NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Report
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An Organized Compilation 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 2024. 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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CHOICE OF LAW, VENEZUELAN LAW, NEW YORK LAW, UNIFORM COMMERCIAL CODE.

FOLLOWING THE RE-ELECTION OF VENEZUELAN PRESIDENT NICOLAS MADURO, THE VENEZUELAN NATIONAL ASSEMBLY NAMED JUAN GUAIDO INTERIM PRESIDENT AND DECLARED THE EXCHANGE OF UNSECURED FOR SECURED NOTES OFFERED BY THE VENEZUELAN STATE-OWNED OIL COMPANY UNAUTHORIZED; VENEZUELAN LAW CONTROLS THE VALIDITY OF THE NOTES UNDER THE UCC, NEW YORK LAW CONTROLS ALL OTHER ASPECTS OF THE TRANSACTION (CT APP).

The Court of Appeals, in a comprehensive full-fledged opinion by Judge Troutman, answering questions posed by the Second Circuit, determined the extent to which the exchange of unsecured for secured notes offered to shareholders by the Venezuela's state-owned oil company was controlled by the New York Uniform Commercial Code (UCC). The court concluded the validity of the notes under the UCC is governed by Venezuelan law and New York law governs the transaction in all other aspects. The opinion is far too detailed and complex to fairly summarize here. At the heart of the dispute is the 2018 re-election of Nicolas Maduro as President of Venezuela and the declaration by the Venezuelan National Assembly naming Juan Guaido as interim President, followed by the National Assembly's declaration that the exchange of unsecured for secured notes was unauthorized:

In 2016, Venezuela's state-owned oil company offered a bond swap through which its noteholders could exchange unsecured notes due in 2017 for new, secured notes due in 2020. The United States Court of Appeals for the Second Circuit certified three questions to this Court concerning the extent to which New York law governs this transaction. … [W]e answer that Venezuelan law governs the validity of the notes under Uniform Commercial Code § 8-110 (a) (1), which encompasses within its scope plaintiffs' arguments concerning whether the issuance of the notes was duly authorized by the Venezuelan National Assembly under the Venezuelan Constitution—i.e., whether there is a defect in the notes occasioned by the application of a constitutional provision bearing on the procedure through which

the notes were issued. … New York law governs the transaction in all other respects, including the consequences if a security was "issued with a defect going to its validity" (UCC 8-202 [b] [1]-[2]). * * *

Plaintiffs are three related entities. Petróleos de Venezuela, S.A. (PDVSA) is an oil and gas company wholly owned by the Venezuelan government (Venezuelan Const art 303 ["the State shall retain all shares of" PDVSA]). PDVSA Petróleo S.A. (Petróleo) is incorporated in Venezuela and is a wholly owned subsidiary of PDVSA. PDV Holding, Inc. (PDVH), also a wholly owned subsidiary of PDVSA, is incorporated in Delaware and has its principal place of business in Houston, Texas. PDVH wholly owns CITGO Holding, Inc., which is the sole owner of CITGO Petroleum Corporation, a refiner and marketer of petroleum products in the United States. Nonparties CITGO Holding and CITGO Petroleum Corporation are both incorporated in Delaware with a principal place of business in Houston. Petróleos de Venezuela S.A. v MUFG Union Bank, N.A., 2024 NY Slip Op 00851, CtApp 2-20-24

Practice Point: Nicolas Maduro was re-elected President of Venezuela. Juan Guaido was subsequently named interim President of Venezuela by the Venezuelan National Assembly. The question at the heart of this dispute is whether actions taken by President Maduro (issuance of notes offered by the Venezuelan state-owned oil company) are valid in the face of a subsequent declaration by the Venezuelan National Assembly that the issuance of the notes was not authorized.

FEBRUARY 20, 2024

CIVIL RIGHTS LAW, NAME CHANGE, SEX DESIGNATION CHANGE.

PETITIONERS' MINOR CHILD'S NAME CHANGE AND SEX-DESIGNATION CHANGE COURT RECORDS SHOULD HAVE BEEN PERMANENTLY SEALED PURSUANT TO THE CIVIL RIGHTS LAW (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, reversing Supreme Court, determined the records of petitioners' minor child's name change and sex-designation change should be permanently sealed pursuant to the Civil Rights Law:

Endeavoring to remove barriers, expand protections and simplify the subject process for transgender and nonbinary New Yorkers … , the Gender Recognition Act expressly authorizes individuals to simultaneously petition for a change in sex designation and change of name (see Civil Rights Law § 67 [3]). Notwithstanding the different sealing standards articulated within the subject articles, both provisions expressly recognize an applicant's transgender status as a ground for sealing the records … . The provisions promote the sealing of name change applications by transgender applicants — on the court's own initiative, even where such relief is not requested.

… [T]his is for good reason. Despite some progress in our recent past, it remains sadly true, as evidenced by nearly every memorandum in support of the Act, and amply illustrated by the amici in this case, that risk to one's safety is always present upon public disclosure of one's status as transgender or otherwise gender nonconforming … . The Legislature recognized that disclosure of such status subjects individuals to the risk of "hate crimes, public ridicule, and random acts of discrimination" … . Courts have also observed this unfortunate reality … . There is no doubt that violence and discrimination against transgender and nonbinary individuals continue to permeate our society at alarming rates … . Matter of Cody VV. (Brandi VV.), 2024 NY Slip Op 00961, Third Dept 2-22-24

Practice Point: Court records reflecting a sex-designation change and a name change should, in most cases, be permanently sealed pursuant to the Civil Rights Law.

FEBRUARY 22, 2024

CLERK'S JUDGMENT FOR A SUM CERTAIN.

THE ACTION FOR DAMAGES FOR MEDICAL SERVICES WAS NOT APPROPRIATE FOR A CLERK'S JUDGMENT FOR A SUM CERTAIN; DEFENDANT RAISED A QUESTION OF FACT WHETHER HE WAS PROPERLY SERVED WITH THE SUMMONS WITH NOTICE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined (1) the action for damages for medical services was not appropriate for a clerk's judgment for a sum

certain pursuant to CPLR 3215(a) and (2) defendant raised a question of fact about whether he was served with the summons with notice pursuant to CPLR 308(4):

… [T]he Clerk lacked authority under CPLR 3215 (a) to enter the default judgment. "CPLR 3215 (a) allows a party to seek a default judgment by application to the clerk if the claim is 'for a sum certain or for a sum which can by computation be made certain' " … . "The limitation of clerk's judgments to claims for a sum certain contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due" … . "The statute is intended to apply to only the most liquidated and undisputable of claims, such as actions on money judgments and negotiable instruments" … . Under the circumstances of this case, we conclude that this action, which seeks to recover damages for medical services, is not for a sum certain or for a sum that by computation can be made certain … . * * *

Defendant submitted an affidavit in which he averred, inter alia, that he lived in the upstairs apartment of a two-story, two-family house, and that, because his apartment was not specified on the papers described in the process server's affidavit of service, he never received service … . State of New York v Walker, 2024 NY Slip Op 00716, Fourth Dept 2-9-24

Practice Point: An action for a clerk's judgment for a sum certain is only appropriate where there is absolutely no dispute about the amount due, not here in a case seeking damages for medical services.

FEBRUARY 9, 2024

DISCOVERY, TAX RETURNS.

PLAINTIFF DID NOT MAKE A SUFFICIENTLY STRONG SHOWING TO SUPPORT DISCOVERY OF DEFENDANT'S PERSONAL TAX RETURNS; PLAINTIFF'S ATTORNEY'S FAILURE TO SUBMIT A GOOD FAITH AFFIRMATION WARRANTS DENIAL OF THE DISCOVERY MOTION; THE IMPOSITION OF SANCTIONS WAS NOT SUPPORTED BY EVIIDENCE OF DEFENDANT'S WILLFUL AND CONTUMACIOUS FAILURE TO COMPLY WITH A DISCOVERY ORDER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined (1) plaintiff did not make an adequate showing to warrant discovery of defendant's personal tax returns; (2) plaintiff's attorney's affirmation did not meet the requirements of the "good faith" affirmation required by 22 NYCRR 202.7 (a), and (3) plaintiff did not make a showing sufficient to warrant discovery sanctions:

"Tax returns generally are not discoverable 'in the absence of a strong showing that the information is indispensable to the claim and cannot be obtained from other sources'" … . Here, [defendant] admitted that she deposited some of the rent money she collected into a personal account, which she claimed that she then used to pay expenses on the properties, whereas the plaintiff claimed that [she] used the money to pay her own personal expenses. The plaintiff failed to make a "strong showing" that [defendant's] personal tax returns are indispensable to proving his claims and that evidence cannot be obtained from other sources, such as bank records … .

Pursuant to 22 NYCRR 202.7(a), all motions relating to disclosure must include "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" … . * * * "Failure to provide an affirmation of good faith which substantively complies with 22 NYCRR 202.7(c) warrants denial of the motion" … . …

"Before a court invokes the drastic remedy of precluding a party from offering evidence at trial, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious" … . Here, the plaintiff failed to make a clear showing of a willful and contumacious failure to comply

with discovery demands. Cyngiel v Krigsman, 2024 NY Slip Op 00996, Second Dept 2-28-24

Practice Point. Before a court will order discovery of personal tax returns, the moving party must make a strong showing the information cannot be provided by other sources (not the case here).

FEBRUARY 28, 2024

FORUM NON CONVENIENS, PERSONAL JURISDICTION.

DENYING A MOTION TO DISMISS ON FORUM NON CONVENIENS GROUNDS WAS NOT AN ABUSE OF DISCRETION DESPITE THE PRIOR GRANTING OF AN IDENTICAL MOTION BY ANOTHER DEFENDANT; HOWEVER PLAINTIFF BANK DID NOT DEMONSTRATE NEW YORK'S PERSONAL JURISDICTION OVER SEVERAL DEFENDANTS IN THIS INTERNATIONAL BANK-FRAUD AND MONEY-LAUNDERING CASE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Pitt-Burke, determined the denial of a defendant's motion to dismiss on forum-non-conveniens grounds was a proper exercise of discretion, despite the fact that the identical motion by another defendant had already been granted. The case stems from an elaborate international fraud and money-laundering scheme which allegedly resulted in the theft by hackers of $81 million from plaintiff bank. The opinion addresses forum non conveniens, long-arm "conspiracy" jurisdiction and conversion but is too complex and detailed to fairly summarize here. With respect to forum non conveniens, the court wrote:

Forum non conveniens is a common-law doctrine that presumes jurisdiction … . … [T]the initial question before this Court is whether Supreme Court had the discretion to deny the … defendants' motion to dismiss the complaint on forum non conveniens grounds when it had already granted another defendant's motion to dismiss under the same doctrine. We answer this question in the affirmative and

find that the … defendants have not demonstrated that Supreme Court's denial was an improvident use of discretion. * * *

… [W]e find Supreme Court's determination to deny each defendant's motion to dismiss on forum non conveniens grounds was not an abuse of discretion. However, this determination only represents half of our inquiry, as a finding that it was proper for Supreme Court to deny defendants' motions to dismiss on forum non conveniens grounds does not equate to a finding that Supreme Court had personal jurisdiction over all … defendants. Indeed … , plaintiff has failed to establish personal jurisdiction over Reyes, Pineda, Capina, and Agarrado. Bangladesh Bank v Rizal Commercial Banking Corp. 2024 NY Slip Op 01112, 2-29-24

Practice Point: Whether to grant a motion to dismiss on forum non conveniens grounds is discretionary. Here the denial of the motion was not an abuse of discretion despite the prior granting of an identical motion brought by another defendant.

FEBRUARY 29, 2024

FORUM SELECTION CLAUSE, CONTRACT LAW.

THE FORUM SELECTION CLAUSE IN THE NURSING HOME ADMISSION AGREEMENT WAS VALID AND ENFORCEABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the forum selection clause in the nursing-home admission was valid and enforceable:

"'A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court' … . …

In opposition to the defendant's prima facie showing of the parties' agreement which includes a forum selection clause, the plaintiff was required to show that enforcement of the forum selection clause would be unreasonable, unjust, or would contravene public policy, or that the forum selection clause was the result of fraud

or overreaching … . Here, the plaintiff failed to do so. Johnson v Seagate Rehabilitation & Nursing Ctr., 2024 NY Slip Op 00620, Second Dept 2-7-24

Practice Point: To contest a forum selection clause in a nursing home admission agreement, the plaintiff must show that enforcement of the forum selection clause would be unreasonable, unjust, or would contravene public policy, or that the forum selection clause was the result of fraud or overreaching.

FEBRUARY 7, 2024

IMMUNITY, COVID, EMERGENCY OR DISASTER TREATMENT PROTECTION ACT.

THE REPEAL OF THE EMERGENCY OR DISASTER TREATMENT PROTECTION ACT (EDTPA) WAS NOT RETROACTIVE; THEREFORE DEFENDANT'S NURSING HOME WAS IMMUNE FROM SUIT STEMMING FROM PLAINTIFF'S DECEDENT'S DEATH FROM COVID-19 (FIRST DEPT).

The First Department determined the repeal of the Emergency or Disaster Treatment Protection Act (EDTPA) in April 2021 was not retroactive. Therefore defendant's nursing home was immune from suit stemming from plaintiff's decedent's death from COVID-19. Although the Act does not confer immunity from gross negligence, gross negligence was not demonstrated because the Department of Health required nursing homes to admit COVID-positive patients:

As to the application of the EDTPA, defendant was entitled to immunity under that statute. The documents submitted with defendant's motion to dismiss, including several pandemic-related policies, State Department of Health directives, and more than 1600 of pages of the decedent's medical records, demonstrate that defendant was providing health care services to the decedent under the COVID-19 emergency orders when he was infected and, before that, "in accordance with applicable law"; the care provided was "impacted by" defendant's "decisions or activities in response to or as a result of the COVID-19 outbreak and in support of the state's directives"; and the decedent was provided care "in good faith" … . Hasan v Terrace Acquisitions II, LLC, 2024 NY Slip Op 00739, First Dept 2-13-24

Practice Point: This decision includes an extensive discussion of when a statute can be deemed to apply retroactively.

FEBRUARY 13, 2024

RELATION-BACK DOCTRINE, LANDLORD-TENANT.

FOR PURPOSES OF THE RELATION-BACK DOCTRINE, A LANDLORD AND A TENANT ARE NOT "UNITED IN INTEREST" (FIRST DEPT).

The First Department, reversing Supreme Court, determined the landlord-tenant relationship between the insured and the defendant building owner, Marion, did not constitute a "unity of interest" such that a negligence action against Marion could be commenced after the statute of limitations had run:

There are three conditions that must be satisfied for a claim asserted against a subsequent defendant such as Marion to relate back to claims asserted against another defendant: (1) both claims must arise out of the same conduct, occurrence, or transaction; (2) the new party must be "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the lawsuit such that he will not be prejudiced in maintaining his defense on the merits; and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well … . * * *

… [A] landlord-tenant relationship, standing alone, does not give rise to vicarious liability or otherwise create unity of interest, which, as the Court of Appeals has recently reaffirmed, requires a situation in which the parties "stand or fall together and the judgment against one will similarly affect the other" … . Kingstone Ins. Co. v Marion Pharm. Inc., 2024 NY Slip Op 00805, First Dept 2-15-24

Practice Point: A landlord and a tenant are not united in interest for purposes of the relation-back doctrine and will not support adding a landlord to a complaint after the statute of limitations has run.

FEBRUARY 15, 2024

SERVICE OF LATE ANSWER ALLOWED, STATUTE OF LIMITATIONS, FORECLOSURE.

SUPREME COURT PROPERLY ALLOWED DEFENDANT IN THIS FORECLOSURE ACTION TO SERVE A 10-MONTHS-LATE ANSWER, CRITERIA EXPLAINED; IN ADDITION, SUPREME COURT PROPERLY DISMISSED THE FORECLOSURE ACTION AS TIME-BARRED, CRITERIA EXPLAINED (THIIRD DEPT).

The Third Department, affirming Supreme Court, in a full-fledged opinion by Justice Egan, determined the judge properly granted leave to serve a late answer raising the statute-of-limitations defense to the foreclosure action. The motion for leave to serve a late answer was made 10 months after the expiration of the time to serve an answer. The Third Department affirmed the dismissal of the complaint as time-barred.

… [D]efendant did not seek leave to serve a late answer until approximately 10 months after the expiration of his time to serve an answer, but there is no indication that the failure to serve an answer was willful. Defense counsel … attributed the delay to defendant's unsuccessful pro se negotiations with plaintiff — of which little detail was given, but which plaintiff also notably failed to deny had occurred — after which defendant promptly sought legal assistance upon receiving plaintiff's motion for a default judgment … . Plaintiff further offered no explanation as to how it would be prejudiced by allowing defendant to serve a late answer. * * *

As the first [foreclosure] action was dismissed for neglect to prosecute, neither CPLR 205 (a) nor CPLR 205-a afforded plaintiff a six-month grace period in which to commence this action following the termination of that action upon dismissal of plaintiff's appeal from the 2016 order … Supreme Court … , as a result, properly dismissed this action as time-barred. Deutsche Bank Natl. Trust Co. v Deluca, 2024 NY Slip Op 01132, Third Dept 2-29-24

Practice Point: The criteria for allowing leave to serve a late answer is explained in some depth.

Practice Point: The unique criteria for dismissal of a foreclosure action as time-barred is explained in some depth.

FEBRUARY 29, 2024

SERVICE OF PROCESS, EVIDENCE.

THE APPELLANT RAISED A QUESTION OF FACT ABOUT WHETHER SHE WAS SERVED WITH THE SUMMONS AND COMPLAINT ENTITLING HER TO A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the appellant had raised a question of fact about whether she was served with the summons and complaint requiring a hearing:

Here, the process server's affidavit of service, in which he averred that he personally served the appellant, constituted prima facie evidence of valid service pursuant to CPLR 308(1) … . However, the Supreme Court erred in determining this branch of the motion without first conducting a hearing. The appellant demonstrated her entitlement to a hearing on the issue of service by submitting, among other evidence, her sworn denial, setting forth significant discrepancies between the description of the person allegedly served and the appellant's physical appearance … . Under these circumstances, the appellant is entitled to a hearing on the issue of whether service was properly effected pursuant to the personal delivery provisions of CPLR 308(1) … . Matter of Rockman v Nassau County Sheriff's Dept., 2024 NY Slip Op 00770, Second Det 2-14-24

Practice Point: Here, although plaintiff demonstrated proper service of process, the appellant raised a question of fact about whether she in fact was personally served by noting the process server's description of the person served did not match her appearance.

FEBRUARY 14, 2024

SERVICE OF PROCESS, LIMITED LIABILITY COMPANY'S LAW FAILURE TO UPDATE ADDRESS, DEFAULT.

DEFENDANT LIMITED LIABILITY COMPANY'S FAILURE TO UPDATE ITS ADDRESS FOR SERVICE OF PROCESS ON FILE WITH THE SECRETARY OF STATE FOR TEN YEARS WAS NOT A REASONABLE EXCUSE SUFFICIENT TO SUPPORT DENIAL OF PLAINTIFF'S MOTION FOR LEAVE TO ENTER A DEFAULT JUDGMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant limited liability company's (FAC's) failure to update its address for service of process on file with the Secretary of State was not a reasonable excuse sufficient to defeat a motion for leave to enter a default judgment:

Generally, a corporation's failure to receive copies of process served upon the Secretary of State due to a breach of its own obligation to keep a current address on file with the Secretary of State does not constitute a reasonable excuse for its delay in appearing or answering the complaint, although "there is no per se rule" … . In determining whether a reasonable excuse was demonstrated, "a court should consider, among other factors, the length of time for which the address had not been kept current" … . * * *

… FAC failed to meet its burden of establishing a reasonable excuse … . FAC's failure to file with the Secretary of State the current address of the agent designated to receive service of process on its behalf for a period of at least 10 years, without providing any explanation of its failure, does not constitute a reasonable excuse … . Bachvarov v Khaimov, 2024 NY Slip Op 00753, Second Dept 2-14-24

Practice Point: Failure to update an LLC's address for service of process on file with the Secretary of State is not a reasonable excuse for a default.

FEBRUARY 14, 2024

SERVICE OF PROCESS.

FAILURE TO FILE AFFIDAVITS OF SERVICE WITH THE CLERK OF THE COURT WITHIN 20 DAYS IS NOT A JURISDICTIONAL DEFECT; SERVICE IS DEEMED COMPLETE 10 DAYS AFTER FILING A MOTION FOR A DEFAULT JUDGMENT WITH THE AFFIDAVITS OF SERVICE (FIRST DEPT).

The First Department noted that the "nail and mail" service of process was valid and the failure to file affidavits of service within 20 days was not a jurisdictional defect:

… [E]ach affidavit of service states that the process servers made three separate attempts at serving the individual defendants at various dates and times before resorting to "nail and mail" service (CPLR 308(4) …). Plaintiffs' failure to file affidavits of service with the clerk of the court within 20 days of service is a "mere irregularity" rather than a jurisdictional defect and does not render the service of process a "nullity" … . In any event, service was deemed complete 10 days after plaintiffs filed their initial motion for default judgment with the affidavits of service … . General Ins. v Leandre, 2024 NY Slip Op 00598, First Dept 2-6-24

Practice Point: The "nail and mail" service was valid despite the failure to fine affidavits of service with the clerk of the court within 20 days of service.

Practice Point: Here service was deemed complete ten days after the motion for a default judgment was filed with the affidavits of service.

FEBRUARY 8, 2024

SERVICE OF PROCESS.

FAILURE TO SUBMIT PROOF OF MAILING THE SUMMONS AND COMPLAINT PURSUANT TO CPLR 308 (2) IS A JURISDICTIONAL DEFECT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the failure to offer any proof of mailing the summons and complaint was a jurisdictional defect:

Plaintiff's failure to comply with CPLR 308(2)'s mailing requirement was not a mere "technical infirmity" that may be overlooked by the court pursuant to CPLR 2001 … . "'In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant — notice that must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'" … . The court found that a late mailing under CPLR 308(2) was not a mere technical infirmity, as it increased the likelihood that the defendant did not receive proper notice of the legal proceeding (id. at 1251). We likewise hold that a plaintiff's complete failure to comply with CPLR 308(2)'s mailing requirement greatly increases the likelihood that a defendant will not receive the pleadings and have an opportunity to answer. Accordingly, plaintiff's failure to offer proof of mailing under CPLR 308(2) was a jurisdictional defect requiring denial of plaintiff's motion for a default judgment. Williams v MTA Bus Co., 2024 NY Slip Op 00692, First Dept 2-8-24

Practice Point: Both delivery and mailing of the summons and complaint is required to effect service of process pursuant to CPLR 308 (2). Failure to submit proof of mailing is a jurisdictional, not a technical, defect.

FEBRUARY 8, 2024

STATUTE OF LIMITATIONS, COVID TOLL.

THE COVID STATUTE OF LIMITATIONS TOLLS EXPLAINED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, explained how the COVID toll of the statute of limitations works:

"A toll does not extend the statute of limitations indefinitely but merely suspends the running of the applicable statute of limitations for a finite and, in this instance, readily identifiable time period" … . "[T]he period of the toll is excluded from the calculation of the time in which the plaintiff can commence an action" (id.). In response to the COVID-19 pandemic, on March 20, 2020, the Governor issued [an] Executive Order … , which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not

limited to . . . the civil practice law and rules . . . from the date of this order until April 19, 2020." The Governor later issued a series of nine subsequent executive orders that extended the tolling period through November 3, 2020 … . Thus, here, the statute of limitations was tolled from March 20, 2020, at which time 289 days remained in the limitations period, until November 3, 2020, and thereafter the "statute of limitations began to run again, expiring on [August 19, 2021]" … . State of New York v Williams, 2024 NY Slip Op 00709, Fourth Dept 2-9-24

Practice Point: The number of days left on the statute of limitations when the COVID toll was imposed remains when the toll is lifted.

FEBRUARY 9, 2024

STATUTE OF LIMITATIONS, PARTIAL PAYMENT OF A DEBT.

PARTIAL PAYMENT OF A DEBT WITHIN THE STATUTE OF LIMITATIONS PERIOD MAY REVIVE OR TOLL THE STATUTE OF LIMITATIONS FOR AN ACTION BASED UPON THE DEBT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff in this suit against his employer seeking payment for work performed raised a question of fact whether the statute of limitations was revived by defendants' partial payment:

There is a "long-standing common law rule" that partial payment of a debt, if made under "circumstances from which a promise to honor the obligation may be inferred," will operate to start the statute of limitations running anew from the time the partial payment is made … . To show that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was accompanied by circumstances amounting to "an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder" … .

Here, the plaintiff alleged that, over a course of years, the defendants made repeated assurances that they would pay him salary and bonus money that he was owed pursuant to his employment arrangement. Further, he alleged that the defendants made a partial payment of outstanding bonus money to the plaintiff on July 17, 2015, within the statute of limitations. Under these circumstances, the plaintiff raised a question of fact as to whether the statute of limitations was tolled

or revived … . Costello v Curan & Ahlers, LLP, 2024 NY Slip Op 00758, Second Dept 2-14-24

Practice Point: Partial payment of a debt made within the statute of limitations period may revive or toll the statute of limitations for an action based on the debt.

FEBRUARY 14, 2024

STATUTE OF LIMITATIONS, DEFAULT, FORECLOSURE.

AS LONG AS PLAINTIFF TAKES SOME ACTION THAT WOULD LEAD TO ENTRY OF A DEFAULT JUDGMENT WITHIN ONE YEAR AND NINETY DAYS OF THE DEFAULT, THE ACTION SHOULD NOT BE DISMISSED AS ABANDONED (SECOND DEPT).

The Second Department, reversing the sua sponte dismissal of the foreclosure complaint, noted that as long as a plaintiff initiates some action for the entry of judgment within one year and ninety days after a default, the action should not be dismissed as abandoned. Here the plaintiff made a request for judicial intervention within one year and ninety days:

… [P]laintiff demonstrated that, within one year after the defendants' default, it filed a request for judicial intervention which sought a foreclosure settlement conference within the foreclosure action as mandated by CPLR 3408. "Where, as here, a settlement conference is a necessary prerequisite to obtaining a default judgment (see CPLR 3408[a], [m]), a formal judicial request for such a conference in connection with an ongoing demand for the ultimate relief sought in the complaint constitutes 'proceedings for entry of judgment' within the meaning of CPLR 3215(c)" … . Since the plaintiff demonstrated that it initiated proceedings for the entry of a judgment of foreclosure and sale within one year after the defendants' default, it was not required to proffer a reasonable excuse or demonstrate a potentially meritorious cause of action (see CPLR 3215[c] …). US Bank N.A. v Jerriho-Cadogan, 2024 NY Slip Op 00790, Second Dept 2-14-24

Practice Point: Here in this foreclosure action the bank made a request for judicial intervention within one year and ninety days of the default. The action should not have been dismissed as abandoned.

FEBRUARY 14, 2024

SUMMARY JUDGMENT MOTION PREMATURE.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PREMATURE AND SHOULD HAVE BEEN DENIED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case was premature and should have been denied:

A motion for summary judgment may be denied as premature where it appears that the facts essential to oppose the motion exist but cannot then be stated (see CPLR 3212[f] …). "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" … .

Here, the plaintiff demonstrated that further discovery, including records of the United States Postal Service, a deposition of the plaintiff's former coworker, and discovery related to hearsay statements that the alleged defect had been reported to the defendants, may result in the disclosure of evidence relevant to the issue of whether the defendants had notice of the alleged defective condition … . Knowles v 21-43 27th St., LLC, 2024 NY Slip Op 00759, Second Dept 2-14-24

Practice Point: Here the defendants' motion for summary judgment was deemed premature; criteria explained.

FEBRUARY 14, 2024

WORKERS' COMPENSATION BOARD VS SUPREME COURT.

WHERE THERE ARE UNRESOLVED QUESTIONS OF FACT CONCERNING ELIGIBILITY FOR WORKERS' COMPENSATION BENEFITS THE WORKERS' COMPENSATION BOARD HAS PRIMARY JURISDICTION AND MUST RULE BEFORE ANY RELATED ACTION CAN BE BROUGHT IN SUPREME COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Workers' Compensation Board had primary jurisdiction and must rule on defendant's eligibility for benefits before Supreme Court can hear an action by the insurer for reimbursement of no-fault payments made to defendant:

In July 2018, the subrogors of the plaintiff no-fault insurer, State Farm Mutual Automobile Insurance Company, allegedly were injured in a motor vehicle accident while traveling in a vehicle insured by the plaintiff. After the plaintiff provided payments for medical services on behalf of the subrogors, it learned that the subrogors had applied for workers' compensation benefits and that the Workers' Compensation Board had directed the defendant workers' compensation insurer, Amtrust North America, Inc., to pay for necessary medical treatments for the subrogors. Thereafter, the plaintiff demanded that the defendant reimburse it for the full amount of no-fault benefits the plaintiff had provided on behalf of its subrogors. * * *

"[W]here the availability of workmen's compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions" … . "Since 'primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board,' it is 'inappropriate for the courts to express views with respect thereto pending determination by the board'" … . State Farm Mut. Auto. Ins. Co. v Amtrust N. Am., Inc., 2024 NY Slip Op 00646, Second Dept 2-7-24

Practice Point: Where there are unresolved questions of fact about a party's eligibility for Workers' Compensation benefits, any action in Supreme Court should be transferred to the Workers' Compensation Board, which is vested with primary jurisdiction.

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