mal case after the statute of limitations had run. The defendant doctors were not the PA's employers or supervisors (the doctors and PA's were not united in interest) and the plaintiff did not show the PA"s had timely knowledge of the suit.

FEBRUARY 1, 2023

ANSWER, UNTIMELY ANSWER.

IF PLAINTIFF DOES NOT REJECT AN UNTIMELY ANSWER SUBMITTED WITHOUT LEAVE OF COURT OR STIPULATION, OBJECTION TO THE ANSWER AS UNTIMELY IS WAIVED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the amended answer should not have been struck because it was untimely. The plaintiff did not reject the amended answer:

Although Saldarriaga [defendant] filed her amended answer approximately 20 months after filing her original answer, well beyond the period within which an amended pleading could have been served as of right (see CPLR 3025[a]), without obtaining leave of court or the stipulation of all parties to the amendment … , the plaintiff did not reject the amended answer. By "retaining the amended pleading without objection" , the plaintiff waived any "objection as to untimeliness" … . Thus, Saldarriaga's amended answer should not have been stricken as untimely. Citibank, N.A. v Saldarriaga, 2023 NY Slip Op 00647, Second Dept 2-8-23

Practice Point: If a plaintiff accepts an untimely answer submitted without leave of court or a stipulation, objection to the answer as untimely is waived.

FEBRUARY 8, 2023

APPEALS, FAMILY LAW, JUDGES.

THE JUDGE'S FAILURE TO MAKE FINDINGS OF FACT IN THIS CUSTODY CASE PRECLUDED APPELLATE REVIEW; MATTER REMITTED (FOURTH DEPT),

The Fourth Department, remitting the matter to Family Court, determined the judge's failure to make findings of fact in this custody case precluded appellate review:

The court, in the order on appeal, however, failed to make any factual findings whatsoever to support the award of primary physical custody. It is "well

established that the court is obligated 'to set forth those facts essential to its decision' " … . Here, the court completely failed to follow that well-established rule when it failed to issue any factual findings to support its initial custody determination … , nor did it make any findings with respect to the relevant factors that it considered in making a best interests of the child determination … . "Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses" … . Matter of Ianello v Colonomos, 2023 NY Slip Op 00767, Fourth Dept 2-10-23

Practice Point: Here in this custody case the judge did not make findings of fact, which precluded appellate review. The case was sent back.

FEBRUARY 10, 2023

ARBITRATION, JUDGES, CONTRACT LAW.

THE JUDGE CANNOT, SUA SPONTE, DIRECT ARBITRATION WITHOUT A REQUEST FROM A PARTY; NON-SIGNATORIES TO AN AGREEMENT CONTAINING A FORUM SELECTION PROVISION MAY BE BOUND BY THE PROVISION IF THEY ARE SIGNATORIES TO A RELATED AGREEMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Connolly, interpreted jurisdiction, forum selection and arbitration provisions in the subject agreements. The decision is fact-specific and cannot be fairly summarized here. The court summarized its rulings as follows:

This appeal presents novel questions related to jurisdiction, as well as arbitration and forum selection provisions in agreements. The first question is whether, upon reviewing an agreement and determining that an arbitration provision governs, a court should, sua sponte, direct the parties to arbitrate. We hold that a court should not direct parties to arbitrate absent a request from one of the parties.

The second 9uestionn requires us to examine the circumstances under which non-signatories to an agreement containing a forum selection provision may be bound by that provision consistent with due process. We hold that non-signatories to an agreement may be bound by that agreement's forum selection provision when they

are signatories to a related agreement, which forms part of the same transaction, and are closely related to both the transaction and one of the signatories to the agreement containing the forum selection provision. P.S. Fin., LLC v Eureka Woodworks, Inc., 2023 NY Slip Op 00877, Second Dept 2-15-23

Practice Point: A judge should not, sua sponte, direct parties to arbitrate pursuant to an agreement absent a request from a party.

Practice Point: Non-signatories may be bound by a forum selection provision in an agreement if they are signatories to a related agreement.

FEBRUARY 15, 2023

BORROWING STATUTE, FRAUD.

MATTER REMITTED FOR CONSIDERATION OF EXPERT EVIDENCE ABOUT WHICH ECUADORIAN STATUTE IS MOST CLOSELY ANALOGOUS TO NEW YORK'S FRAUDULENT-CONVEYANCE CRITERIA FOR PURPOSES OF NEW YORK'S BORROWING STATUTE; HERE THE ACTION ACCRUED IN ECUADOR; THE SHORTER OF THE APPLICABLE ECUADORIAN AND NEW YORK STATUTES OF LIMITATIONS WILL APPLY (FIRST DEPT).

The Frist Department, reversing Supreme Court and remitting the matter for consideration of the expert evidence, determined Supreme Court may have applied the wrong Ecuadorian statute in the analysis of the statute of limitations under the borrowing statute:

Under CPLR 202, New York's "borrowing statute," where a nonresident plaintiff sues on causes of action that accrued outside of New York, the claims must be timely under the limitations period of both New York and the jurisdiction where the action accrued … . In effect, the shorter of the two states' statutes of limitations controls the timeliness of the action … . …

If the foreign state does not have causes of action directly analogous to the New York causes of action, the limitations period of the foreign causes of action that are most closely analogous to the New York claims are to be applied … . …

In performing the foregoing analysis, the motion court found applicable Ecuador's default statute, which has a 10-year statute of limitations, and thereby found plaintiff's claims timely filed, despite the expert testimony establishing that Ecuador's default statute is not directly applicable to plaintiff's fraudulent conveyance claims and not the Ecuadorian cause of action most closely analogous to the New York causes of action. Andes Petroleum Ecuador Ltd. v Occidental Petroleum Co., 2023 NY Slip Op 00481, First Dept 2-2-23

Practice Point: Here the fraudulent conveyance action accrued in Ecuador. Under the borrowing statute the shorter of the New York and Ecuadorian statutes of limitations applies. Where, as here, there is no foreign statute exactly analogous to the New York cause of action, expert evidence about which foreign statute is most analogous should be considered.

FEBRUARY 2, 2023

CHILD VICTIMS ACT, CONSTITUTIONAL LAW, EDUCATION-SCHOOL LAW, NEGLIGENCE.

THE REVIVED STATUTE OF LIMITATIONS FOR LAWSUITS ALLEGING SEXUAL ABUSE PURSUANT TO THE CHILD VICTIMS ACT (CVA) DOES NOT VIOLATE DUE PROCESS (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Bannister, determined the revived statute of limitations for law suits based upon sexual abuse under the Child Victims Act (CVA) did not violate due process:

… [I]t is well settled that "a claim-revival statute will satisfy the Due Process Clause of the [New York] State Constitution if it was enacted as a reasonable response in order to remedy an injustice" … . Addressing the second prong of that standard first—i.e., whether the statute "remed[ied] an injustice"—the Court of Appeals recognized that, "[i]n the context of a claim-revival statute, there is no principled way for a court to test whether a particular injustice is 'serious' or whether a particular class of plaintiffs is blameless; such moral determinations are left to the elected branches of government" … . Here, as evidenced by the legislative history of the CVA, the legislature considered the need for "justice for past and future survivors of child sexual abuse" and the need to "shift the significant and lasting costs of child sexual abuse to the responsible parties" … .

Specifically, the legislative history noted the significant barriers those survivors faced in coming forward with their claims, including that child sexual abuse survivors may not be able to disclose their abuse until later in life after the relevant statute of limitations has run because of the mental, physical and emotional injuries sustained as a result of the abuse … . As explained in the Senate Introducer's Memorandum in Support, "New York currently requires most survivors to file civil actions . . . against their abusers by the age of 23 at most, long before most survivors report or come to terms with their abuse, which has been estimated to be as high as 52 years old on average" … .. Because the statutes of limitat ions left "thousands of survivors" of child sexual abuse unable to sue their abusers, the legislature determined that there was an identifiable injustice that needed to be remedied … . PB-36 Doe v Niagara Falls City Sch. Dist., 2023 NY Slip Op 00598, Fourth Dept 2-3-23

Practice Point: The revived statute of limitations in the Child Victims Act is constitutional.

FEBRUARY 3, 2023

CONSOLIDATE ACTIONS, STATUTE OF LIMITATIONS, FORECLOSURE, JUDGES.

WHERE ONE OF TWO RELATED FORECLOSURE ACTIONS IS SUBJECT TO A MERITORIOUS MOTION TO DISMISS AS TIME-BARRED, IT IS AN ABUSE OF DISCRETION TO GRANT A MOTION TO CONSOLIDATE THE TIME-BARRED ACTION WITH THE TIMELY ACTION (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, reversing Supreme Court, determined that where one action is subject to a meritorious motion to dismiss as time-barred, it is an abuse of discretion for a judge to grant a motion to consolidate that action with another which is timely:

… [B]oth actions are to foreclose on the same mortgage securing the same debt owed by the same defendant. However, in our view, a precondition for merging two or more actions is that each action should itself be viable, meaning that neither is confronted with a pending—and apparently meritorious—motion to dismiss. Once the defendant here met her burden of establishing, prima facie, that the time

in which to commence the 2017 action had expired, it became the plaintiff's burden to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period. The plaintiff could not meet that shifted burden by merely asserting that the 2017 action will become timely once it is merged with the timely 2008 action. The purpose of consolidation under CPLR 602(a) is not to provide a party with a procedural end run around a legal defense applicable to one of the actions. In our opinion, in such instances, judicial discretion should not be used to cure the untimeliness of one action by tethering it to a related timely action. We hold, as an issue of apparent first impression that, in this case, the Supreme Court improvidently exercised its discretion in granting consolidation and that, in general, consolidation should be denied where one of the cases to be consolidated is subject to a meritorious motion to dismiss…. . HSBC Bank USA, N.A. v Francis, 2023 NY Slip Op 00992, Second Dept 2-22-23

Practice Point: Here there were two related foreclosure actions. One was subject to dismissal as time-barred and the other was time-barred. The two should not be consolidated as an end-run around the statute of limitations.

FEBRUARY 22, 2023

CONVERSION, BREACH OF CONTRACT TO ARTICLE 78, ADMINISTRATIVE LAW, PUBLIC HEALTH LAW.

A BREACH OF CONTRACT ACTION IS NOT PROPERLY CONVERTED TO AN ARTICLE 78 PROCEEDING; HERE THE PHYSICIAN SUED THE HOSPITAL FOR FAILING TO HONOR A CONTRACTUAL COMMITMENT TO ADMIT PLAINTIFF TO A RESIDENCY PROGRAM; THE PHYSICIAN'S ACTION WAS PRECLUDED FOR FAILURE TO EXHAUST THE ADMINISTRATIVE REMEDIES UNDER THE PUBLIC HEALTH LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the breach of contract action should not have been converted to an Article 78 and the action was precluded by plaintiff-physician's failure to exhaust the administrative remedies under the Public Health Law. Plaintiff was matched to a residency program at defendant hospital and the hospital was contractually bound to offer the residency

to the plaintiff. The hospital sought a waiver which was denied, and the hospital still refused to offer the residency to plaintiff. Plaintiff sued for breach of contract and requested a preliminary injunction. Supreme Court improperly converted the action to an Article 78 (mandamus) proceeding and granted the preliminary injunction. The appellate division held a breach of contract action cannot be converted to an Article 78:

Invoking CPLR 103(c), the Supreme Court erroneously converted the subject branch of the plaintiff's motion and this action into a proceeding pursuant to CPLR article 78. Under CPLR 103(c), courts are empowered to convert a civil judicial proceeding that was brought in the improper form to the proper form and convert a motion into a special proceeding. Here, the court erred in concluding that a proceeding pursuant to CPLR article 78 was the proper form. "[A] CPLR article 78 proceeding is not the proper vehicle to resolve contractual rights" … . "Indeed, it is well settled that mandamus relief lies only to compel the performance of purely ministerial acts, and may not be used when there are other available remedies at law, such as a breach of contract action" … . * * *

Supreme Court should not have rejected the hospital's argument that the branch of the plaintiff's motion which was for preliminary injunctive relief against it should be denied because the plaintiff failed to exhaust his administrative remedies under Public Health Law article 28. Public Health Law § 2801-b(1) makes it an "improper practice" for a hospital to deny, withhold, or terminate professional privileges for a reason unrelated to "patient care, patient welfare, the objectives of the institution or the character or competency of the applicant." "To enforce the statutory prohibition against improper practices, the Legislature created a two-step grievance process by which a physician may obtain injunctive relief requiring the hospital to restore wrongfully terminated staff privileges" … . "First, the physician must submit a complaint to the [public health and health planning council (hereinafter PHHPC)]" … . "It is the duty of the [PHHPC] to undertake a prompt investigation of the action complained of and to allow the parties to the dispute to submit, in a strictly confidential setting, any relevant information in support of their respective positions" … . "After investigating the physician's complaint, the [PHHPC] will either direct the hospital to reconsider its decision or inform the parties of its determination that the complaint lacks merit" … . Khass v New York Presbyt. Brooklyn Methodist Hosp., 2023 NY Slip Op 00851, Second Dept 2-15-23

Practice Point: A breach of contract action is not properly converted to an Article 78 proceeding pursuant to CPLR 103(c).

Practice Point: A hospital's failure to honor its contractual commitment to admit plaintiff physician to a residency program is subject to administrative remedies under the Public Health Law which must be exhausted before bringing suit.

FEBRUARY 15, 2023

CONVERSION, SPECIAL PROCEEDING TO PLENARY ACTION.

WHEN A COURT DECIDES AN ACTION BROUGHT AS A SPECIAL PROCEEDING SHOULD HAVE BEEN BROUGHT AS A PLENARY ACTION, THE ACTION SHOULD NOT BE DISMISSED BECAUSE IT WAS BROUGHT IN THE WRONG FORM; THE PETITION SOULD BE DEEMED A COMPLAINT, NOT A MOTION FOR SUMMARY JUDGMENT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the special proceeding should have been converted to a plenary action, not dismissed. Once converted the petition is deemed a complaint, not a motion for summary judgment:

Supreme Court should have converted the special proceeding into a plenary action rather than dismissing the petition, as CPLR 103© "prohibits dismissal of [a] proceeding solely on the ground that it was not brought in the proper form" … .

… [W]e decline petitioner's request to construe the petition and answer as summary judgment papers and to summarily adjudicate his remaining claims at this stage. When a special proceeding is converted into a plenary action in accordance with CPLR 103©, the petition is deemed a complaint, not a motion for summary judgment … . Zanani v Scott Seidler Family Trust, 2023 NY Slip Op 00836, First Dept 2-14-23

Practice Point: Here the action should not have been dismissed solely because it was in the wrong form. The special proceeding should have been brought as a plenary action. The petition should be deemed a complaint, not a motion for summary judgment.

FEBRUARY 14, 2023

CRIMINAL LAW, PROVING OUT-OF-STATE CONVICTION.

THE PEOPLE DID NOT HAVE THE DOCUMENT OFFERED TO PROVE DEFENDANT'S MASSACHUSETTS CONVICTION CERTIFIED PURSUANT TO CPLR 4540; SECOND FELONY OFFENDER SENTENCE VACATED (THIRD DEPT).

The Third Department, vacating defendant's sentence as a second felony offender, determined the proof of the Massachusetts conviction which was the basis for the second felony offender status was deficient:

… [T]he People offered a copy of a "warrant" transferring defendant from local custody to state prison, as well as a copy of defendant's public docket report. Both documents reflect defendant's conviction in Massachusetts of armed robbery, bear the seal of the Massachusetts Superior Court and contain the signature of a court official attesting that such documents are true copies. However, the People's submissions "lacked the certificate, under seal, showing that the attestor was the legal custodian of the records and that this signature was genuine as required by CPLR 4540 [c]" … As a result of such failure, we vacate defendant's adjudication as a second felony offender, as well as the resulting sentence, and remit this matter to County Court for a new second felony offender hearing, at which time the People will have an opportunity to overcome the technical deficiencies in their proof … . People v Caraballo, 2023 NY Slip Op 01029, Third Dept 2-23-23

Practice Point: To prove a foreign conviction the relevant document must be certified in accordance with CPLR 4540 (c).

FEBRUARY 23, 2023

DEFAULT JUDGMENT, COMPLAINT.

A JUDGE HAS DISCRETION TO DENY A MOTION FOR A DEFAULT JUDGMENT ON THE GROUND THE CAUSE OF ACTION HAS NOT BEEN SHOWN TO BE VIABLE; HERE THE ALLEGATIONS IN THE COMPLAINT, WHICH ARE DEEMED ADMITTED, STATED A VIABLE CAUSE OF ACTION AND THE MOTION FOR A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in a case related to Aleyne v Rutland Dev. Group, Inc.,2023 NY Slip Op 00975, Second Dept 2-22-23 (also summarized in the Digest), determined plaintiff's motion for a default judgment in this action to set aside a deed as forged should have been granted:

… [T]he plaintiff correctly contends that the motion for leave to enter a default judgment against Rutland was timely filed. The plaintiff served Rutland with the summons and complaint on March 25, 2019, pursuant to Business Corporation Law § 306 via service on the Secretary of State. Rutland defaulted by failing to appear or answer the complaint within 30 days (see CPLR 320[a]; 3012[c]). The plaintiff would have been required to take proceedings for the entry of a default judgment against Rutland within one year of the default, by April 24, 2020 (see id. § 3215[c]). However, time limitations in civil actions were tolled by executive order from March 20, 2020, until November 3, 2020 … . Since the plaintiff filed the motion on October 6, 2020, it was timely.

… "A plaintiff seeking leave to enter a default judgment under CPLR 3215 must file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default" (…See CPLR 3215[f]). "[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" … . However, "'a court does not have a mandatory, ministerial duty to grant a motion for leave to enter a default judgment, and retains the discretionary obligation to determine whether the movant has met the burden of stating a viable cause of action'" … .

… [Plaintiff's] submissions, including her affidavit in which she denied signing the deed and other documents related to the transfer of the property, were sufficient to demonstrate that her causes of action, insofar as asserted against Rutland, were

viable … . Alleyne v Rutland Dev. Group, Inc., 2023 NY Slip Op 00976,Second Dept 2-22-23

Practice Point: A judge has the discretion to deny a motion for a default judgment if the plaintiff has not demonstrated the action was viable. Here the allegations in the complaint, which are deemed admitted by the failure to answer, stated a viable cause of action and the default judgment should have been awarded.

FEBRUARY 22, 2023

DEFAULT JUDGMENT, EVIDENCE, NEGLIGENCE.

THE ALLEGATIONS IN THE VERIFIED COMPLAINT IN THIS SLIP AND FALL CASE WERE SUFFICIENT TO SUPPORT PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT; THE DEFENDANT'S FAILURE TO ANSWER IS DEEMED TO BE AN ADMISSION TO THE ALLEGATIONS (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for a default judgment based upon the allegations in the verified complaint should have been granted:

A party seeking a default judgment must submit proof of service of the summons and the complaint and "proof of the facts constituting the claim, the default and the amount due" (CPLR 3215[f] …). To demonstrate "facts constituting the claim," the movant need only proffer proof sufficient "to enable a court to determine that a viable cause of action exists" … . The movant may do so either by submission of an affidavit of merit or by verified complaint, if one has been properly served … .

Here, contrary to the court's conclusion, plaintiffs established the facts constituting their claim. Their verified complaint alleges that plaintiff Maria Bigio was walking in front of defendant's property when she tripped and fell on a defective sidewalk condition, sustaining injuries, and plaintiff stated in her verification that these allegations were true to her own personal knowledge. Because defendant, by defaulting, is deemed to have admitted "all traversable allegations in the complaint, including the basic allegation[] of liability," the allegations were sufficient to enable the court to determine that a viable negligence cause of action existed … . Bigio v Gooding, 2023 NY Slip Op 00806, First Dept 2-14-23

Practice Point: Here in this slip and fall case the allegations in the verified complaint were sufficient to grant plaintiff's motion for a default judgment. The failure to answer is deemed an admission to the allegations in the complaint.

FEBRUARY 14, 2023

DEPOSITIONS, INTERPRETERS, MEDICAL MALPRACTICE.

PLAINTIFF'S DAUGHTER SHOULD NOT HAVE BEEN APPOINTED TO SERVE AS THE INTERPRETER FOR HER MOTHER'S DEPOSITION IN THIS MEDICAL MALPRACTICE CASE; THE CRITERIA FOR ALLOWING A RELATIVE TO SERVE AS AN INTERPRETER ARE EXPLAINED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wooten, determined the plaintiff's daughter should not have been appointed an interpreter for plaintiff's deposition in this medical malpractice action. The opinion lays out the criteria for when a relative could be allowed to act as an interpreter:

… [W]e hold that the appointment of an individual to serve as interpreter for a relative or to serve as interpreter in an action or proceeding in which the interpreter has personal knowledge of the relevant facts is only permissible under exceptional circumstances. In evaluating whether such circumstances are present, courts must consider the following: (1) whether sufficient information has been disclosed by the party in need of an interpreter to the court and to opposing parties so as to allow for a thorough search for a disinterested interpreter; (2) whether an exhaustive and meaningful search has been conducted for a disinterested interpreter; (3) whether the potential interpreter is the least interested individual available to serve as interpreter; and (4) whether the potential interpreter is capable of objectively translating the testimony verbatim, which may only be assessed after the court has conducted an inquiry of the potential interpreter. Unless the court is satisfied that each of these four elements has been satisfied, then the potential interpreter must not be permitted to serve as interpreter in view of the "danger that [the] witness' [testimony] will be distorted through interpretation," "either consciously or subconsciously" … .Zhiwen Yang v Harmon, 2023 NY Slip Op 00893, Second Dept 2-15-23

Practice Point: Here the plaintiff's daughter should not have been appointed to serve as the interpreter for her mother's deposition in this med mal case. The court

laid out guidelines for the extraordinary circumstances in which a party's relative may act as the interpreter.

FEBRUARY 15, 2023

JURISDICTION, IN REM, REAL PROPERTY TAX LAW.

THE COUNTY HAD IN REM JURISDICTION IN THIS TAX FORECLOSURE PROCEEDING AND MADE ADEQUATE ATTEMPTS TO NOTIFY THE NECESSARY PARTIES (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, affirming the appellate division, determined the county had in rem jurisdiction in this tax foreclosure proceeding and the county's attempts to notify all parties of the tax foreclosure proceedings were sufficient:

Two fundamental legal principles govern our decision in this appeal. First, a tax foreclosure proceeding is in rem against the "res"—the taxable real property—and not an action in personam commenced against an individual to establish personal liability. Second, New York statutory law and state and federal constitutional guarantees of due process require that the petitioner in a foreclosure proceeding must attempt notice that is reasonably calculated to alert all parties with an interest in the property.

Here, defendants commenced an in rem tax foreclosure proceeding and mailed the statutorily-required notice to the publicly-listed owners of the property, posted and filed the notice, and publicized the notice in the press. Upon learning that a person listed as an owner died before the notices were issued, defendant County Treasurer also personally contacted the sole business located on the property in an effort to identify and personally inform a manager, owner, or any person in charge of the pending foreclosure proceeding. Under these circumstances, defendants provided legally adequate notice of a validly commenced tax foreclosure action. Hetelekides v County of Ontario, 2023 NY Slip Op 00803, CtApp 2-14-23

Practice Point: A tax foreclosure proceeding is an in rem proceeding against the taxable real property, not an in personam action against an individual.

FEBRUARY 14, 2023

JURISDICTION, LONG-ARM, CONTRACT LAW.

NEW YORK HAS LONG-ARM JURISDICTION OVER THE MICHIGAN MANUFACTURER OF UNMANNED AERIAL VEHICLES (UAV'S) PURCHASED BY SUNY STONY BROOK FOR USE IN MADAGASCAR IN THIS BREACH OF CONTRACT ACTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a dissenting opinion, reversing the appellate division, determined New York had long-arm jurisdiction over a Michigan manufacturer of unmanned aerial vehicles (UAV's) purchased by SUNY Stony Brook for transporting medical supplies to remote areas of Madagascar. The two UAV's purchased by SUNY Stony Brook didn't meet Stony Brooks' needs and were returned to Michigan for replacement. The UAV's were not replaced and SUNY Stony Brook sued for breach of contract:

… "[T]he nature and purpose of a solitary business meeting conducted for a single day in New York may supply the minimum contacts necessary to subject a nonresident participant to the jurisdiction of our courts" … . Here … there was more than this bare minimum: the meeting was part of a far reaching and long-standing relationship … . * * *

… Plaintiff's claims are based on the sale of the two UAVs, and [the UAV manufacturer's] contacts in New York were directly related to efforts to resolve the dispute over operability of the purchased UAVs … .Thus, "[t]here is an articulable nexus or substantial relationship between defendant's New York activities and the parties' contract, defendant's alleged breach thereof, and potential damages" … .

Finally, the exercise of jurisdiction must also comport with due process, a constitutional inquiry focused on "the relationship among the defendant, the forum, and the litigation" … . * * * Those requirements are satisfied here. State of New York v Vayu, Inc., 2023 NY Slip Op 00801, CtApp 2-14-23

Practice Point: Even a single solitary business meeting in New York may supply the minimum contacts necessary for long-arm jurisdiction.

FEBRUARY 14, 2023

LANDLORD-TENANT, YELLOWSTONE INJUNCTION, CONTRACT LAW.

THE TENANT WAS NOT ENTITLED TO A YELLOWSTONE INJUNCTION BECAUSE THE RELIEF WAS SOUGHT AFTER THE DEADLINE IN THE NOTICE TO CURE; THAT DEADLINE WAS CONTROLLED BY THE LEASE AND THEREFORE WAS NOT EXTENDED BY THE COVID-RELATED EXECUTIVE ORDERS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the tenant was not entitled to a Yellowstone injunction because the relief was not sought before the deadline in the notice to cure, which is controlled by the lease. The time-limit extensions in response to COVID do not apply to the notice-to-cure deadline which is contractual:

… [T]he landlord served a notice to cure on the tenant on May 15, 2020, and the cure period ended on June 1, 2020, in accordance with the terms of the lease. When the tenant did not cure the alleged defects, the landlord served a notice of termination on June 2, 2020. The tenant commenced this action and moved for a Yellowstone injunction on June 15, 2020, well after the cure period expired.

Executive Order 202.8, and the subsequent orders extending that order, did not toll the cure period since the cure period, set by contract, was not "prescribed by [a] procedural law[ ] of the state" or "any other statute, local law, ordinance, order, rule, or regulation" (9 NYCRR 8.202.8). Moreover, filing of new non-essential matters through the New York State Courts Electronic Filing System was available in the five New York City counties, including Kings County, as of May 25, 2020 … . Prestige Deli & Grill Corp. v PLG Bedford Holdings, LLC, 2023 NY Slip Op 01019, Second Dept 2-22-23

Practice Point: The deadlines extended by the COVID Executive Orders do not apply to contractual deadlines (here the deadline for seeking a Yellowstone injunction after the tenant's receipt of a notice to cure).

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LANDLORD-TENANT, YELLOWSTONE INJUNCTION.

THE TENANT MADE GOOD FAITH EFFORTS TO CURE THE DEFAULTS CITED BY THE LANDLORD AND WAS ENTITLED TO A YELLOWSTONE INJUNCTION TOLLING TENANT'S TIME TO CURE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gonzalez, determined the tenant liquor-store had made good faith efforts to cure the defaults cited by the landlord and was entitled to a Yellowstone injunction tolling the tenant's time to cure the defaults. The opinion lays out the fact in a level of detail which cannot be fairly summarized here:

In keeping with public policy against forfeiture, courts grant Yellowstone relief on "far less than the normal showing required for preliminary injunctive relief" … . The tenant need only demonstrate that (1) it holds a lease; (2) it received a notice of default, notice to cure, or threat to terminate the lease; (3) it requested injunctive relief prior to the termination of the lease or expiration of the cure period; and (4) it is prepared to cure the alleged default by any means short of vacating the premises … ,. Once the tenant establishes these elements, the motion court may exercise its discretion to issue a Yellowstone injunction tolling the tenant's time to cure … . Elite Wine & Spirit LLC v Michelangelo Preserv. LLC, 2023 NY Slip Op 00631, First Dept 2-7-23

Practice Point: If a tenant has made good faith efforts to cure the defaults cited by the landlord, a court may grant the tenant a Yellowstone injunction tolling the tenant's time for curing the defaults. The Yellowstone criteria are laid out in the opinion.

FEBRUARY 7, 2023

LAW OFFICE FAILURE, MISSED DATE FOR SUBMISSIONS.

PLAINTIFF'S COUNSEL EXPLAINED THAT THE RETURN DATE FOR DEFENDANT'S SUMMARY JUDGMENT MOTION WAS MISCALEDARED AS THE DATE FOR SUBMISSION OF OPPOSITION PAPERS; IT WAS AN ABUSE OF DISCRETION TO DENY PLAINTIFF'S MOTION TO VACATE THE SUMMARY JUDGMENT ORDER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court abused its discretion in denying plaintiff's motion to vacate the order granting summary judgment to defendant in this slip and fall case. Plaintiff's counsel explained that the return date had been mistakenly calendared as the date for the submission of opposition papers:

In order to vacate a default in opposing a motion pursuant to CPLR 5015(a)(1), the moving party is required to demonstrate a reasonable excuse for the default as well as a potentially meritorious opposition to the motion … . Here, the plaintiff's excuse of law office failure was reasonable … , and she also demonstrated that she had a potentially meritorious opposition to the defendant's motion … .

Under the circumstances of this case, including that the scheduling error by counsel for the plaintiff was brief, isolated, and unintentional, with no evidence of wilful neglect … , and considering the strong public policy in favor of resolving cases on the merits … , the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was to vacate the … order … . Valesquez v Landino, 2023 NY Slip Op 01023, Second Dept 2-22-23

Practice Point: Here plaintiff's counsel offered a reasonable excuse for missing the date for submission of opposition papers. Supreme Court abused its discretion in denying plaintiff's motion to vacate the summary judgment order.

FEBRUARY 22, 2023

MOTION TO DISMISS, DOCUMENTARY EVIDENCE, REAL PROPERTY LAW.

IF PLAINTIFF MOVED FOR SUMMARY JUDGMENT IN THIS ACTION TO SET ASIDE A DEED PLAINTIFF WOULD HAVE HAD TO PROVE THE DEED WAS FORGED; TO WIN A MOTION TO DISMISS BASED ON DOCUMENTARY EVIDENCE, HOWEVER, THE DEFENDANT MUST UTTERLY REFUTE PLAINTIFF'S ALLEGATION THE DEED WAS FORGED WHICH DEFENDANT FAILED TO DO HERE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's (Golden Bridge's) motion to dismiss this action to set aside a deed (allegedly forged) should not have been granted. The decision clearly lays out the subtle but crucial differences in proof requirements between a defendant's motion to dismiss based on documentary evidence and a a plaintiff's motion for summary judgment.

On February 3, 2004, the plaintiff acquired title to real property located in Brooklyn. In 2017, the property was transferred to the defendant Rutland Development Group, Inc. (hereinafter Rutland), by the deed that is the subject of this action. Rutland granted the defendant Golden Bridge, LLC (hereinafter Golden Bridge), a mortgage on the property in exchange for the sum of $625,000. * * *

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" … . Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate … . A motion to dismiss a complaint based upon CPLR 3211(a)(1) may be granted "only where the documentary evidence utterly refutes [a] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" … . …

Here, in support of its motion, Golden Bridge submitted … a notary's certificate of acknowledgment attesting that the plaintiff had appeared before him … , and

executed the subject deed or acknowledged her execution thereof, a resolution by Rutland authorizing the plaintiff to borrow a sum of money from Golden Bridge on Rutland's behalf, and bank checks … . Although Golden Bridge did proffer some evidence that the plaintiff may have received consideration as a result of the transfer of the property, Golden Bridge's evidentiary submissions were insufficient to utterly refute the plaintiff's allegations that the deed and other relevant documents were forged, she received no consideration, and she did not have any relationship to Rutland (see CPLR 4538 …). On a motion for summary judgment, the plaintiff would have had to proffer evidence so clear and convincing as to amount to a moral certainty, in order to rebut the presumption, based on the notary's certificate of acknowledgment, that the deed was duly executed (see CPLR 4538 …). Here, however, on a motion to dismiss the complaint pursuant to CPLR 3211(a), the questions are whether the plaintiff has a cause of action and whether Golden Bridge conclusively established a defense as a matter of law. Aleyne v Rutland Dev. Group, Inc.,2023 NY Slip Op 00975, Second Dept 2-22-23

Practice Point: Here in this action to set aside a deed as forged, the proof requirements for a plaintiff's motion for summary judgment and defendant's motion to dismiss based on documentary evidence were compared. In the summary judgment motion, plaintiff would have to prove the deed was forged. In the motion to dismiss, the defendant must produce documentary evidence which utterly refutes plaintiff's allegation the deed was forged–two very different standards of proof.

FEBRUARY 22, 2023

NOTICE OF CLAIM, PORT AUTHORITY, NEGLIGENCE.

IN THIS SLIP AND FALL ACTION AGAINST THE PORT AUTHORITY, THE APPLICABLE STATUTE PROVIDES THAT THE NOTICE OF CLAIM MUST BE SERVED AT LEAST 60 DAYS BEFORE THE COMMENCEMENT OF THE ACTION (NOT 60 DAYS AFTER THE ACCRUAL OF THE ACTION); THEREFORE THE NOTICE OF CLAIM WAS TIMELY SERVED (SECOND DEPT).

The Second Department, reversing Supreme Court, ©n a full-fledged opinion by Justice Maltese, determined the notice of claim in this slip and fall action against

the Port Authority was timely because it was served at least 60 days before the commencement of the action. The statute of limitations for the commencement of the action had been tolled by executive order due to the COVID pandemic:

This appeal involves the intersection of McKinney's Unconsolidated Laws of NY § 7107, which sets forth conditions precedent for commencing an action against the Port Authority of New York and New Jersey (hereinafter the Port Authority), and the executive orders issued by former Governor Andrew Cuomo which tolled time limitations due to the COVID-19 pandemic. McKinney's Unconsolidated Laws of NY § 7107 requires that an action against the Port Authority must be commenced within one year after the cause of action accrues and that a notice of claim must be served upon the Port Authority at least 60 days before the commencement of the action. We hold that where, as here, the deadline to commence an action pursuant to section 7107 was tolled, service of the notice of claim at least 60 days prior to the timely commencement of the action satisfies section 7107. * * *

… [T]the commencement of this action on November 4, 2020, satisfied section 7107 … .

… [T]he plain language of section 7107 makes the deadline to serve a notice of claim dependent upon the date of commencement, unlike other statutes where the time to serve the notice of claim is measured from the date that the cause of action accrues … . … Therefore, the plaintiff's service of the notice of claim on August 14, 2020, more than 60 days prior to the commencement of the action on November 4, 2020, satisfied the condition precedent set forth in section 7107. Espinal v Port Auth. Of N.Y. & N.J., 2023 NY Slip Op 00844, Second Dept 2-15-23

Practice Point: The statute controlling the timing of a notice of claim against the Port Authority requires service of the notice of claim at least 60 days before the commencement of the action, not 60 days after the accrual of the action.

FEBRUARY 15, 2023

SERVICE OF PROCESS, EXTENSION OF TIME, FORECLOSURE, JUDGES.

AN "INTEREST OF JUSTICE" EXTENSION OF TIME TO SERVE A DEFENDANT HAS DIFFERENT CRITERIA THAN A "GOOD CAUSE" EXTENSION; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's request for more time to serve the defendant in this foreclosure action should have been granted. The different criteria for an "interest of justice" versus a "good cause" request for an extension is explained:

Pursuant to CPLR 306-b, a court may, in the exercise of its discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice … . "Good cause requires a showing of reasonable diligence in attempting to effect service" … . "[I]n deciding whether to grant a motion to extend the time for service in the interest of justice, the court must carefully analyze the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter" … . Under the interest of justice standard, "the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to [the] defendant" … .

… The plaintiff demonstrated that the action was timely commenced, that service was timely attempted and was believed by the plaintiff to have been made within 120 days after the commencement of the action but was subsequently found to be defective, that the statute of limitations had expired, and that the extension of time would not prejudice the defendant as the defendant had actual notice of the action … . Wells Fargo Bank, N.A. v Boakye-Yiadom, 2023 NY Slip Op 01026, Second Dept 2-22-23

Practice Point: An "interest of justice" extension of time to serve a defendant has different criteria than a "good cause" extension. The criteria are explained.

FEBRUARY 22, 2023

STANDNG, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), UNIFORM COMMERCIAL CODE.

THE BANK IN THIS FORECLOSURE ACTION DID NOT SUBMIT SUFFICIENT PROOF OF STANDING OR COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not demonstrate standing or compliance with the notice requirements of RPAPL 1304:

"[A] plaintiff may demonstrate its standing in a foreclosure action through proof that it was in possession of the subject note endorsed in blank, or the subject note and a firmly affixed allonge endorsed in blank, at the time of commencement of the action" … . Although the plaintiff attached to the complaint copies of the note and a chain of purported allonges ending with an undated purported allonge endorsed in blank, the plaintiff did not demonstrate that the purported allonges, which were on pieces of paper completely separate from the note, were "so firmly affixed thereto as to become a part thereof," as required by UCC 3-202(2) … . …

Johnson's [the foreclosure specialist's] affidavit did not establish proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed … Further, Johnson's affidavit failed to address the nature of Fay's [plaintiff's loan servicer's] relationship with LenderLive [third-party vendor which sent the RPAPL 1304 notice] and whether LenderLive's records were incorporated into Fay's own records or routinely relied upon in its business … . Thus, Johnson's affidavit failed to lay a foundation for admission of the transaction report generated by LenderLive (see CPLR 4518[a] …). Finally, the tracking numbers on the copies of the 90-day notices submitted by the plaintiff, standing alone, did not suffice to establish, prima facie, proper mailing under RPAPL 1304 …) . US Bank N.A. v Okoye-Oyibo, 2023 NY Slip Op 00457, Second Dept 2-1-23

Practice Point: Here there was no evidence the allonge was firmly attached to the note; therefore the bank's standing to bring the foreclosure action was not demonstrated.

Practice Point: The bank in this foreclosure action did not demonstrate compliance with the notice requirements of RPAPL 1304.

FEBRUARY 1, 2023

STANDING, JUDGES, SUA SPONTE.

THE LACK-OF-STANDING DEFENSE WAS NOT RAISED IN THE ANSWER OR THE PREANSWER MOTION TO DISMISS; IT IS NOT A JURISDICTIONAL DEFECT; THEREFORE THE JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE ACTION ON THAT GROUND (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed petitioners' declaratory judgment action against the town for lack of standing. The petitioners sought a ruling that the town had failed to enforce a zoning code provision which prohibited respondent-defendant from operating a commercial business out of his residence. Although the town moved to dismiss the action, it did not raise lack-of-standing in its answer or its motion. Therefore the judge did not have the authority to dismiss on that ground:

"Standing 'is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation' " … . Nonetheless, "a party's lack of standing does not constitute a jurisdictional defect" … , and therefore a challenge to a party's standing is waived if the defense is not asserted in either the answer or a preanswer motion to dismiss … . Here, the Town's motion with respect to the second cause of action was not based on petitioners' alleged lack of standing. Thus, we conclude that the court erred in sua sponte reaching the issue of standing with respect to that cause of action … . Matter of Cayuga Nation v Town of Seneca Falls, 2023 NY Slip Op 00575. Fourth Dept 2-3-23

Practice Point: A lack-of-standing is not a jurisdictional defect. Therefore, if it is not raised in the answer or a preanswer motion to dismiss, it is waived and the judge cannot raise it sua sponte.

FEBRUARY 3, 2023

TRIAL WITNESS TAKEN ILL, TESTIMONY STRUCK, DEPOSITION ADMITTED, JUDGES.

AFTER AN IMPORTANT PLAINTIFFS' WITNESS BECAME ILL DURING CROSS-EXAMINATION AND WAS TAKEN BY AMBULANCE TO THE HOSPITAL, THE JUDGE, SUA SPONTE, DECLARED THE WITNESS UNAVAILABLE, STRUCK HIS TESTIMONY AND ADMITTED HIS DEPOSITION TESTIMONY; THERE WAS NO SUPPORT IN THE RECORD FOR THE FINDING THE WITNESS WOULD BE UNABLE TO TESTIFY; JUDGMENT REVERSED (SECOND DEPT).

The Second Department, reversing the judgment after trial, determined the trial judge should not have, sua sponte, announced that an important witness for plaintiffs (Awad) was unavailable due to illness, struck the witness's testimony and admitted the witness's deposition testimony:

During his cross-examination, Awad fell ill, and was taken from the courthouse by ambulance. …

CPLR 3117(a)(3)(iii) permits the reading of a witness's deposition at trial where the court finds "that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment" … . In exercising its discretion under CPLR 3117, "the trial court may not act arbitrarily or deprive a litigant of a full opportunity to present [its] case" … .

Here, there is no information in the record regarding the nature of Awad's illness or the treatment he received, or whether he was hospitalized and for how long. Thus, the Supreme Court's sua sponte determination that Awad was unavailable to testify due to sickness or infirmity lacked support in the record, and the court improvidently exercised its discretion in determining that Awad's deposition testimony was admissible under CPLR 3117(a)(3)(iii) … . 244 Linwood One, LLC v Tio Deli Grocery Corp., 2023 NY Slip Op 01072, Second Dept 3-1-23

Practice Point: Here a witness became ill during cross-examination and was taken to the hospital by ambulance. Without putting any additional information on the record, the judge declared the witness unavailable, struck his testimony and admitted his deposition. Because there was no support in the record for the judge's

(sua sponte) determination the witness would not be able to testify, the judgment after trial was reversed.

MARCH 1, 2023

VENUE, UNTIMELY MOTION TO CHANGE.

THE MOTION TO CHANGE VENUE WAS MADE MORE THAN 15 DAYS AFTER THE DEMAND TO CHANGE VENUE; THE 15-DAY TIME-LIMIT IS STRICTLY ENFORCED AND THE MOTION SHOULD HAVE BEEN DENIED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendants' motion to change venue pursuant to CPLR 511(b) was made more than 15 days after their demand to change venue and was therefore untimely:

Supreme Court should have denied defendants' motion to change venue from Bronx County to Westchester County because it was untimely made. Defendants have a reasonable excuse for their failure to make a timely demand to change venue. They learned of plaintiff's Westchester address on April 5, 2022, when they received plaintiff's medical authorizations and a copy of the Aided report, and made a prompt demand to change venue the day after, on April 6, 2022 … . However, pursuant to CPLR 511(b), defendants had until April 21, 2022, 15 days after service of their demand, to make the motion. Defendants' motion made on April 26, 2022, 20 days after the demand, is untimely and should have been denied. Defendant did not move within the strict time limits provided by the statute and failed to offer any explanation for the delay … . Gomez v Cypser, 2023 NY Slip Op 01060, First Dept 2-28-23

Practice Point: Once defendant makes a demand to change venue, defendant has 15 days to make a motion to change venue pursuant to CPLR 511(b). The 15-day time-limit is strictly enforced. Here the motion was made 20 days after the demand and Supreme Court should not have granted it.

FEBRUARY 28, 2023

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