NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Report
December 2023

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 December, 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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AMEND COMPLAINT, MOTION TO.

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The Second Department, reversing Supreme Court, determined the motion to amend the complaint to correct a typographical error should have been granted and noted that a motion for summary judgment can be granted on an unpleaded cause of action. The complaint alleged violation of Labor Law 241 and 241 (b) instead of Labor Law 240(1). The Second Department went on to find that plaintiff was not entitled to summary judgment because there was a question of fact whether the accident was an "elevation-related" event–a cylinder had dropped four inches and injured plaintiff's finger. The question of fact concerned whether the four-inch height differential was de minimis:

… [T]he proposed amendment corrected a typographical error, did not result in any prejudice or surprise to the defendants, and was not palpably insufficient or patently devoid of merit … .

We note that, despite the fact that the plaintiff had not yet properly pleaded a Labor Law § 240(1) cause of action at the time that he made a motion for summary judgment on the issue of liability pursuant to Labor Law § 240(1), "summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice" … . * * *

The plaintiff failed to meet his prima facie burden, as he did not prove, as a matter of law, that he sustained the type of elevation-related injury that Labor Law § 240(1) was intended to protect against. Namely, where the cylinder fell only four inches but did so with such force as to crush the plaintiff's finger, there are triable issues of fact as to whether the elevation differential between the plaintiff and the falling object was de minimis … . Castillo v Hawke Enters., LLC, 2023 NY Slip Op 06505, Second Dept 12-20-23

Practice Point: The motion to amend the complaint to correct a typo should have been granted.

Practice Point: Where the facts support it, a summary judgment motion may be based on an unpleaded cause of action.

Practice Point: Here a cylinder dropped four inches, injuring plaintiff's finger. There was a question of fact whether the elevation-differential was de minimis.

DECEMBER 20, 2023

COUNTERCLAIMS.

THE DISMISSAL OF THE COMPLAINT DID NOT NULLIFY THE COUNTERCLAIMS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the dismissal of the complaint did not nullify the counterclaims for which discovery had been demanded:

… Supreme Court should not have denied, as academic, the [plaintiffs'] cross-motions pursuant to CPLR 3211(a)(7) to dismiss the counterclaims and to compel the defendants to comply with certain discovery demands. "A cause of action contained in a counterclaim . . . shall be treated, as far as practicable, as if it were contained in a complaint" (CPLR 3019[d] …). "Thus, dismissal of the . . . complaint did not, in itself, extinguish the [defendants'] counterclaims," which were independent of the causes of action asserted in the complaint … . Banschick v Johnson, 2023 NY Slip Op 06231, Second Dept 12-6-23

Practice Point: Here the dismissal of the complaint should not have been deemed to render the counterclaims academic. Causes of action in counterclaims should be treated as if they were in a complaint.

DECEMBER 6, 2023

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DEFAMATION, COMPLAINT SUFFICIENT.

THE COMPLAINT SUFFICIENTLY ALLEGED A DEFAMATION CAUSE OF ACTION; THE DEFENDANT ALLEGEDLY TOLD PLAINTIFF'S PHYSICIAN THAT PLAINTIFF WAS BANNED FROM DEFENDANT'S PHARMACY FOR STEALING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff had alleged a defamation cause of action and the motion to dismiss should not have been granted. Plaintiff alleged defendant falsely accused him of stealing newspapers from a pharmacy:

The plaintiff alleged, among other things, that in November 2020, he was a customer at a CVS store in Jericho, where the defendant Martin was employed as a pharmacist. The plaintiff further alleged that, on December 3, 2020, Martin informed his physician, inter alia, that the plaintiff was banned from the pharmacy for stealing newspapers on multiple occasions and that she had reported the plaintiff to the police. * * *

… [T]he complaint alleged that the statement that the plaintiff was banned from the pharmacy in question for stealing was made on December 3, 2020. The complaint also set forth the statement allegedly made and to whom the statement was made … . Contrary to the defendants' contention, "the words need not be set in quotation marks" to state a cause of action to recover damages for defamation … . Moreover, the allegation that the plaintiff "was stealing" "constitutes an allegation of a 'serious crime' so as to qualify as slander per se" … . Jesberger v CVS Health Solutions, LLC, 2023 NY Slip Op 06515, Second Dept 12-20-23

Practice Point: The allegation that defendant told plaintiff's physician that plaintiff was banned from defendant's pharmacy for stealing sufficiently stated a cause of action for defamation.

DECEMBER 20, 2023

DEFAULT JUDGMENT, DEBTOR-CREDITOR.

ALTHOUGH VOLUNTARY PAYMENTS ON A DEFAULT JUDGMENT MAY WAIVE THE PERSONAL JURISDICTION DEFENSE TO THE FAILURE TO MOVE TO VACATE A DEFAULT JUDGMENT WITHIN A YEAR, HERE THE GARNISHMENT OF DEFENDANT'S WAGES FOR MORE THAN A YEAR DID NOT WAIVE THE DEFENSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant did not waive the personal jurisdiction defense (CPLR 5015(a)(4)) by waiting more that a year to move to vacate the default judgment, despite the garnishment of defendant's wages during that time. Voluntary payments on a default judgment would have waived the defense, but not garnishment:

The proper approach for determining whether a defendant has waived the CPLR 5015(a)(4) personal jurisdiction defense involves the consideration of whether the defendant's particular actions amount to "an intentional relinquishment of a known right" … , and results from the taking of some affirmative action evincing the intent to accept a judgment's validity — such as the making of voluntary payments to satisfy a default judgment prior to moving to vacate … . The mere fact that a defendant, like defendant here, was subject to payments pursuant to a wage garnishment order for more than one year without taking some action is not, without more, a proper basis for finding waiver of the ability to seek relief under CPLR 5015(a)(4) … . Esgro Capital Mgt., LLC v Banks, 2023 NY Slip Op 06312, First Dept 12-7-23

Practice Practice: Making voluntary payments on a default judgment would waive a defendant's personal-jurisdiction defense to the failure to move to vacate a default judgment within a year. But the garnishment of defendant's wages for more than a year did not waive the defense.

DECEMBER 7, 2023

DISCOVERY.

BECAUSE THE NONPARTY WITNESS, WHO WAS PLAINTIFF'S ASSAILANT, HAD A COMMON NAME AND WAS HOMELESS, PLAINTIFF WAS ENTITLED TO DISCOVERY OF THE WITNESS'S DATE OF BIRTH AS AN AID IN LOCATING HIM; PLAINTIFF WAS NOT ENTITLED TO THE WITNESS'S SOCIAL SECURITY NUMBER HOWEVER (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to the birth date of a nonparty witness who was plaintiff's assailant's in the underlying event. Because the witness was homeless and had a common name, the witness's date of birth would help in locating him. Plaintiff was not entitled to the witness's social security number, however:

Supreme Court should have granted plaintiff's request that defendants provide the date of birth of the nonparty witness. "[O]rdinarily the names and addresses of witnesses are a proper subject of disclosure" … . The identity of an active participant in an incident is discoverable because "'the witness was so closely related to the [incident] that his testimony [became] essential in establishing [its] happening'" … .

Plaintiff seeks disclosure of the date of birth and social security number of the nonparty witness, who was also plaintiff's assailant in the incident underlying the litigation. Defendants have already disclosed that plaintiff's assailant, who has a remarkably common name, was homeless. Accordingly, the ordinary disclosure of "names and addresses" is unlikely to assist plaintiff in locating the witness. Disclosure of his date of birth may assist plaintiff in identifying and locating the witness. Defendants are not required to provide the witness's social security number, however, as courts have recognized a heightened level of confidentiality with respect to an individual's social security number. Lane v City of New York. 2023 NY Slip Op 06480, First Dept 12-19-23

Practice Point: Here plaintiff was entitled to discover of a witness's date of birth as an aid to locating him because the witness was homeless and had a very common name. However plaintiff was not entitled to the witness's social security number which is protected by a higher level of confidentiality.

DECEMBER 19, 2023

ELECTION LAW, REDISTRICTING.

THE COURTS CAN COMPEL (MANDAMUS) THE INDEPENDENT REDISTRICTING COMMISSION (IRC) TO DRAW THE LEGISLATIVE DISTRICTS; THE IRC IS ORDERED TO SUBMIT ITS REDISTRICTING PLAN BY FEBRUARY 28, 2024 (CT APP).

The Court of Appeals, affirming the Appellate Division, in a full-fledged opinion by Judge Wilson, over a three-judge dissenting opinion, determined the courts can compel (mandamus) the Independent Redistricting Commission (IRC) to draw the legislative districts. The opinion is far too comprehensive to fairly summarize:

In 2014, the voters of New York amended our Constitution to provide that legislative districts be drawn by an Independent Redistricting Commission (IRC). The Constitution demands that process, not districts drawn by courts. Nevertheless, the IRC failed to discharge its constitutional duty. That dereliction is undisputed. The Appellate Division concluded that the IRC can be compelled to reconvene to fulfill that duty; we agree. There is no reason the Constitution should be disregarded. Matter of Hoffmann v New York State Ind. Redistricting Commn., 2023 NY Slip Op 06344, CtApp 12-12-23

Practice Point: The courts have the power to compel the Independent Redistricting Commission (IRC) to submit a redistricting plan. The IRC was ordered to do so by February 28, 2024.

DECEMBER 12, 2023

INTERVENE, MOTION TO, FORECLOSURE.

APPELLANT, WHICH HAD PURCHASED THE PROPERTY WHILE THE FORECLOSURE ACTION WAS PENDING, SHOULD HAVE BEEN ALLOWED TO INTERVENE, CRITIERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to intervene in this foreclosure proceeding should have been granted. The foreclosure action was commenced by the plaintiff in 2007 and defendants never answered. When plaintiff moved for a default judgment, MAK (the appellant in this case),

which had purchased the property while the foreclosure was pending, moved to intervene:

"Upon timely motion, any person shall be permitted to intervene in any action . . . 2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or 3. when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment" ([CPLR] § 1012[a]). "'[I]ntervention may occur at any time, provided that it does not unduly delay the action or prejudice existing parties'" … . "[N]either the fact that the appellant obtained its interest in the subject property after this action was commenced and the notice of pendency was filed, nor the fact that the defendants defaulted in answering or appearing, definitively bars intervention" … . "'In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party'" … .

… MAK was entitled to intervene as of right "since it established that the representation of its interest by the parties would be inadequate, that the action involved the disposition of title to real property, and that it would be bound and adversely affected by a judgment of foreclosure and sale" … . Under the circumstances, MAK's cross-motion … was timely. "Significantly, it was made in response to the plaintiff's motion … for leave to enter a default judgment and for an order of reference, . . . [and] since it was made before an order of reference or a judgment of foreclosure and sale was issued, the plaintiff was not prejudiced by the timing of the cross motion" … . HSBC Bank USA, N.A. v Islam, 2023 NY Slip Op 06356, Second Dept 12-13-24

Practice Point: Here the party which purchased the property while the foreclosure on the property was pending should have been allowed to intervene when the plaintiff moved for a default judgment and an order of reference. The criteria for a successful motion to intervene in this context are explained.

DECEMBER 13, 2023

LONG-ARM JURISDICTION.

PLAINTIFF SUED AN ILLINOIS SCHOOL ALLEGING THAT THE ONLINE COURSES OFFERED BY DEFENDANT SCHOOL DURING THE PANDEMIC CONSTITUTED A TRANSACTION IN NEW YORK WITHIN THE MEANING OF THE LONG-ARM STATUTE; BUT PLAINTIFF DID NOT ALLEGE SHE WAS IN NEW YORK WHEN SHE TOOK THE ONLINE COURSES; DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not raise a question of fact about whether defendant, an Illinois school, conducted a transaction in New York sufficient to confer long-arm jurisdiction. Because of the pandemic, the courses offered by the school were online. Plaintiff alleged a breach of contract by the school involving a grading issue. A major flaw in plaintiff's case was that she did not allege she was in New York when she took the online courses:

… [T]he plaintiff failed to show that the defendants purposefully availed themselves of the privilege of conducting activities in New York so as to subject them to long-arm jurisdiction pursuant to CPLR 302(a)(1) … . While the plaintiff attests in her affidavit that since March 2020, she has not taken a class at the defendants' Illinois location, that the only contact she had with the defendants since that date was either virtually or by telephone, and that none of the facts alleged in her complaint took place in person in Illinois, none of this demonstrates that the defendants were engaged in any activity in New York, let alone purposeful activity. Other than the plaintiff's allegation that she is a New York resident, there is no other reference to New York in the complaint or in the plaintiff's affidavit. Significantly, the plaintiff's allegations are devoid of any indication that she was in New York during the time of the alleged communications with the defendants. Greenfader v Chicago Sch. of Professional Psychology, 2023 NY Slip Op 06513, Second Dept 12-20-23

Practice Point: It is not clear from the decision whether taking an online course in New York offered by a school in Illinois confers long-arm jurisdiction over the school. Granting the school's motion to dismiss appears to be based upon the plaintiff's failure to allege she was in New York when she took the online course.

DECEMBER 20, 2023

MUNICIPAL LAW, NOTICE OF CLAIM.

PLAINTIFF'S MOTION TO AMEND THE NOTICE OF CLAIM TO ADD A VERIFICATION IN THIS WRONGFUL DEATH ACTION AGAINST THE CITY SHOULD NOT HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, held that the plaintiff's motion to amend the notice of claim in this wrongful death action against the defendant city should not have been denied:

"Where there is no showing of prejudice to a municipality, the fact that a notice of claim was not verified by a claimant may be disregarded" … . Here, the Supreme Court improvidently exercised its discretion in denying the plaintiff's cross-motion pursuant to General Municipal Law § 50-e(6) for leave to amend the notice of claim to add a verification from the plaintiff's attorney that the plaintiff lives in a different county than the attorney, as the City defendants failed to demonstrate that they would be prejudiced by the amendment … . Watts v Jamaica Hosp. Med. Ctr., 2023 NY Slip Op 06276, Second Dept 12-6-23

Practice Point: Where there is no prejudice to the municipality, the fact that a notice of claim was not verified can be disregarded.

DECEMBER 6, 2023

MUNICIPAL LAW, SLIP AND FALL, WRITTEN NOTICE REQUIREMENT.

THE COURT PARKING LOT WHERE PLAINTIFF ALLEGEDLY TRIPPED AND FELL WAS DEEMED TO BE THE FUNCTIONAL EQUIVALENT OF A SIDEWALK; THEREFORE THE STATUTE REQUIRING WRITTEN NOTICE OF A DANGEROUS SIDEWALK CONDITION AS A PREREQUISITE FOR COUNTY LIABILITY APPLIED; THE COUNTY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant county's motion for summary judgment in this trip and fall case should have been granted. Plaintiff allegedly tripped over a section of rebar protruding from a concrete island

in a court parking lot. Although parking lots are not explicitly mentioned in the statute requiring written notice of a dangerous condition as a prerequisite for the county's liability, the Second Department held that the parking lot served the function of a sidewalk and therefore was subject to the written notice requirement:

The County has a prior written notice statute which provides, in relevant part, that "'[n]o civil action shall be maintained against the County for damages or injuries to person or property sustained by reason of any sidewalk . . . unless written notice of such defective, unsafe, dangerous or obstructed condition of such sidewalk [is given] . . . [and s]uch written notice shall specify the particular place and nature of such defective, unsafe, dangerous or obstructed condition . . . [and that n]otice required to be given as herein provided shall be made in writing by certified or registered mail directed to the Office of the County Attorney'" … . * * *

The County demonstrated … that its prior written notice statute applied here because the concrete island with the protruding metal "served the same functional purpose as a sidewalk" … . The County further demonstrated, prima facie, that it lacked prior written notice of the alleged defect. Sanchez v County of Nassau, 2023 NY Slip Op 06270, Second Dept 12-6-23

Practice Point: Here the statute required written notice of a dangerous condition on a sidewalk before the county could be liable for a slip or trip and fall. The plaintiff tripped in a county parking lot. The parking lot was deemed the functional equivalent of a sidewalk, triggering the written-notice requirement.

DECEMBER 6, 2023

NOTICE TO ADMIT.

THE NOTICE TO ADMIT SOUGHT CONCESSIONS THAT WENT TO THE ESSENCE OF THE CONTROVERSY AND THEREFORE WAS PALPABLY IMPROPER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the notice to admit in this breach of contract action was palpably improper:

CPLR 3123(a) authorizes the service of a notice to admit upon a party, and provides that if a timely response thereto is not served, the contents of the notice are deemed admitted … . However, the purpose of a notice to admit is only to

eliminate from contention those matters which are not in dispute in the litigation and which may be readily disposed of … . A notice to admit is not to be employed to obtain information in lieu of other disclosure devices, or to compel admissions of fundamental and material issues or contested ultimate fact … .

… [T]he notice to admit at issue sought concessions that go to the essence of the controversy … . Thus, the … defendants could not have reasonably believed that the admissions they sought were not in substantial dispute … , and the notice to admit was palpably improper … . Moreover, the information sought in the notice to admit may be obtained through discovery, including depositions … . American Bldrs. & Contrs. Supply Co., Inc. v Vinyl is Final, Inc., 2023 NY Slip Op 06346, Second Dept 12-13-24

Practice Point: A notice to admit which seeks concessions at the heart of the controversy is palpably improper and should be struck.

DECEMBER 13, 2023

RENEW, MOTION TO.

DEFENDANT'S MOTION TO RENEW A MOTION FOR MORE TIME TO CONDUCT AN IME SHOULD HAVE BEEN GRANTED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion to renew should have been granted and defendant should have been granted more time to conduct an independent medical examination (IME) of plaintiff:

"A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court" … . A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" … and "shall contain reasonable justification for the failure to present such facts on the prior motion" … . "A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought" … . …

The Supreme Court improvidently exercised its discretion in denying, without prejudice, that branch of the defendant's motion which was for leave to renew. The defendant presented new facts and a reasonable justification for failing to present such facts on the prior motion, and demonstrated that the new evidence would have changed the prior determination … . Moreover, the papers submitted by the defendant in support of the motion, as supplemented by the papers submitted by the plaintiff, which expressly incorporated the plaintiff's prior opposition, were sufficient to determine the motion …. Fulcher v Empire State Grand Council Ancient & Accepted Scottish Rite Masons, Inc., 2023 NY Slip Op 06352, Second Dept 12-13-24

Practice Point: The motion to renew presented new facts and a reasonable justification for failing to present those facts in the prior motion. The motion should have been granted.

DECEMBER 13, 2023

RESTORATION TO ACTIVE CALENDAR, FAILURE TO FILE A NOTE OF ISSUE.

RESTORATION OF AN ACTION TO THE ACTIVE CALENDAR AFTER FAILURE TO FILE A NOTE OF ISSUE IS AUTOMATIC IF NO 90-DAY NOTICE HAS BEEN SERVED AND NO ORDER OF DISMISSAL HAS BEEN ISSUED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to restore the action to the active calendar after plaintiff's failure to file a note of issue should should have been granted. No 90-day notice had been served and no order of dismissal had been issued:

When a plaintiff has failed to file a note of issue by a court-ordered deadline, restoration of the action to the active calendar is automatic, unless either a 90-day notice has been served pursuant to CPLR 3216 or there has been an order directing dismissal of the complaint pursuant to 22 NYCRR 202.27 … . In the absence of those two circumstances, the court need not consider whether the plaintiff had a reasonable excuse for failing to timely file a note of issue … .

Here, the so-ordered stipulation did not suffice as a predicate notice for dismissal pursuant to CPLR 3216. The restoration of the action to the active calendar should

have been automatic. Rosario v Cummins, 2023 NY Slip Op 06547, Second Dept 12-20-23

Practice Point: Here plaintiff failed to file a note of issue by a court-ordered deadline. Restoration of the action to the active calendar is automatic if no 90-day notice has been served and no order of dismissal has been issued.

DECEMBER 20, 2023

SERVICE OF PROCESS.

DEFENDANT PRESENTED SUFFICIENT SPECIFIC FACTS TO REBUT THE PRESUMPTION OF PROPER SERVICE OF THE SUMMONS AND COMPLAINT; A HEARING SHOULD HAVE BEEN HELD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant Bloom was entitled to a hearing on whether she was served with the summons and complaint:

Here, the affidavit of the plaintiff's process server indicated that the process server served Bloom at an address on Avenue W in Brooklyn (hereinafter the Avenue W address) by delivering a copy of the summons and complaint upon a cotenant, who was a person of suitable age and discretion, on May 4, 2019, and mailing a copy of the summons and complaint to Bloom at the Avenue W address on May 6, 2019. However, Bloom's submission of a sworn statement in which she denied that she resided at the Avenue W address, and a copy of her driver license, which listed a different address as her residence at the time that service upon her was allegedly effectuated, contained specific facts to rebut the statements in the process server's affidavit … . Therefore, the presumption of proper service upon Bloom was rebutted and the Supreme Court should have held a hearing to determine whether Bloom was properly served pursuant to CPLR 308(2) … . Garrick v Charles, 2023 NY Slip Op 06353, Second Dept 12-13-23

Practice Point: Here defendant presented specific facts sufficient to rebut the presumption of proper services of process. A hearing should have been ordered.

DECEMBER 13, 2023

SERVICE OF PROCESS.

PLAINTIFF DEMONSTRATED DUE DILIGENCE IN ATTEMPTING TO SERVE THE DEFENDANT; PLAINTIFF WAS ENTITLED TO A SECOND EXTENSION OF TIME TO SERVE BY ALTERNATIVE MEANS (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff had exercised due diligence in attempting to serve defendant and was entitled to a second extension of time to serve the defendant:

Supreme Court improvidently exercised its discretion in denying plaintiff a second extension to serve Dr. Hanandeh under CPLR 306-b, as plaintiff established good cause for the late service by proffering evidence of diligent efforts to serve the doctor … . Plaintiff attempted service at an Ohio address obtained through investigation, which turned out to be the home of Dr. Hanandeh's parents and brother, and also attempted service at Dr. Hanandeh's last known New York address as provided by his former employer, defendant New York City Health and Hospitals Corporation … .

In addition, plaintiff established entitlement to an extension of time in the interest of justice because, in addition to showing that she made diligent efforts to obtain jurisdiction, she made a showing that Dr. Hanandeh did not incur any prejudice by the delay, and in fact has known of the suit since before plaintiff requested the second extension … .

Under the circumstances presented, plaintiff is also entitled to effectuate service by alternative means, as she made a showing that service on Dr. Hanandeh was impracticable, and that service by email was reasonably calculated to apprise him of this action (CPLR 308 …). Dixon v New York City Health & Hosps. Corp., 2023 NY Slip Op 06592, Third Dept 12-21-23

Practice Point: Because plaintiff demonstrated due diligence in attempting the serve the defendant and the lack of prejudice to the defendant, plaintiff was entitled to a second extension of time to serve and service by alternative means.

DECEMBER 21, 2023

SERVICE OF PROCESS.

THE PROCESS SERVER DID NOT EXERCISE DUE DILIGENCE IN LOCATING THE DEFENDANT BEFORE RESORTING TO "NAIL AND MAIL" SERVICE OF PROCESS; COMPLAINT DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint should have been dismissed because plaintiff did not demonstrate the process server exercised diligence because resorting to "nail and mail" service:

The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received" … . "For the purpose of satisfying the 'due diligence' requirement of CPLR 308(4), it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment" … .

Here, the plaintiff failed to demonstrate that the process server acted with due diligence before relying on affix and mail service pursuant to CPLR 308(4) … . The process server averred that he made two attempts to personally serve the defendant at his home before affixing the summons and complaint to the door of the defendant's home. There was no evidence that the process server made any genuine inquiries about the defendant's whereabouts and place of employment, which was known to the plaintiff. Niebling v Pioreck, 2023 NY Slip Op 06526, Second Dept 12-20-23

Practice Point: A process server's failure to exercise due diligence in trying to locate a defendant before resorting to "nail and mail" service, including making inquiries about defendant's whereabouts and place of employment, will result in dismissal of the complaint.

DECEMBER 20, 2023

STATUTE OF LIMITATIONS, FORECLOSURE ABUSE PREVENTION ACT (FAPA).

THE FORECLOSURE ABUSE PREVENTION ACT (FAPA) APPLIES RETROACTIVELY; THE DEFENDANT MORTGAGE COMPANY IS ESTOPPED BY CPLR 213(4)(A) FROM ASSERTING THE STATUTE OF LIMITATIONS FOR A FORECLOSURE HAS NOT EXPIRED; PLAINTIFF'S COMPLAINT SEEKING DISCHARGE AND CANCELLATION OF THE MORTGAGE SHOULD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Higgitt, determined (1) the Foreclosure Abuse Prevention Act (FAPA) applies retroactively; and (2) because the defendant mortgage company is estopped by CPLR 213(4)(b) from asserting the six-year statute of limitations for foreclosure had not expired, plaintiff's RPAPL 1501(4) complaint (seeking cancellation and discharge of the mortgage) should not have been dismissed:

Having concluded that FAPA applies retroactively, we must next consider whether defendant is estopped under CPLR 213(4)(b) from asserting that the statute [*6]of limitations for the commencement of a mortgage foreclosure action has not expired because the debt secured by the mortgage was not validly accelerated in connection with the prior foreclosure action. CPLR 213(4)(b)'s potent estoppel bar will not be imposed, and a defendant will be free to assert that the debt secured by the mortgage was not validly accelerated in connection with a prior action, if, and only if, the prior action was dismissed based on an express judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.

Here, defendant is estopped from asserting that the statute of limitations on a cause of action to foreclose on the mortgage has not expired. An action to foreclose on the mortgage was previously commenced and dismissed. Defendant is not saved by the limited exception afforded by CPLR 213(4)(b) because Supreme Court, in dismissing the foreclosure action, did not make an express determination that the debt secured by the mortgage was not validly accelerated. Rather, the court dismissed the foreclosure action on the ground that the court lacked personal jurisdiction over the defendants therein … . Genovese v Nationstar Mtge. LLC, 2023 NY Slip Op 06477, First Dept 12-19-23

Practice Point: The Foreclosure Abuse Prevention Act (FAPA) applies retroactively. Here the defendant mortgage company was estopped by CPLR 214(4)(b) from asserting the six-year statute of limitations for a foreclosure action had not expired.

DECEMBER 19, 2023

SUMMARY JUDGMENT, AFFIRMATIVE DEFENSES.

IN A TRAFFIC ACCIDENT CASE A PLAINTIFF'S COMPARATIVE NEGLIGENCE CAN ONLY BE CONSIDERED ON A SUMMARY JUDGMENT MOTION IF THE PLAINTIFF MOVES TO DISMISS THE DEFENDANT'S COMPARATIVE-NEGLIGENCE AFFIRMATIVE DEFENSE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bicyclist's motion for summary judgment in this traffic accident case should not have been granted. The court noted that plaintiff's comparative negligence in a traffic accident case is usually not considered on a summary judgment motion except where, as here, plaintiff moved to dismiss the defendant's comparative-negligence affirmative defense:

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" … . A plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case against a defendant on the issue of that defendant's liability … . "[However], the issue of a plaintiff's comparative negligence may be decided in the context of a plaintiff's motion for summary judgment on the issue of liability where, as here, the plaintiff also seeks dismissal of the defendant's affirmative defense alleging comparative negligence"… . A motion for]summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b] …). On a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party … . Garutti v Kim Co Refrig. Corp., 2023 NY Slip Op 06354, Second Dept 12-13-24

Practice Point: If a plaintiff in a traffic accident case makes a motion for summary judgment which includes a motion to dismiss defendant's comparative-negligence affirmative defense, the plaintiff's comparative negligence can properly be considered by the motion court.

DECEMBER 13, 2023

SUMMARY JUDGMENT, PREMATURE MOTION, APPEALS.

THE MOTION FOR SUMMARY JUDGMENT WAS PREMATURE (MADE BEFORE ISSUE WAS JOINED) AND SHOULD NOT HAVE BEEN GRANTED; ALTHOUGH NOT PRESERVED THE ISSUE COULD BE HEARD ON APPEAL BECAUSE IT PRESENTED A QUESTION OF LAW THAT COULD NOT HAVE BEEN AVOIDED IF RAISED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for summary judgment which was brought before issue was joined should not have been granted. Although the issue was not preserved for appeal, the Second Department heard the appeal because it presented a pure question of law that could not have been avoided if it was brought up below:

"A motion for summary judgment may not be made before issue is joined and the requirement is strictly adhered to" … . Since H Mart's motion was made prior to joinder of issue, the Supreme Court should not have granted that branch of the motion which was for summary judgment on the cause of action to recover damages for breach of contract alleging failure to procure insurance … . "Although this argument is raised for the first time on appeal, we reach the argument because it presents a pure question of law appearing on the face of the record which could not have been avoided if raised at the proper juncture" … . Maurizaca v CW Highridge Plaza, LLC, 2023 NY Slip Op 06734, Second Dept 12-27-23

Practice Point: A motion for summary judgment will be denied if made before issue is joined.

Practice Point: An issue that is not preserved for appeal may be decided on appeal if it presents a pure question of law which could not have been avoided if it had been raised below.

DECEMBER 27, 2023

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WRIT OF PROHIBITION, ARTICLE 78, CONTEMPT, GAG ORDERS.

THE CONTEMPT AND GAG ORDERS ISSUED IN THIS TRIAL WHERE FORMER PRESIDENT TRUMP IS THE DEFENDANT ARE NOT APPROPRIATELY CHALLENGED BY A DEMAND FOR A WRIT OF PROHIBITION OR AN ARTICLE 78 REVIEW; MOTIONS TO VACATE THE ORDERS SHOULD BE MADE; ANY DENIAL OF THE MOTIONS COULD THEN BE APPEALED (FIRST DEPT).

The First Department determined demand for a writ of prohibition (CPLR 7803(2)) and an article 78 review (CPLR 7801(2)) of Contempt Orders and Gag Orders issued by the judge in this trial (where former President Donald Trump is the defendant) were not the proper procedural vehicles. The proper procedure would be to move the vacate the orders and then appeal the denial of the motion:

In determining whether to exercise the court's discretion and grant a writ of prohibition, several factors are to be considered, including "the gravity of the harm which would be caused by an excess of power" and "whether the excess of power can be adequately corrected on appeal or by other ordinary proceedings at law or in equity" … . Here, the gravity of potential harm is small, given that the Gag Order is narrow, limited to prohibiting solely statements regarding the court's staff … . Further, while the Gag Order and Contempt Orders were not issued pursuant to formal motion practice, they are reviewable through the ordinary appellate process (see CPLR 5701[a][3] …). For these reasons, a writ of prohibition is not the proper vehicle for challenging the Gag Order and Contempt Orders.

As to the first cause of action, CPLR 7801(2) clarifies that article 78 review is not permitted in a civil or criminal action where it can be reviewed by other means, "unless it is an order summarily punishing a contempt committed in the presence of the court" (CPLR 7801[2]). The Contempt Orders here were not issued "summarily," nor was the contempt "committed in the presence of the court." To the extent there may have been appealable issues with respect to any of the procedures the court implemented in imposing the financial sanctions, the proper method of review would be to move to vacate the Contempt Orders, and then to take an appeal from the denial of those motions. Matter of Trump v Engoron, 2023 NY Slip Op 06461, First Dept 12-14-23

Practice Point: The contempt and gag orders issued in this trial of former president Donald Trump cannot be challenged by a demand for a writ of prohibition or an Article 78 review. The proper procedure is to move to vacate the orders and appeal any denial.

DECEMBER 14, 2023