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Civil Procedure
Reversal Report
April 2023

Table of Contents

Contents

Table of Contents

Table of Contents

Table of Contents

VACATE DEFAULT, FORECLOSURE, ATTORNEYS. 27

PLAINTIFF FAILED TO SHOW UP FOR THE SETTLEMENT CONFERENCE IN THIS FORECLOSURE ACTION AND A DEFAULT JUDGMENT WAS GRANTED; IN MOVING TO VACATE THE DEFAULT, PLAINTIFF DID NOT PRESENT SUFFICIENT PROOF OF LAW OFFICE FAILURE AND DID NOT EXPLAIN ITS DELAY IN SEEKING TO VACATE THE DEFAULT JUDGMENT (SECOND DEPT). 27

ABANDONMENT OF ACTION, JUDGES.

IN 2011 PLAINTIFF WITHDREW THE MOTION FOR SUMMARY JUDGMENT IN LIEU OF COMPLAINT WITHOUT PREJUDICE AND SUBSEQUENTLY ENGAGED IN SETTLEMENT NEGOTIATIONS FOR YEARS; THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED AND TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's action for a money judgment should not have been dismissed as abandoned and time-barred. In 2011 plaintiff withdrew its motion for summary judgment in lieu of complaint, without prejudice, and continued settlement negotiations for years, demonstrating plaintiff did not intend to abandon the lawsuit:

Supreme Court incorrectly determined that the action had been rendered a nullity by plaintiff's withdrawal of his initial summons and motion for summary judgment in lieu of a complaint (CPLR 3213), as the parties' course of conduct reflected an understanding that plaintiff was not discontinuing or abandoning the action. Plaintiff withdrew the summons and motion "without prejudice" after reaching a settlement agreement with Progressive and, by contrast, the settlement agreement expressly stated that the matter would be discontinued "with prejudice" upon Progressive's full and complete compliance with its payment obligations. After Progressive defaulted, plaintiff and defendant, participated in further settlement discussions, court conferences, and motion practice for years before defendant invoked the argument that the action had been discontinued or abandoned. Rizzo v Progressive Capital Solutions, LLC, 2023 NY Slip Op 01948, First Dept 4-13-23

Practice Point: Although plaintiff withdrew the motion for summary judgment in lieu of complaint, without prejudice, in 2011, plaintiff continued settlement

negotiations for years, demonstrating plaintiff did not intend to abandon the action. The dismissal of the action as abandoned was reversed.

APRIL 13, 2023

ADMINISTRATIVE LAW, DEBTOR-CREDITOR.

IN THIS SUIT BY A NEW JERSEY CASINO TO RECOVER DEFENDANT'S GAMBLING DEBT, DEFENDANT RAISED AFFIRMATIVE DEFENSES ALLEGING PLAINTIFF CASINO VIOLATED PROVISIONS OF NEW JERSEY'S CASINO CONTROL ACT (CCA); THE CONTROLLING AGENCY, THE CASINO CONTROL COMMISSION (CCC), HAS PRIMARY JURISDICTION OVER THOSE COMPLAINTS; THE COMPLAINTS MUST BE RULED ON BEFORE THE COURT CAN CONSIDER PLAINTIFF'S SUMMARY JUDGMENT MOTION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kapnick, determined the plaintiff, a New Jersey casino (Golden Nugget), was not entitled to summary judgment this action seeking to recover defendant's (Chan's) $200,000 gambling debt. Defendant had raised affirmative defenses based upon complaints alleging the dice used by the casino violated the Casino Control Act (CCA) which defendant filed with the New Jersey Division of Gaming Enforcement (DGE). The Casino Control Commission has primary jurisdiction over those complaints. Therefore the complaints must be ruled upon before summary judgment can be considered by the court:

Supreme Court's granting of summary judgment to plaintiff was premature. The motion court should instead have deferred any decision until receipt of DGE's ruling on Chan's "patron complaint" based on the same violations, since that grievance was filed prior to the commencement of plaintiff's litigation and remained pending at the time of its decision. While DGE has ruled that the same scribing violations against another casino do not violate the CCA, there has been no ruling by DGE in any matter concerning defendant's allegations of "non-transparent dice." Accordingly, the motion for summary judgment is denied, with leave to renew upon a ruling by DGE on the "patron complaint," or after six months if DGE has failed to resolve this issue despite sufficient notice to DGE by

the parties … . Golden Nugget Atl. City LLC v Chan, 2023 NY Slip Op 02176, First Dept 4-27-23

Practice Point: Here a New Jersey sued defendant to recover a $200,000 gambling debt. Defendant raised violations of New Jersey's Casino Control Act as affirmative defenses. Because New Jersey's Casino Control Commission has primary jurisdiction over those complaints, they must be ruled on before the court can consider the casino's summary judgment motion.

APRIL 27, 2023

ARBITRATION, ARTICLE 78, CONTRACT LAW, EMPLOYMENT LAW, JUDGES, MUNICIPAL LAW.

COURTS HAVE ONLY A LIMITED POWER TO REVIEW AN ARBITRATOR'S RULING; HERE SUPREME COURT SHOULD NOT HAVE FOUND THE ARBITRATOR EXCEEDED HER AUTHORITY BY ORDERING BACK PAY FOR A REINSTATED COUNTY EMPLOYEE (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the arbitrator in this employment dispute did not exceed her authority when she ordered that the employee be reinstated with back pay. The employee had been absent from work and the employer (the county) the absence a voluntary resignation. Supreme Court had affirmed the employee's reinstatement but found the arbitrator had exceeded her authority by ordering the back pay:

… "[J]udicial review of arbitral awards is extremely limited. Pursuant to CPLR 7511 (b) (1), a court may vacate an award when it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power" … . "Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact" … . "[I]t is well settled that an arbitrator has broad discretion to determine a dispute and fix a remedy, and that any contractual limitation on that discretion must be contained, either explicitly or incorporated by reference, in the arbitration clause itself" … .

We discern no basis to vacate the arbitrator's award as to back pay and benefits. Notably, the CBA [collective bargaining agreement] does not contain "a specifically enumerated limitation on the arbitrator's power" … . In fact, it does not explicitly limit the arbitrator's authority in any way other than stating that the arbitrator does not have the power to "amend, modify or delete any provision of the CBA," which does not set any limitations on the arbitrator's power to order the remedy that he or she sees fit …

. Matter of County of Albany (Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO, Albany County Local 801), 2023 NY Slip Op 01828, Third Dept 4-6-23

Practice Point: Here the arbitrator ordered a county employee reinstated with back pay. Supreme Court held the arbitrator exceeded her powers by ordering back pay. The Third Department noted the courts' limited review powers re: arbitration rulings and found no basis for concluding the arbitrator had exceeded her powers.

APRIL 6, 2023

ARTICLE 78, JUDGES, CRIMINAL LAW.

THE BRAKES FAILED ON A LIMOUSINE OWNED BY PETITIONER AND 20 PEOPLE DIED; PETITIONER PLED TO 20 COUNTS OF CRIMINALLY NEGLIGENT HOMICIDE AND, PURSUANT TO A PLEA AGREEMENT, WAS SENTENCED TO PROBATION AND COMMUNITY SERVICE; BECAUSE OF A TECHNICAL DEFECT IN THE SENTENCE, PETITIONER APPEARED FOR RESENTENCING BEFORE A DIFFERENT JUDGE WHO DECIDED TO IMPOSE PRISON TIME; PETITIONER WITHDREW HIS PLEA, THE MATTER WAS SET FOR TRIAL AND PETITIONER BROUGHT THIS ARTICLE 78 PROCEEDING TO REINSTATE THE ORIGINAL SENTENCE; THE PETITION WAS DENIED OVER A DISSENT (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Ceresia, over a dissent. denied the petition to reinstate the original sentence in the prosecution of the owner of a limousine service. The brakes failed on one of petitioner's limousines and the driver, 17 passengers and two pedestrians were killed. Petitioner pled guilty to 20 counts of criminally negligent homicide and was sentenced to two years of interim probation, community service, followed by a period of probation. When it was discovered that the two-year interim probation was illegal, petitioner appeared before a different judge for resentencing, the respondent in this proceeding. The respondent refused to abide by the plea agreement and informed the petitioner he would impose a prison sentence. Petitioner withdrew his plea and the case was set down for trial. Petitioner then brought this Article 78 petition seeking a writ of mandamus, a writ of prohibition and specific performance of the plea agreement. In a complex ruling too detailed to fairly summarize here, the relief was denied.

The dissenter argued petitioner was entitled to specific performance of the plea agreement:

Mandamus to compel is an extraordinary remedy, commanding "an officer or body to perform a specified ministerial act that is required by law to be performed. It does not lie to enforce a duty that is discretionary" … . * * *

"… [I]mposing a criminal sentence is never ministerial" … . * * *

… [A] review of the merits leads us to conclude that the issuance of a writ [of prohibition] is unwarranted … . A "defendant [is not] entitled to specific performance of [a] plea bargain unless he [or she has] been placed in a 'no-return position' in reliance on the plea agreement" … . Matter of Hussain v Lynch, 2023 NY Slip Op 02049, Third Dept 4-20-23

Practice Point: This opinion should be consulted for the criteria for a writ of mandamus versus a writ of prohibition in the context of requiring a judge to abide by a plea agreement.

APRIL 20, 2023

ATTORNEY AFFIDAVIT IS WITHOUT EVIDENTIARY VALUE, SUMMARY JUDGMENT.

THE ATTORNEY AFFIDAVIT SUBMITTED IN SUPPORT OF THE SUMMARY JUDGMENT MOTION WAS WITHOUT EVIDENTIARY VALUE; THE DEFICIENCIES IN THE ORIGINAL SUBMISSION CANNOT BE CURED IN REPLY; FAILURE TO REGISTER AN APARTMENT WITH THE CITY DHCR AND INCREASING THE RENT DO NOT DEMONSTRATE A FRAUDULENT SCHEME TO DEREGULATE (FIRST DEPT).

The First Department, reversing Supreme court, determined: (1) the summary judgment motion should have been supported by plaintiff's affidavit, not the attorney's affidavit; (2) papers submitted in reply cannot be used to remedy deficiencies in the original submission; and (3), to demonstrate a fraudulent scheme to deregulate an apartment, it is not enough to show the landlord did not register the apartment with the NYC Division of Housing and Community Renewal (DHCR) and increased the rent:

CPLR 3212(b) states, "A motion for summary judgment shall be supported by affidavit . . . The affidavit shall be by a person having knowledge of the facts." Plaintiff failed to submit an affidavit. While he submitted his attorney's affirmation, "[s]uch an affirmation . . . is without evidentiary value" … . Although plaintiff submitted his complaint, it is not verified, so it cannot be used in lieu of an affidavit (see CPLR 105[u] …).

… [I]n Ampim v 160 E. 48th St. Owner II LLC (208 AD3d 1085 [1st Dept 2022]), [we] said, "an increase in rent and failure to register [an] apartment with . . . DHCR . . ., standing alone, are insufficient to establish a colorable claim of a fraudulent scheme to deregulate the apartment" … .

… Plaintiff failed to demonstrate an increase in rent, or that landlord misrepresented the legal regulated rent … .

Plaintiff did show an increase in rent through documents submitted in reply. However, a movant may not use reply papers "to remedy . . . basic deficiencies in [his] prima facie showing" … . Tribbs v 326-338 E 100th LLC, 2023 NY Slip Op 01950, First Dept 4-13-23

Practice Point: The attorney affidavit submitted in support of the summary judgment motion was not based on first-hand knowledge and therefore had no evidentiary value.

Practice Point: Re: a summary judgment motion, deficiencies in the original submissions cannot be cured in reply.

Practice Point: Failure to register an apartment with the NYC DHCR coupled with raising the rent do not demonstrate a fraudulent scheme to deregulate.

APRIL 13, 2023

ATTORNEYS, DISQUALIFICATION.

PLAINTIFF'S COUNSEL SHOULD NOT HAVE BEEN DISQUALIFIED; HER TESTIMONY ABOUT HER ALLEGED CONDUCT AT THE INDEPENDENT MEDICAL EXAMINATION (IME) WOULD HAVE BEEN CUMULATIVE AND DEFENDANTS COULD NOT SHOW THE IME WAS COMPROMISED IN ANY WAY (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's counsel should not have been disqualification based upon her alleged interference with the independent medical examination (IME). Defendants did not demonstrate counsel's testimony concerning the IME was necessary, given the plaintiff's and physician's ability to testify:

… [D]isqualification is required "only where the testimony by the attorney is considered necessary and prejudicial to plaintiffs' interests" … .

… Although defendants maintain that they have a right to call plaintiff's counsel as a witness based on the knowledge she obtained at the IME, and therefore her disqualification under Rules of Professional Conduct (22 NYCRR 1200.0) rule 3.7 is required, defendants have not established that counsel's testimony would be necessary to their defense and not cumulative of the testimony that could be provided by the examining physician and plaintiff herself … .

The examining physician completed a "meaningful examination" of plaintiff at the IME, reflected by the IME report in which he was able to opine with a reasonable degree of medical certainty as to the genesis of plaintiff's symptoms, and defendants have not established that they were prejudiced by the contents of the report based on counsel's alleged intrusions … . To the extent that further information is required to prepare a defense, the remedy is not disqualification of opposing counsel but rather to permit defendants to seek further discovery to obtain that information … . Domingo v 541 Operating Corp., 2023 NY Slip Op 02175, First Dept 4-27-23

Practice Point: Defendants alleged plaintiff's counsel's behavior during the independent medical examination (IME) required her disqualification because defendants needed to call her as a witness to IME proceedings. The First Department held that counsel's testimony about the IME was not necessary (cumulative to plaintiff's and the physician's testimony) and defendants did not

show any prejudice stemming from counsel's alleged conduct. Therefore plaintiff's counsel and her firm should not have been disqualified.

APRIL 27, 2023

ATTORNEYS, PROOF OF REPRESENTATION.

DEFENDANT DEMONSTRATED HE WAS NOT REPRESENTED BY THE ATTORNEY WHO PURPORTED TO WAIVE SERVICE OF PROCEES AND PERSONAL JURISDICTION DEFENSES ON BEHALF OF ALL DEFENDANTS; TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, over a two-justice dissent, determined that one foreign defendant (Koukis) demonstrated he was not represented by an attorney (Santamarina) who purported to waive all defenses based on service of process or lack of personal jurisdiction on behalf of all defendants. Supreme Court agreed Koukis demonstrated Santamarina did not represent him, but found personal jurisdiction over Koukis pursuant to CPLR 302(a)2). The First Department held the court did not have personal jurisdiction over Koukis:

The motion court correctly found that there was no basis to conclude that Koukis authorized Santamarina to appear and waive all jurisdictional defenses on his behalf … . … Koukis emailed Santamarina, with a copy to his attorney, specifically stating that "I have not authorized you to represent me in any legal or other matters." Koukis also averred that he never communicated with Santamarina and that he never represented him, and there is no indication in the record that Koukis was even aware of Santamarina for any significant time prior to his … email. The two … emails referenced by the dissent were not from or to Santamarina and made no mention of any representation by Santamarina. Gibson, Dunn & Crutcher LLP v Koukis, 2023 NY Slip Op 01863, First Dept 4-11-23

Practice Point: Here defendant demonstrated he was not represented by an attorney who purported to waive service of process and personal jurisdiction defenses on behalf of all defendants.

APRIL 11, 2023

CHILD VICTIMS ACT, CIVIL RIGHTS LAW, FAMILY LAW.

THE EXTENDED STATUTE OF LIMITATIONS IN THE CHILD VICTIMS ACT DOES NOT APPLY TO CIVIL RIGHTS CAUSES F ACTION PURSUANT TO 42 USC 1983; THE DUTY TO REPORT CHILD ABUSE UNDER THE SOCIAL SERVICES LAW APPLIES ONLY TO "PERSONS LEGALLY RESPONSIBLE" FOR THE CARE OF THE CHILD, WHICH DOES NOT INCLUDE TEACHERS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Aarons, reversing (modifying) Supreme Court, determined the negligence and civil rights causes of action against the school district in this Child Victims Act suit were properly dismissed, and the Social Services Law causes of action should have been dismissed. The complaints alleged sexual abuse by a teacher. The Third Department followed the Fourth Department holding that the extended statute of limitations in the Child Victims Act did not apply to the 42 USC 1983 civil rights causes of action. The Third Department also determined the teacher was not a "person legally responsible" for the plaintiffs such that the abuse-reporting requirement in the Social Services Law applied to the school district:

It is true that CPLR 214-g contains broad language. The statute nonetheless limits the types of causes of action — i.e., claims involving child sexual abuse — that are revived and then given a new limitations period. … 42 USC § 1983 does not create any independent, substantive rights but merely provides a vehicle to enforce such rights … . As the Fourth Department reasoned, to determine whether CPLR 214-g was a related revival statute would require a court to impermissibly consider the particular facts or particular legal theory advanced by a plaintiff in a section 1983 claim (see BL Doe 3 v Female Academy of the Sacred Heart, 199 AD3d at 1422). Accordingly, we decline plaintiffs' invitation to reject the Fourth Department's approach as articulated in BL Doe 3 v Female Academy of the Sacred Heart … . * * *

… [C]ertain individuals must report cases of suspected abuse when reasonable cause exists that a child coming before them is an abused child (see Social Services Law § 413). Civil liability may be imposed upon these individuals who knowingly and willfully fail to make the requisite report (see Social Services Law § 420 [2]). … [F]or purposes of Social Services Law § 413, an "abused child" is one who is abused by a "parent or other person legally responsible for [a child's] care" (Family Ct Act § 1012 [e]; see Social Services Law § 412 [1]).

The School District maintains that plaintiffs' statutory claim should have been dismissed because Wales [defendant teacher] was not a "person legally responsible" for plaintiffs' care at the time of the alleged abuse. … [W]hether an individual constitutes a "person legally responsible" for a child within the meaning of Family Ct Act § 1012 (e) entails the examination of various factors … . The Court of Appeals cautioned … that "persons who

assume fleeting or temporary care of a child . . . or those persons who provide extended daily care of children in institutional settings, such as teachers," should not be interpreted as a "person legally responsible" for a child's care … . … [T]he School District cannot be liable for any alleged failure to report any abuse by Wales … . Dolgas v Wales, 2023 NY Slip Op 01830, Third Dept 4-6-23

Practice Point: Here the school district was sued under the Child Victims Act alleging sexual abuse by a teacher. The civil rights causes of action pursuant to 42 USC 1983 are not subject to the extended statute of limitations in the Child Victims Act and, therefore, those causes of action were properly dismissed.

Practice Point: A teacher is not a "person legally responsible" for the care of a child within the meaning of the Family Court Act. Therefore the causes of action under the Social Services Law alleging the school district failed to report abuse by a teacher should have been dismissed.

APRIL 6, 2023

CHILD VICTIMS ACT, COURT OF CLAIMS.

ALTHOUGH THE REQUIREMENTS FOR THE CONTENTS OF A CLAIM AGAINST THE STATE IN COURT OF CLAIMS ACT SECTION 11 ARE STRICT AND JURISDICTIONAL, THE CLAIMANT IS NOT REQUIRED TO ALLEGE EVIDENTIARY FACTS (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the claim in this Child Victims Act proceeding sufficiently stated the nature of the claim. The claimant alleged he was sexually abused in state-run foster homes every week for two years (1994 – 1996}. The claim alleged negligent hiring, retention or supervision:

The only reason identified by the Court of Claims in the order appealed from, and by the defendant on appeal, for concluding that the claim failed to state the nature of the claim is that, while the claim included an allegation that the defendant had actual or constructive notice of the alleged sexual abuse, it did not supply any "details" as to how the defendant received notice of the alleged abuse. Although the requirements of Court of Claims Act § 11(b) are strict, and jurisdictional in nature, the fact remains that the claim is a pleading, the contents of which are merely allegations. As the defendant correctly contends, "[a] necessary element of a cause of action to recover damages for negligent hiring, retention, or supervision

is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … . Nonetheless, "[c]auses of action alleging negligence based upon negligent hiring, retention, or supervision are not statutorily required to be pleaded with specificity" ,,, . The manner in which the defendant acquired actual or constructive notice of the alleged abuse is an evidentiary fact, to be proved by the claimant at trial. In a pleading, "the plaintiff need not allege his [or her] evidence" … . Martinez v State of New York, 2023 NY Slip Op 01990, Second Dept 4-19-23

Practice Point: A claim (i.e., the pleading) against the state must meet the strict, jurisdictional "contents" requirements in Court of Claims Act section 11. But the claim is merely a pleading and need not allege evidentiary facts to survive a motion to dismiss.

APRIL 19, 2023

CORPORATION LAW, INFORMAL APPEARANCE.

ALTHOUGH DEFENDANT CORPORATION WAS NOT SERVED WITH THE SUMMONS AND COMPLAINT, THE CORPORATE DEFENDANT "APPEARED INFORMALLY" THROUGH THE CEO'S AFFIDAVIT; PLAINTIFFS WERE ENTITLED TO A DEFAULT JUDGMENT AGAINST THE CORPORATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, although the defendant corporation was not served with the summons and complaint, it "appeared informally" in the action and, therefore, plaintiffs' motion for a default judgment should have been granted. The "informal appearance" was in the form of the corporate CEO's affidavit:

… "'[I]n addition to the formal appearances listed in CPLR 320(a), the law continues to recognize the so-called "informal" appearance'" .. . An informal appearance "'comes about when the defendant, although not having taken any of the steps that would officially constitute an appearance under CPLR 320(a), nevertheless participates in the case in some way relating to the merits'" … . "When a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court's jurisdiction over the action, and by appearing informally in this manner, the defendant confers in personam jurisdiction on the court" … . "[A]n appearance of the defendant is equivalent to personal service of the summons upon him [or her], unless an objection to jurisdiction

under [CPLR 3211(a)(8)] is asserted by motion or in the answer as provided in rule 3211" (CPLR 320[b]).

"The occasion for [an informal] appearance [is] an infrequent thing" … . However, an informal appearance may occur even where the defendant is not served with process , where an individual defendant affirmatively states that he or she is only acting in his or her capacity as an officer of a corporate defendant … . Travelon, Inc. v Maekitan, 2023 NY Slip Op 01816, Second Dept 4-5-23

Practice Point: Although infrequent, New York still recognizes an "informal appearance" in an action, here through an affidavit submitted by the CEO of a corporate defendant. Because of the informal appearance, plaintiffs were entitled to a default judgment, even though the defendant was never served with a summons and complaint.

APRIL 5, 2023

DEBTOR-CREDITOR, FOREIGN JUDGMENT.

PLAINTIFFS OBTAINED A NEW JERSEY DEFAULT JUDGMENT IN A BREACH OF CONTRACT ACTION AGAINST THREE DEFENDANTS WHO ARE JOINTLY AND SEVERALLY LIABLE; PLANTIFFS NEED ONLY SERVE ONE OF THE DEFENDANTS TO ENFORCE THE FOREIGN JUDGMENT AGAINST THAT DEFENDANT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs, who obtained a New Jersey default judgment against three defendants, need only serve one of the defendants in this action to enforce the foreign judgment:

In October 2013, the plaintiffs contracted with the defendant Tirepool, LLC … for the purchase of a used car. The contract was negotiated by the defendants Jeff Massicott and Vivian Wallace, the owners/managers of Tirepool. The defendants breached the contract and retained the plaintiffs' down payment. … [T]he plaintiffs commenced an action against the defendants in the Superior Court of New Jersey (hereinafter the New Jersey action). The defendants failed to answer the complaint, and the plaintiffs obtained a default judgment against the defendants in the principal sum of $26,548.32. …

CPLR 1501 provides: "Where less than all of the named defendants in an action based upon a joint obligation, contract or liability are served with the summons, the plaintiff may proceed against the defendants served, unless the court otherwise directs, and if the judgment is for the plaintiff it may be taken against all the defendants." Here, the defendants are jointly and severally liable for the judgment in the New Jersey action

and, therefore, the plaintiffs are permitted to proceed against Wallace without effectuating service on the other defendants.

Accordingly, the Supreme Court should have granted that branch of the plaintiffs' motion which was for summary judgment in lieu of complaint insofar as asserted against Wallace. Obed v Tirepool, LLC, 2023 NY Slip Op 01802, Second Dept 4-5-23

Practice Point: Here there was a foreign default judgment against three defendants who are jointly and severally liable. Plaintiffs only served one of the defendants with a summons in lieu of complaint to enforce the foreign judgment. Plaintiffs did not need to serve the other two defendants and could proceed against the defendant who was served.

APRIL 5, 2023

DEBTOR-CREDITOR, PREJUDGMENT INTEREST.

THE AWARD OF PREJUDGMENT INTEREST IN A BREACH OF CONTRACT ACTION IS REQUIRED BY CPLR 5001; THE REQUEST FOR PREJUDGMENT INTEREST SHOULD NOT HAVE BEEN DENIED BASED ON A FIVE-YEAR DELAY IN BRINGING SUIT (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined plaintiff attorney was entitled to prejudgment interest in this breach of contract action against defendant, a former client, seeking payment of plaintiff's fee for legal services:

… [W]e agree with plaintiff that her motion seeking an award of prejudgment interest should have been granted. Supreme Court faulted plaintiff for waiting until 2020 to commence this action to recover monies owed as a result of a legal representation that ended in 2015 but, as prejudgment interest only compensates the judgment creditor for the loss of use of money he or she was owed and is not a penalty, the "responsibility for the delay [in bringing suit] should not be the controlling factor in deciding whether interest is to be computed" … . Rather, prejudgment interest in a breach of contract action is required by CPLR 5001, running "from the earliest ascertainable date on which the prevailing party's cause of action existed '[or,] if that date cannot be ascertained with precision, . . . from the earliest time at which it may be said the cause of action accrued' " … . Supreme Court determined in the April 2022 order that plaintiff's claim for breach of contract accrued when she completed her legal services on May 23, 2015. Thus, plaintiff was entitled to prejudgment interest running from that date…. O'Keefe v Barra, 2023 NY Slip Op 01829, Third Dept 4-6-23

Practice Point: This was a breach of contract action brought by an attorney against a former client for failure to pay the legal fees. The fact that the attorney stopped

representing the client in 2015 and didn't bring suit until 2020 was not a ground for the denial of prejudgment interest, which is required in breach of contract actions by CPLR 5001. The court noted that prejudgment interest is not a penalty.

APRIL 6, 2023

DEBTOR-CREDITOR, FRAUD, ACCURAL OF CAUSE OF ACTION.

WHEN PURELY ECONOMIC INJURY IS ALLEGED, THE CAUSE OF ACTION ACCRUES WHERE THE PLAINTIFF RESIDES; HERE PLAINTIFF RESIDED IN FLORIDA AND, PURSUANT TO NEW YORK'S BORROWING STATUTE, THE FLORIDA STATUTE OF LIMITATIONS APPLIED, RENDERING THE FRAUDULENT-TRANSFER ACTION UNTIMELY (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the borrowing statute required that the Florida statute of limitations for an action alleging the fraudulent transfer of property be applied, rendering the action time-barred. Plaintiff, a Florida resident, alleged the transfer of property in New York, by defendant, a New York resident, was fraudulent in that it rendered the defendant judgment proof. The Third Department determined the injury occurred in Florida, not New York:

… [T]he parties dispute the applicability of CPLR 202, New York's "borrowing" statute, which … provides that "[w]hen a nonresident sues on a claim that accrued outside of New York, the cause of action must be commenced within the time period provided by New York's statute of limitations, as well as the statute of limitations in effect in the jurisdiction where the cause of action in fact accrued" … . "[A] cause of action accrues at the time and in the place of the injury . . . in tort cases involving the interpretation of CPLR 202" … . Relevant here, "[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss" … .

While plaintiff asks that we draw a distinction between tort and contract matters as it pertains to the principle that locates his economic harm — and thus accrual of his various causes of action — in his state of residence, we find little support for that premise. Although the tortious act may have occurred when the property was transferred in this state, that does not establish that the accompanying injury to plaintiff was also felt in this state or that the cause of action accrued here … . Erdely v Estate of Airday, 2023 NY Slip Op 01827, Third Dept 4-6-23

Practice Point: Here plaintiff, a Florida resident, alleged defendant, a New York resident, fraudulently transferred New York property, making defendant judgment proof. Because plaintiff alleged purely economic injury (the inability to collect money judgments), the

injury occurred where plaintiff resided. Therefore, pursuant to New York's borrowing statute, the Florida statute of limitations applied, rendering the action untimely.

APRIL 6, 2023

DISMISSAL FOR FAILURE TO STATE A CLAIM, RES JUDICATA.

A DISMISSAL FOR FAILURE TO STATE A CLAIM IS NOT ON THE MERITS AND HAS NO RES JUDICATA EFFECT (FIRST DEPT).

The First Department noted that a dismissal for failure to state a claim is not on the merits and therefore does not have res judicata effect:

To the extent defendants rely on the doctrine of res judicata, this reliance is misplaced because a dismissal under CPLR 3211(a)(7) for failure to state a claim is not a dismissal on the merits with res judicata effect … . Wilder v Fresenius Med. Care Holdings, Inc., 2023 NY Slip Op 01978, First Dept 4-18-23

Practice Point: A dismissal pursuant to CPLR 3211(a)(7) is not on the merits and therefore has no res judicata effect.

APRIL 18, 2023

FAMILY LAW, JURISDICTION.

THE ORIGINAL CUSTODY ORDER WAS ISSUED IN NEW JERSEY, WHERE FATHER RESIDES; THE NEW YORK CUSTODY ORDER MUST BE REVERSED BECAUSE FAMILY COURT DID NOT COMMUNICATE WITH THE NEW JERSEY COURT AND NO FINDING WAS MADE ON WHETHER NEW JERSEY HAD RELINQUISHED EXCLUSIVE JURISDICTION OR WHETHER NEW YORK WAS A MORE CONVENIENT FORUM; MATTER REMITTED (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court lacked jurisdiction to issue the custody order on appeal because the court failed to communicate with the court in New Jersey, where father resides, which issued the original custody order:

… [P]rior to modifying a custody determination from another state, a court of this state must have jurisdiction to make the initial determination pursuant to Domestic Relations

Law § 76, and "[t]he court of the other state [must] determine[that] it no longer has exclusive, continuing jurisdiction under [Domestic Relations Law § 76-a] or that a court of this state would be a more convenient forum under [Domestic Relations Law § 76-f]" … . Inasmuch as the child has resided in this state since 2018, Family Court had jurisdiction to make an initial determination of custody (see Domestic Relations Law §§ 76 [1] [a]; 75-a [7]). However, the record is devoid of any indication that the New Jersey court relinquished its jurisdiction or that it determined that this state was a more convenient forum, and Family Court failed to communicate with the New Jersey court to make such inquiry. … Family Court lacked jurisdiction to issue the order on appeal … , and we must vacate said order and remit this matter to Family Court to conduct the required inquiry…. . Matter of Alda X. v Aurel X., 2023 NY Slip Op 01826, Third Dept 4-6-23

Practice Point: Here the original custody order was issued in New Jersey, where father resides. Family Court in Albany did not communicate with the New Jersey court before issuing an order modifying custody. Family Court did not have jurisdiction and the New York order was reversed.

APRIL 6, 2023

HYBRID ARTICLE 78 AND DECLARATORY JUDGMENT, JUDGES.

IN A HYBRID PROCEEDING SEEKING REVIEW UNDER CPLR ARTICLE 78 AND SEEKING A DECLARATORY JUDGMENT AND DAMAGES, A MOTION FOR SUMMARY JUDGMENT MUST BE MADE FOR BOTH; HERE THERE WAS NO MOTION TO DISMISS THE DECLARATORY JUDGMENT AND DAMAGES CAUSES OF ACTION; MATTER REMITTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the declaratory judgment causes action should not have been dismissed because the motion for summary judgment did not seek that relief. Summary judgment on the CPLR Article 78 causes of action was properly granted, however:

"In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand" … . "The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment" … . "Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or

declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action" … .

Here, since no party made such a motion, the Supreme Court erred in summarily disposing of the petitioner/plaintiff's third through eighth causes of action. Accordingly, we remit the matter to the Supreme Court … for further proceedings on those causes of action … . Matter of Kelly v Farmingdale State Coll., State Univ. of N.Y., 2023 NY Slip Op 01895, Second Dept 4-12-23

Practice Point: In a hybrid Article 78 and declaratory judgment/damages action, a motion for summary judgment must be made for both. Here the motion only concerned the Article 78 causes of action so the court should not have summarily disposed of the declaratory judgment/damages causes of action.

APRIL 12, 2023

JUDGES, SANCTIONS FOR SPOLIATION OF EVIDENCE.

THE SPOLIATION OF EVIDENCE AFFECTED ONLY THE COUNTERCLAIMS, STRIKING THE ENTIRE ANSWER AND COUNTERCLAIMS WAS TOO SEVERE A SANCTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the sanctions imposed for spoliation of evidence were too severe:

… [T]he drastic remedy of striking the entire answer and all the counterclaims was not warranted … . Here, plaintiff failed to establish that the unavailability of the lost and destroyed evidence prejudiced it and left it unable to prosecute its action. Indeed, plaintiff argued only that its ability to defend the counterclaims was compromised. Therefore, the appropriate sanction under the circumstances should have been directed solely to the counterclaims. Harry Winston, Inc. v Eclipse Jewelry, Corp., 2023 NY Slip Op 01840, First Dept 4-6-23

Practice Point: Striking the answer as a spoliation sanction was not warranted. Plaintiff demonstrated only that the ability to prove the counterclaims was affected. The sanctions should have been confined to striking the counterclaims.

APRIL 6, 2023

Table of Contents

LONG-ARM JURISDICTION, CHILD VICTIMS ACT.

NEW YORK HAS LONG-ARM JURISDICTION OVER A SINGLE ALLEGED ACT OF SEXUAL ABUSE WHICH OCCURRED IN NEW YORK IN 1975 OR 1976 WHEN PLAINTIFF WAS ON A FIELD TRIP; THE ACTION WAS BROUGHT BY A CONNECTICUT RESIDENT AGAINST A CONNECTICUT DEFENDANT AND ALLEGED SEVERAL OTHER ACTS OF ABUSE WHICH TOOK PLACE IN CONNECTICUT; BECAUSE THE ALLEGED TORT TOOK PLACE IN NEW YORK, THE CONNECTICUT PLAINTIFF CAN TAKE ADVANTAGE OF THE EXTENDED STATUTE OF LIMITATIONS IN NEW YORK'S CHILD VICTIMS ACT (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Christopher, determined a single alleged act of sexual abuse which took place during a field trip to New York from Connecticut, involving a Connecticut-resident plaintiff and a Connecticut defendant, was sufficient for long-arm jurisdiction in New York. Plaintiff alleged defendant Boys and Girls Club of Greenwich, Inc failed to properly supervise club activities and, as a result, plaintiff was abused on several occasions by a member of the club. Only one of the alleged instances of abuse took place in New York. Although plaintiff is a Connecticut resident, the court ruled plaintiff could take advantage of the extended statute of limitations in New York's Child Victims Act because the alleged tort took place in New York.

Where, as here, the plaintiff has established the requisite minimum contacts, as previously set forth, we must then engage in the second part of the due process inquiry; that is, whether defending a suit in New York comports with "traditional notions of fair play and substantial justice" … . Here, the Club has failed to present a "compelling case" that some other consideration would render jurisdiction unreasonable … . … [T]he exercise of jurisdiction over the Club in New York would "comport with 'fair play and substantial justice'" … . * * *

With regard to CPLR 214-g, the revival statute, enacted under the Child Victims Act, S.H. v Diocese of Brooklyn (205 AD3d 180), does not preclude determining that it is appropriate for New York to exercise long-arm jurisdiction in this case. While S.H. discussed the legislative history of the revival statute and found that the history supports the proposition that the statute was enacted for the benefit of New

York residents, this was in the context of the facts of S.H., wherein the alleged acts of abuse occurred in Florida. In S.H. we held, "that under the circumstances of this case, CPLR 214-g is not available to nonresident plaintiffs where the alleged acts of abuse occurred outside New York" … . In the instant case, while the plaintiff is not a New York resident, unlike the situation in S.H., the alleged abuse occurred in New York.

We note that our finding that the Club is subject to personal jurisdiction pursuant to CPLR 302(a)(2) is limited to the one act of sexual abuse alleged to have occurred in New York. WCVAWCK-Doe v Boys & Girls Club of Greenwich, Inc., 2023 NY Slip Op 02026, Second Dept 4-19-23

Practice Point: Here a Connecticut resident sued a Connecticut defendant alleging several acts of sexual abuse in 1975 or 1976. Most of the alleged abuse took place in Connecticut. One alleged instance of abuse took place when plaintiff was on a field trip to New York. New York has long-arm jurisdiction over that tort, and the Connecticut plaintiff can take advantage of the extended statute of limitations in the Child Victims Act based on the situs of that single instance of abuse. The opinion should be consulted for its comprehensive analysis of jurisdiction under the long-arm statute.

APRIL 19, 2023

MOTION TO INTERVENE, JUDGES.

ALTHOUGH THE COURT DID NOT HAVE THE POWER TO GRANT THE MOTION TO INTERVENE BECAUSE THE PROPOSED ANSWER WAS NOT INCLUDED IN THE PAPERS, A THRESHOLD SHOWING INTERVENTION WAS WARRANTED WAS MADE AND THE DENIAL SHOULD HAVE BEEN "WITH LEAVE TO RENEW" (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the motion to intervene by Poloncarz was properly denied because the proposed answer was not included with the motion papers. but because Poloncarz made a showing warranting intervention, the motion should have been denied with leave to renew:

"A motion seeking leave to intervene, whether made under CPLR 1012 or 1013, must include the proposed intervenor's . . . complaint or answer (CPLR 1014)" … . "The court has no power to grant leave to intervene where, as here, the prospective intervenor[ ] did not include in [his] motion papers 'a proposed pleading setting forth the claim or defense for which intervention is sought'" … . Here, Poloncarz, in his official capacity as Erie County Executive, failed to include his proposed answer in his motion papers. Nevertheless, he made a threshold showing that his defense and the Nassau action have a common question of law and fact, that he has a real and substantial interest in the outcome of the proceedings, and that intervention will not unduly delay the determination of the Nassau action or prejudice the substantial rights of any party … . Accordingly, although the Supreme Court was "without the power to grant such relief inasmuch as [Poloncarz, in his official capacity as Erie County Executive,] has failed to comply with CPLR 1014," the court should have denied the motion with leave to renew that branch of the motion which was for leave to intervene in the Nassau action on proper papers … . Landa v Poloncarz, 2023 NY Slip Op 01891, Second Dept 4-12-23

Practice Point: A court cannot grant a motion to intervene if the proposed complaint or answer is not submitted with the motion papers. Here, because a threshold showing intervention was appropriate was made, the denial should have been "with leave to renew."

APRIL 12, 2023

OUT-OF-STATE AFFIDAVITS.

THE ABSENCE OF A CERTIFICATE OF CONFORMITY FOR AN OUT-OF-STATE AFFIDAVIT OF SERVICE WAS A MERELY TECHNICAL DEFECT WHICH DID NOT PREVENT THE COURT FROM CONSIDERING THE AFFIDAVIT (FIRST DEPT).

The First Department, reversing Supreme Court, noted that the absence of a certificate of conformity for an out-of-state affidavit of service did not prevent the court from considering the affidavit in this dispute about the legitimacy of service of process in Nevada:

Ameritek's [defendant's] argument that the lack of a certificate of conformity prevents the affidavit of service from being considered is unavailing. Even if such a finding may not be made until after the court's jurisdiction over Ameritek has been established … , any defects resulting from the absence of the certificate of conformity in this instance are merely technical and do not raise questions about "the likelihood that the summons and complaint will reach defendant and inform him that he is being sued" … . GS Capital Partners, LLC v Ameritek Ventures, 2023 NY Slip Op 01942, First Dept 4-13-23

Practice Point: The absence of a certificate of conformity for an out-of-state affidavit of service did not prevent the court from considering the affidavit.

APRIL 13, 2023

STANDING, FORECLOSURE.

THE BANK DID NOT DEMONSTATE IT HAD STANDING TO FORECLOSE BECAUSE IT DID NOT ADEQUATELY EXPLAIN HOW IT CAME INTO POSSESSION OF THE NOTE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that plaintiff did not demonstrate it had standing to bring the foreclosure action and its summary judgment motion should not have been granted:

A plaintiff demonstrates standing in a mortgage foreclosure action by establishing that "it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" … . "With respect to the note, either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" … . …

Other than alleging that he reviewed the electronic records that were kept in the normal course of business, [the affiant] failed to provide details with regard to how plaintiff came into possession of the note … . Wilmington Sav. Fund Socy., FSB v LaFrate, 2023 NY Slip Op 01824, Third Dept 4-6-23

Practice Point: When the defendant raises lack-of-standing as an affirmative defense in a foreclosure action, the bank must demonstrate it came into possession of the note before commencing the action. Here the proof of standing was conclusory and lacking in detail. The bank's motion for summary judgment should not have been granted.

APRIL 6, 2023

TOXIC TORTS, MARITIME LAW, FEDERAL EMPLOYERS' LIABILITY ACT (FELA), TRUSTS AND ESTATES.

UNDER THE JONES ACT OHIO HAD JURISDICTION TO APPOINT ADMINSTRATORS OF THE ESTATE OF DECEDENT WHO ALLEGEDLY DIED OF EXPOSURE TO ASBESTOS ON MERCHANT MARINE SHIPS; THE NEW YORK EXECUTOR OF THE ESTATE WAS TIMELY AND PROPERLY SUBSTITUTED FOR THE OHIO ADMINISTRATORS (FIRST DEPT).

The First Department, over a dissent, whichn a complex decision whichh cannot be fairly summarized here, determined: (1) under the Jones Act Ohio had jurisdiction to appoint administrators for decedent who allegedly died from asbestos exposure on merchant marine ships where he was employed; and (2) substitution of a New York personal representative, executor of the estate, was proper and timely:

… [T]he Jones Act provides that when a seaman dies from an employment injury "the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer" (46 USC § 30104).

The Jones Act grants a right of action to the personal representative "without other description" … . The Act does not require that the personal representative be either "a domiciliary or ancillary administrator" … . A domiciliary administrator has standing to file a Jones Act or FELA [Federal Employers' Liability Act] lawsuit in another state … . However, nothing "explicitly clothes a domiciliary administrator with the exclusive right to maintain such an action" because such a requirement is inconsistent with "the remedial nature" of FELA and the "representative character" of such a suit … .

Notably, the personal representative's authority under the Jones Act derives from "a federal statutory right and power given to carry out the policy of the federal statutes" and "is not limited to the confines of the State where he was appointed but is co-extensive with general federal jurisdiction" … . Bartel v Maersk Line, Ltd., 2023 NY Slip Op 02058, First Dept 4-20-23

Practice Point: Under the Jones Act, the estate of a merchant-marine employee who died from exposure to asbestos on the employer's ships may sue the employer. Here the suit was deemed properly started by administrators appointed by an Ohio

court and the New York executor was properly and timely substituted for the Ohio administrators.

See also the companion decision: Bartel v Farrell Lines, 2023 NY Slip Op 02057, First Dept 4-20-23

APRIL 20, 2023

TRUSTS AND ESTATES, AUTHORITY TO REPRESENT ESTATE.

THE PLAINTIFFS IN THIS SUIT AMONG BROTHERS ABOUT THE FATHER'S ESTATE DID NOT HAVE THE AUTHORITY TO ACT ON BEHALF OF THE ESTATE OR TO SUE AS BENEFICIARIES OF THE ESTATE; THE ACTION SHOULD HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiffs in this dispute among brothers about the father's estate did not have the authority to act on behalf of the estate or to sue as beneficiaries of the estate. Therefore the action should have been dismissed:

"It is elementary that the executors or administrators represent the legatees, creditors and distributees in the administration of the estate; that their duty is to recover the property of the estate; and that the legatees and next of kin are concluded by their determination in respect to actions therefor and have no independent cause of action, either in their own right or the right of the estate" … . Here, the plaintiffs did not purport to commence this action as personal representatives of the decedent's estate. The plaintiffs lacked "letters of administration authorizing [them] to act at the key points when this action was commenced and an amended complaint . . . was served" … . Absent extraordinary circumstances which are not present here, a beneficiary has no authority to act on behalf of an estate or to exercise a fiduciary's rights with respect to estate property … . Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(3) to dismiss, insofar as asserted against them, the causes of action in the amended complaint asserted by the plaintiffs in their derivative capacity on behalf of the decedent's estate, as well as the causes of action asserted by the plaintiffs in their individual capacity as beneficiaries of the estate to recover assets of the estate … . Levy v Levy, 2023 NY Slip Op 01892, Second Dept 4-12-23

Practice Point: Absent the authority to act on behalf of an estate, the beneficiaries cannot sue each other claiming rights to estate assets.

APRIL 12, 2023

VACATE DEFAULT, FORECLOSURE, ATTORNEYS.

PLAINTIFF FAILED TO SHOW UP FOR THE SETTLEMENT CONFERENCE IN THIS FORECLOSURE ACTION AND A DEFAULT JUDGMENT WAS GRANTED; IN MOVING TO VACATE THE DEFAULT, PLAINTIFF DID NOT PRESENT SUFFICIENT PROOF OF LAW OFFICE FAILURE AND DID NOT EXPLAIN ITS DELAY IN SEEKING TO VACATE THE DEFAULT JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff did not demonstrate an adequate excuse (law office failure) for not attending the settlement conference and plaintiff's motion to vacate the default judgment should not have been granted:

… [T]he plaintiff's allegation of law office failure was conclusory and unsubstantiated. In an affirmation in support of the motion … to vacate the order of dismissal, the plaintiff's counsel described her office's standard practices and procedures for receiving and processing notices and orders, and posited that her office had not received notice of the scheduled conference because there were "no notes, scanned images, or calendar steps" in the files that she reviewed. The plaintiff … failed to provide an affidavit from anyone with personal knowledge of the purported law office failure, provide any details regarding such failure, or provide any other evidence of the system's purported breakdown that led to counsel's nonappearance at the conference … . Moreover, the plaintiff failed to provide a reasonable excuse for its delay in moving to vacate the order of dismissal … . Since the plaintiff failed to proffer a reasonable excuse its default, it is unnecessary to determine whether the plaintiff demonstrated the existence of a potentially meritorious cause of action (see CPLR 5015[a][1] …). HSBC Bank USA, N.A. v Hutchinson, 2023 NY Slip Op 01782, Second Dept 4-5-23

Practice Point: Here the claim that plaintiff missed the settlement conference due to law office failure was not supported by proof from a person with first hand knowledge. The motion to vacate the default judgment should not have been granted.

APRIL 5, 2023