NEW YORK APPELLATE DIGEST, INC.

Civil Procedure
Reversal Report
September 2024

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 September 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. Clck 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.

Contents

CONDOMINIUMS, CONTRACT LAW, PRE-ANSWER MOTION TO DISMISS BASED ON DOCUMENTARY EVIDENCE.

THE PRE-ANSWER MOTION TO DISMISS CERTAIN CAUSES OF ACTION BASED UPON DOCUMENTARY EVIDENCE SHOULD HAVE BEEN GRANTED; THE CAUSES OF ACTION WERE PRECLUDED BY CONTRACT PROVISIONS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined certain causes of action should have been dismissed based upon documentary evidence, i.e., the purchase agreement and warranty. The plaintiff Board of Managers sued the sponsor and developer of defendant condominium alleging defective construction in common areas:

"On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference" … . "'A motion to dismiss a complaint pursuant to CPR 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law'" … . "On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord the

plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" … . "[T]he criterion is whether the proponent of [a] pleading has a cause of action, not whether he [or she] has stated one" … .

… [T]he defendants submitted, among other things, a limited warranty that had been incorporated into the purchase agreements between the sponsor and unit owners, which expressly stated, "[t]he [s]ponsor's [l]imited [w]arranty excludes all consequential, incidental, special damages and indirect damages." This documentary evidence conclusively established a defense to so much of that cause of action as sought consequential damages as a matter of law … .

… [D]efendants' motion … to dismiss the … causes of action, sounding in unjust enrichment, breach of implied housing merchant warranty, and negligence [should have been granted}. … [T]he defendants conclusively established that these causes of action are precluded by the purchase agreement and limited warranty … . Board of Mgrs. of the 37, 39 Madison St. Condominium v 31 Madison Dev., LLC, 2024 NY Slip Op 04451, Second Dept 9-18-24

Practice Point: Here the pre-answer motion to dismiss based on documentary evidence should have been granted. The relevant causes of action were precluded by the terms of a purchase agreement and warranty.

September 18, 2024

CORPORATION LAW, VACATE DEFAULT, WRONG ADDRESS ON FILE WITH SECRETARY OF STATE.

DESPITE THE FACT THAT THE ADDRESS FOR DEFENDANT CORPORATION ON FILE WITH THE SECRETARY OF STATE WAS INCORRECT, DEFENDANT WAS ENTITLED TO VACATE THE DEFAULT JUDGMENT ON THE GROUND DEFENDANT WAS NOT MADE AWARE OF THE ACTION IN TIME TO DEFEND (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate a default judgment should have been granted. Defendant's address on file with the Secretary of State was incorrect and defendant alleged it did not receive actual notice of the action in time to defend. There was no evidence the failure to

update the address on file with the Secretary of State was intentional, and defendant demonstrated a potentially meritorious defense:

Pursuant to CPLR 317, a party that was not personally served may defend against an action if it demonstrates that it did not have notice of the action in time to defend and that it has a meritorious defense … . "Service upon a corporation through delivery of the summons and complaint to the Secretary of State is not 'personal delivery' to the corporation" … .

Here, the defendant established its entitlement to relief from its default under CPLR 317 by demonstrating that the address on file with the Secretary of State at the time the summons and complaint were served was incorrect and, consequently, that it did not receive actual notice of the action in time to defend itself … . Further, "the evidence does not suggest that the defendant's failure to update its address with the Secretary of State constituted a deliberate attempt to avoid service of process" … , and there is some evidence in the record suggesting that the plaintiff had knowledge of the defendant's actual business address … . Galatro v Lake Pointe Owners, Inc., 2024 NY Slip Op 04375, Second Dept 9-11-24

Practice Point: Here defendant corporation's failure to update its address for service of process on file with the Secretary of State was deemed unintentional. The corporation's motion to vacate the default judgment on the ground it was not aware of the action should have been granted.

September 11, 2024

DISCOVERY, PRIVILEGE LOGS.

A PRIVILEGE LOG WHICH IDENTIFIES WITHHELD DOCUMENTS BY CATEGORY INSTEAD OF INDIVIDUALLY VIOLATES CPLR 3122 (B) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants did not comply with the privilege-log requirements of CPLR 3122(b). The defendants did not identify each withheld document individuals, instead identifying only categories of documents:

Pursuant to CPLR 3122(b), "[w]henever a person is required . . . to produce documents for inspection, and where such person withholds one or more

documents that appear to be within the category of the documents required . . . to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document."

Here, the defendants did not comply with the requirements of CPLR 3122(b), as their privilege log failed to individually identify each type of document being withheld, the general subject matter of each document, and the date of each document … . Contrary to the defendants' contention, Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.70 [g]) rule 11-b(b) does not authorize the defendants' unilateral use of categorical designations in their privilege log, absent an agreement by the parties to employ a categorical approach or the issuance of a protective order … . Joseph v Rassi, 2024 NY Slip Op 04548, Second Dept 9-25-24

Practice Point: Absent an agreement or a court order, a privilege log which identifies withheld documents by category rather than individually violates CPLR 3122 (b).

September 25, 2024

FORECLOSURE, ATTORNEY AFFIDAVIT INSUFFICIENT.

IN THIS FORECLOSURE ACTION, PLAINTIFF'S COUNSEL'S AFFIDAVIT, WHICH WAS BASED SOLELY UPON READING THE COMPLAINT, DID NOT DEMONSTRATE DEFENDANT'S DEFAULT (SECOND DEPT).

he Second Department, reversing Supreme Court, determined the affidavit by plaintiff's counsel in this foreclosure action did not demonstrate defendant's default:

Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie entitlement to judgment as a matter of law through the production of the mortgage, the unpaid note, and evidence of default

… . "A plaintiff may establish a payment default by an admission made in response to a notice to admit (see CPLR 3212[b]; 3123), by an affidavit from 'a person having [personal] knowledge of the facts' (CPLR 3212[b]), or by other evidence 'in admissible form'" … .

Here, in support of its motion, the plaintiff submitted the affirmation of its counsel, Jennie Shnayder, who attested to the borrower's default in payment. However, Shnayder stated that the basis of her knowledge was her review of the complaint, and she did not attest that she had personal knowledge of the defendants' alleged default in payment or annex to her affirmation any other evidence thereof in admissible form. Wilmington Sav. Fund Socy., FSB v E39 St., LLC, 2024 NY Slip Op 04417, Second Dept 9-11-24

Practice Point: A recurring evidentiary issue in foreclosure proceedings where the bank is seeking summary judgment is the sufficiency of evidence presented in the supporting affidavits. Unless the plaintiff's affiant's assertions are based on first-hand knowledge, or on business records that are attached, summary judgment is not supported.

September 11, 2024

FORECLOSURE, MOTION TO INTERVENE.

THE MOTION TO INTERVENE BY A PARTY WHICH PURCHASED THE PROPERTY IN FORECLOSURE SHOULD HAVE BEEN GRANTED; THE BANK DID NOT PROVE THE BORROWER'S DEFAULT BECAUSE THE RELEVANT BUSINESS RECORDS WERE NOT ATTACHED TO THE VICE PRESIDENT'S AFFIDAVIT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined (1) the motion to intervene by a party (the LLC) which had purchased the property subject to foreclosure should have been granted, (2) noncompliance with the notice requirement of RPAPL 1304 and 1306 and the mortgage agreement cannot be raised by the intervenor, a stranger to the note and mortgage, and (3) the bank did not prove the borrower's default because the relevant business records were not attached to the bank's affidavit:

…. [T]he LLC 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 (see CPLR 1012[a][2], [3]; 6501 …). …[T]he fact that the LLC obtained its interest in the premises after the action was commenced and the notice of pendency was filed does not definitively bar intervention … . * * *

… [The bank] failed to provide evidence in admissible form of the borrower's default in payment of the note … . In his affidavit submitted in support of U.S. Bank's motion, Bennett [vice president of the bank's servicer] averred that he was personally familiar with Rushmore's record-keeping practices and that, based on his review of Rushmore's business records, the borrower "defaulted under the terms of the loan documents by failing to make the monthly installment due on January 1, 2015 and has remained in default to the present date." However, Bennett's assertion regarding the borrower's alleged default constituted inadmissible hearsay, as he failed to annex to his affidavit the business records on which he relied … . U.S. Bank N.A. v Medina, 2024 NY Slip Op 04588, Second Dept 9-25-24

Practice Point: Here the party which purchased the property in foreclosure should have been allowed to intervene.

Practice Point: In foreclosure proceedings affidavits which purport to describe the contents of business records which are not attached constitute inadmissible hearsay.

September 25, 2024

FORECLOSURE, SERVICE OF PROCESS, FAILURE TO UPDATE ADDRESS WITH DMV OR USPS.

HERE DEFENDANT'S FAILURE TO UPDATE HIS ADDRESS WITH THE DMV OR USPS WAS NOT "AFFIRMATIVE CONDUCT" DESIGNED TO AVOID SERVICE OF PROCESS; THEREFORE DEFENDANT SHOULD HAVE BEEN AFFORDED A HEARING ON WHETHER HE WAS PROPERLY SERVED (SECOND DEPT).

The Second Department, reversing Supreme Court, over a partial dissent, determined the fact that defendant did not update his address with the Department of Motor Vehicles or the United States Postal Service did not demonstrate "affirmative conduct" designed to mislead a party into serving process at an incorrect address. Here the service was by "nail and mail" and defendant contended he no longer resided at that address. Defendant was entitled to a hearing:

"A defendant may be estopped from contesting the propriety of an address where service was attempted when the defendant has engaged in 'affirmative conduct which misleads a party into serving process at an incorrect address'" … . However, as the Court of Appeals has recognized, "potential defendants ordinarily have no affirmative duty to keep those who might sue them abreast of their whereabouts" … . Thus, a defendant's mere inaction—such as failing to update his or her address with the plaintiff, the Department of Motor Vehicles (hereinafter DMV), or the United States Postal Service (hereinafter USPS)—without more, may not be equated with affirmative or deliberate conduct designed to avoid service … . Here, the defendant's failure to update his address with the plaintiff, DMV, or USPS, or to update his voting records with a new address, did not constitute "affirmative conduct" … , and such failure was insufficient to establish, without a hearing, that the defendant should be estopped from contesting service as a matter of law … . Citimortgage, Inc. v Goldstein, 2024 NY Slip Op 04453, Second Dept 9-18-24

Practice Point: Failure to update one's address with the DMV or USPS is not affirmative conduct designed to avoid service of process, therefore defendant was not estopped from contesting service.

September 18, 2024

FORECLOSURE, STANDING, REVERSAL AFTER TRIAL.

EVIDENCE THAT PLAINTIFF DID NOT HAVE STANDING TO FORECLOSE, SUBMITTED AFTER A JURY TRIAL AND JUDGMENT FOR THE PLAINTIFF, WARRANTED REVERSAL AND A NEW TRIAL (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined defendant's evidence that plaintiff did not have standing to foreclose, submitted after a jury trial and a judgment of foreclosure, raised a question of fact requiring a new trial:

The defendant cross-moved … pursuant to CPLR 4404(b) … for judgment … dismissing the complaint insofar as asserted against him, submitting evidence that Fannie Mae purchased the note subsequent to the assignment of the note to the plaintiff and prior to the commencement of this action. …

"A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying 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, and the mortgage passes with the debt as an inseparable incident" … . …

The evidence submitted by the defendant raised issues of fact warranting a new trial on the issue of standing, and the plaintiff does not contend that it was improper for the defendant to submit this evidence for the first time after the conclusion of the original trial … . Wendover Fin. Servs. Corp. v Steinman, 2024 NY Slip Op 04416, Second Dept 9-11-24

Practice Point: Here evidence submitted by defendant, after a jury trial and judgment for the plaintiff, raised a question of fact about whether plaintiff had standing to foreclose requiring a new trial. Plaintiff did not object to the post-trial submission.

September 11, 2024

LANDLORD-TENANT, VACATE DEFAULT, COVID DELAYS.

DEFENDANTS OFFERED A REASONABLE EXCUSE FOR DEFAULT IN THIS EVICTION ACTION, INCLUDING THE COVID-19-RELATED DELAYS; THE COVID-19 EMERGENCY RENTAL ASSISTANCE PROGRAM (CERAP) APPLIES TO EVICTION PROCEEDINGS IN SUPREME COURT, AS WELL AS HOLDOVER PROCEEDINGS IN CIVIL COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to vacate the default judgment in this eviction action should have been granted. In addition, the Second Department held the COVID-19 Emergency Rental Assistance Program (CERAP) applied to eviction actions in Supreme Court (not just to holdover proceedings in Civil Court) and remitted the matter for consideration of the merits of defendants' motion for a stay pursuant to CERAP:

"A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer . . . must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense" … . "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" … . Under the circumstances of this case, including the lack of prejudice to the plaintiff, the minor delay when accounting for the COVID-19-related stays, the plaintiff's failure to disclose the related holdover proceeding, and the strong public policy of resolving cases on the merits, the defendants' proffered excuse was reasonable … . In addition, the defendants demonstrated a potentially meritorious defense to the action. ZG Palmetto, LLC v Alongi, 2024 NY Slip Op 04419, Second Dept 9-11-24

Practice Point: In this eviction action, the COVID-19-related delays, the lack of prejudice to plaintiff, plaintiff's failure to disclose the related holdover proceeding, and the potentially meritorious defense warranted vacation of the default judgment.

Practice Point: The COVID-19 Emergency Rental Assistance Program (CERAP) applies to eviction actions in Supreme Court, not just to holdover proceedings in Civil Court.

September 11, 2024

LONG-ARM JURISDICTION, CHILD VICTIMS ACT, EMPLOYMENT LAW.

IN THIS CHILD VICTIMS ACT CASE, LONG-ARM JURISDICTION WAS PROPERLY EXERCISED OVER AN OUT-OF-STATE CATHOLIC DIOCESE WHICH EMPLOYED DEFENDANT PRIEST WHO WAS ASSIGNED TO A NEW YORK PARISH (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Diocese of Burlington (apparently an out-of-state party) has sufficient contact with New York to warrant the exercise of long-arm jurisdiction in this Child Victims Act case. It was alleged the Diocese of Burlington employed the defendant priest and assigned him to a parish in New York with actual knowledge of the priest's history of sexually abusing children:

Accepting as true the facts alleged … , plaintiff has made a prima facie showing that Diocese of Burlington is subject to personal jurisdiction under CPLR 302(a)(1) … . Plaintiff alleges that Diocese of Burlington exercised supervision and control over the Priest, placing him on an indefinite, long-term assignment in New York to provide Catholic clergy services to parishioners in New York, including plaintiff even though it knew that he was a sexual predator. Plaintiff also alleges that during this period and in connection with those priestly duties, the Priest sexually assaulted plaintiff on multiple occasions. Therefore, plaintiff adequately alleges that Diocese of Burlington engaged in "purposeful activity" in New York, and that there is a "substantial relationship between the transaction and the claim asserted" …… .

Further, "the exercise of long-arm jurisdiction over defendants per CPLR 302(a)(1) comports with due process, as it must" … . For the reasons stated, "plaintiff adequately alleged Diocese of Burlington's 'minimum contacts' with New York, in the form of their purposeful availment of the privilege of conducting activities here, thus invoking the protections and benefits of New York's laws" … . Diocese of Burlington "failed to present a compelling case that some other consideration would render jurisdiction unreasonable" … . V.Z. v Roman Catholic Diocese of Burlington, 2024 NY Slip Op 04631, First Dept 9-26-24

Practice Point: Here in this Child Victim's Act case, an out-of-state Catholic Diocese employed a priest who was assigned to a New York parish. It was alleged

the Diocese had actual knowledge of the priest's history of sexually abusing children. The Diocese was subject to New York's long-arm jurisdiction.

September 26, 2024

MEDICAL MALPRACTICE, ORDINARY NEGLIGENCE, IDENTIFICATION OF EXPERT.

HERE PLAINTIFF DID NOT IDENTIFY AN EXPERT WITNESS AS REQUIRED BY CPLR 3101 AND THE MEDICAL MALPRACTICE ACTION WAS PROPERLY DISMISSED; HOWEVER PLAINTIFF ALLEGED SCARRING AND BURNING DURING LASER HAIR REMOVAL AND MAY STILL BE ABLE TO PROVE ORDINARY NEGLIGENCE THROUGH THE TESTIMONY OF HIS TREATING PHYSICIAN AND OTHER EVIDENCE; THE NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, although plaintiff was precluded from offering expert evidence and therefore could not prove medical malpractice, the negligence cause of action should not have been dismissed. Plaintiff alleged scarring and burns caused by laser hair removal:

The Supreme Court erred in dismissing the negligence cause of action on the ground that the plaintiff could not establish a prima facie case in the absence of the testimony of an expert witness. At trial, the plaintiff may, through the testimony of his treating physician, records, or "other evidence," be able to establish "the standard of care in performing laser hair removal and the known risks of the procedure" … . Therefore, contrary to the court's determination, although the plaintiff is precluded from offering the testimony of an expert witness whose identity must be disclosed pursuant to CPLR 3101(d)(1)(i), at this juncture, it cannot be determined that the plaintiff will be unable to establish a prima facie case of negligence … . Mishli v Advanced Dermatology Laser & Cosmetic Surgery, P.C., 2024 NY Slip Op 04386, Second Dept 9-11-24

Practice Point: In this case alleging scarring and burning during laser hair removal, the dismissal of a medical malpractice cause of action because the identity of an

expert witness has not been disclosed did not necessarily preclude a negligence cause of action proven by the testimony of plaintiff's treating physician.

September 11, 2024

MUNICIPAL LAW, TRAFFIC ACCIDENTS, LATE NOTICE OF CLAIM.

THE COVID-19 TOLLS AND THE COURT'S DELAY IN SIGNING THE ORDER TO SHOW CAUSE PROVIDED A REASONABLE EXCUSE FOR FAILING TO TIMELY FILE A NOTICE OF CLAIM IN THIS BUS ACCIDENT CASE; THE POLICE REPORT TIMELY NOTIFIED THE CITY OF THE RELEVANT FACTS; THE MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioners' motion for leave to serve a late notice of claim in this bus accident case should have been granted. The COVID-19 tolls, and the court's delay in signing the order to show cause, provided a reasonable excuse and the police report timely notified the city of the relevant facts:

In determining whether to grant a petition for leave to serve a late notice of claim, the court must consider all relevant circumstances, including whether "(1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits" … .

Here the petitioner demonstrated a reasonable excuse for the delay, i.e., the COVID-19 pandemic, the tolls resulting therefrom, and the delay by the Supreme Court in signing the petitioner's order to show cause.

Further, the petitioners met their burden of providing a plausible argument supporting a finding of no substantial prejudice. The happening of the accident and relevant facts were documented in a police report, and any prejudice was the result of delays resulting from the COVID-19 pandemic, not the petitioner's conduct. Matter of Ortiz v New York City Tr. Auth., 2024 NY Slip Op 04464, Second Dept 9-18-24

Practice Point: The COVID-19 tolls and the judge's delay in signing the order to show cause provided a reasonable excuse for failure to timely file a notice of claim in this bus accident case.

Practice Point: The police report provided the city with timely notice of the relevant facts. Therefore the city was not prejudiced by the late notice.

September 18, 2024

RELATION-BACK DOCTRINE, MEDICAL MALPRACTICE, NEGLIGENCE.

THE RELATION-BACK DOCTRINE APPLIES EVEN WHERE A NEW ACTION HAS BEEN COMMENCED AND CONSOLIDATED WITH A PRIOR ACTION (FIRST DEPT).

The Second Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Rosado, determined the relation-back doctrine applied to the wrongful death action against Dr. Ozcan and reinstated that cause of action. The court noted that the relation-back doctrine applies where, as here, a new action has been commenced and consolidated with a prior action:

Dr. Ozcan does not substantively dispute that the claims in the prior and instant actions arose out of the same conduct or that she is united in interest with Montefiore [Medical Center]. Therefore, the only question to be decided, is whether the third prong of the relation-back doctrine has been established.

Dr. Ozcan, who was named as a defendant in the First Action, should have known that, but for a mistake, the wrongful death claim would have been brought against her as well … .

Application of the relation-back doctrine is proper even where, as here, a new action has been commenced and consolidated with a prior action … . Picchioni v Sabur, 2024 NY Slip Op 04362, First Dept 9–5-24

Practice Point: The relation-back doctrine applies to render an action timely brought even where a new action has been commenced and consolidated with a prior action.

September 5, 2024

RES JUDICATA, ARBITRATION, CONTRACT LAW.

THE ARBITRATION RULING THAT THE CONTRACT WAS TERMINATED UNDER A "FRUSTRATION OF PURPOSE" THEORY PRECLUDED, UNDER THE DOCTRINE OF RES JUDICATA, ANY CONSIDERATION OF THE BREACH OF CONTRACT CAUSES OF ACTION THAT AROSE FROM THE SAME FACTS (FIRST DEPT).

The First Department, in a detailed full-fledged opinion by Justice Oing, determined the arbitration-ruling that a multi-million dollar contract for construction and operation of a liquid-natural-gas-related facility was terminated under a "frustration of purpose" theory precluded consideration of the breach of contract causes of action (res judicata). New technology for the extraction of natural gas from shale had rendered the liquid natural gas facility obsolete. The opinion is much too detailed to fairly summarize here. In simple terms, the arbitration ruling precluded the breach of contract causes of action under the doctrine of res judicata because all arose from the same facts:

Under the transactional analysis, the test is to determine whether a claim should be precluded by viewing a claim or cause of action as conterminous with the transaction, regardless of the number of substantive theories or variant forms of relief available to a litigant … . The analysis embraces a broadened view of the scope of a claim in order to limit the number of possible actions arising out of a single controversy … . The application of this test means that a final judgment on the merits of a claim or claims will bar future claims or causes of action arising from "all or any part of the transaction, or series of connected transactions, out of which the [prior] action arose" … . The question for us to resolve is whether the [breach of contract causes of action] arise from "all or any part of the transaction, or series of connected transactions" out of which the prior arbitration arose. We hold they do. Gulf LNG Energy, LLC v Eni S.p.A., 2024 NY Slip Op 04517, First Dept 9-24-24

Practice Point: Here an arbitration ruling that the contract was terminated for "frustration of purpose" precluded, under the doctrine of res judicata, any consideration of the breach of contract causes of action that arose from the same facts.

September 24, 2024

SHORTER LIMITATIONS PERIOD, CONTRACT LAW, INSURANCE LAW.

THE SHORTER LIMITATIONS PERIOD IN THE FIRE INSURANCE POLICY WAS NOT FAIR AND REASONABLE; THE MOTION TO DISMISS IN THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court in the fire-insurance breach of contract case, determined the contractual limitations period in the insurance policy was not fair and reasonable:

"Article 2 of the CPLR ('Limitations of Time'), provides that '[a]n action . . . must be commenced within the time specified in this article unless . . . a shorter time is prescribed by written agreement'" … . "'[A]n agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable'" … . "'[T]he period of time within which an action must be brought . . . should be fair and reasonable, in view of the circumstances of each particular case. . . . The circumstances, not the time, must be the determining factor'" … . "'Absent proof that the contract is one of adhesion or the product of overreaching, or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced'" … .

The Supreme Court should have denied that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss the complaint. Contrary to the defendants' contentions, the modified limitations period in the subject insurance policy was not fair and reasonable. The insurance policy provided that "[n]o action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss" and that "[w]e will pay no more than the actual cash value of the damage until actual repair or replacement is complete. Once actual repair or replacement is complete, we will settle the loss." Here, the one-year limitation was unreasonable since the condition precedent, completion of actual repair or replacement, was not within the plaintiffs' control and could not be met within that period … . "'A "limitation period" that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim'" … . Filasky v Andover Cos., 2024 NY Slip Op 04545, Second Dept 9-25-25

Practice Point: Parties can agree on shorter limitations periods. Here the limitations period in the subject fire insurance policy expired before suit could be brought rendering it unfair, unreasonable and unenforceable.

September 25, 2024

SUPPLEMENTAL BILLS OF PARTICULAR, MEDICAL MALPRACTICE.

PLAINTIFF'S MOTION FOR LEAVE TO SERVE A SUPPLEMENTAL BILL OF PARTICULARS SHOULD HAVE BEEN GRANTED BECAUSE IT MERELY AMPLIFIED THE ALLEGATIONS IN THE COMPLAINT AND BILL OF PARTICULARS; HOWEVER, THE NEW CAUSES OF ACTION IN THE AMENDED BILLS OF PARTICULARS WERE PROPERLY STRUCK (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff in this medical malpractice action should have been allowed to serve a supplemental bill of particulars which amplified the allegations in the complaint and noted that plaintiff's mislabeling an amended bill of particulars as a supplemental bill of particulars could be overlooked:

A party is entitled to amend their bill of particulars "once as of right at any time prior to filing the note of issue" … . A bill of particulars "may be used to amplify the allegations in a complaint [but] may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint" … . Nor can a bill of particulars "add or substitute a new theory or cause of action" not asserted in the complaint … .

Although the second amended bill was denominated as a "Supplemental Bill of Particulars," we may disregard the plaintiff's mistake in labeling her bill of particulars where, as here, a substantial right of a party will not be prejudiced (see CPLR 2001 …).

The Supreme Court properly granted that branch of [defendant's] motion … to strike the first amended bill, as the plaintiff alleged a new cause of action alleging malpractice and negligence in performing the knee replacement surgery, which was not previously set forth in the complaint or original bill of particulars … . Further, the court properly granted that branch of [defendant's] motion … to strike that

portion of the second amended bill that alleged malpractice and negligence in the plaintiff's preoperative care, as well as malpractice and negligence in performing the knee replacement surgery, as these causes of action were not previously set forth in the complaint or original bill of particulars … . However, the court should have granted the plaintiff leave to serve a supplemental bill of particulars with respect to the allegations included in the second amended bill related to postoperative physical therapy and care, as they only served to amplify the allegations in the complaint … , and should have denied that branch of [defendant's] motion which was to preclude the plaintiff from offering evidence at trial relating to her postoperative physical therapy and care. Quinones v Long Is. Jewish Med. Ctr., 2024 NY Slip Op 04471, Second Dept 9-18-24

Practice Point: Here a motion for leave to serve a supplemental bill of particulars which only amplified the allegations in the complaint and bill of particulars should have been granted. But new causes of action included in the amended bills of particulars were properly struck.

September 18, 2024

PROOF OF SERVICE OF PROCESS, FAILURE TO TIMELY FILE.

FAILURE TO FILE PROOF OF SERVICE WITHIN TWENTY DAYS OF DELIVERY OR MAILING OF THE SUMMONS IS NOT A JURISDICTIONAL DEFECT WHICH DEPRIVES THE COURT OF JURISDICTION OVER THE SERVED PARTY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the failure to file proof of service within twenty days of delivery or mailing of the summons does not negate the validity of the service, i.e., the failure to file does not deprive the court of jurisdiction over the defendant:

"Where, as here, service was made pursuant to CPLR 308(2), 'proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later,' and 'service shall be complete ten days after such filing'" … . "Nevertheless, [t]he [*2]purpose of requiring filing of proof of service, along with the 10-day grace period, pertains solely to the time within which a defendant must answer, and does not relate to the jurisdiction acquired by service of the summons" … . * * *

… [T]he defendants failed to rebut the presumption of proper service … which was established by the plaintiff's process server's affidavit … . Contrary to the defendants' contention, the plaintiff's "failure to timely file proof of service [wa]s a mere procedural irregularity, not a jurisdictional defect" … .Palma v Apatow, 2024 NY Slip Op 04465, Second Dept 9-18-24

Practice Point: Failure to file proof of service of the summons within twenty days does not invalidate the service.

September 18, 2024

TRUSTS AND ESTATES, STANDING TO BRING WRONGFUL DEATH ACTION, SUBSTITUTION OF EXECUTOR.

THE PARTY WHO BROUGHT THE WRONGFUL DEATH ACTION WAS NOT A PERSONAL REPRESENTATIVE OF DECEDENT'S ESTATE AND THEREFORE DID NOT HAVE STANDING; BECAUSE THE PARTY HAD NO RIGHT TO SUE, "SUBSTITUTION" OF THE EXECUTORS FOR THAT PARTY WAS NOT AVAILABLE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined (1) plaintiffs' cross-motion to substitute the executors of decedent's estate for plaintiffs should not have been granted, and (2) defendants' motion to dismiss the complaint for lack of standing should have been granted. The plaintiff who purportedly brought the wrongful death action (a "proposed" executor) was not a "personal representative" under the Estates, Powers and Trusts Law (EPTL). Therefore, "substitution" of the executors for the plaintiff was not possible:

… [A]s a "[p]roposed" executor who had not obtained letters to administer decedent's estate, plaintiff was not a personal representative within the meaning of the Estates, Powers and Trusts Law at the time the action was commenced and thus did not have standing to commence an action on behalf of decedent's estate … . Thus, we agree with defendants that Supreme Court erred in granting plaintiff's cross-motion to substitute as plaintiffs the executors of decedent's estate inasmuch as "[s]ubstitution . . . is not an available mechanism for replacing a party . . . who had no right to sue with one who has such a right" … .

We … agree with defendants that the court erred in denying that part of their motion seeking to dismiss the complaint on the ground that the action was brought by a party without standing … . Cappola v Tennyson Ct., 2024 NY Slip Op 04672, Fourth Dept 9-27-24

Practice Point: Only a "personal representative" of a decedent's estate has standing to sue on behalf of the decedent Here the suit was brought by a party who had not obtained letters to administer the estate and therefore did not have standing. "Substitution" of the executors for a party without standing is not possible.

September 27, 2024

VENUE CHANGE, JUDGES.

TO BE ENTITLED TO A CHANGE OF VENUE AS OF RIGHT, THE DEMAND MUST BE SERVED WITH THE ANSWER OR BEFORE THE ANSWER IS SERVED; TO BE ENTITLED TO A DISCRETIONAY CHANGE OF VENUE, THE MOTION MUST BE MADE PROMPTLY AFTER LEARNING OF THE GROUND FOR THE CHANGE; HERE THE MOTION SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion to change venue should not have been granted. The summons indicated plaintiff's residence was the basis of venue in Kings County. Defendants did not serve a demand to change venue with their answer or before the answer was served. The motion to change venue was based upon plaintiff's deposition testimony that he lived at an address in Richmond County. The defendants were not entitled to a change of venue as of right (because the demand was not served with the answer or before the answer was served), and the defendants were not entitled to a discretionary change of venue because the motion to change venue was not made promptly after plaintiff's deposition testimony:

A demand to change venue based upon the designation of an improper county must be "served with the answer or before the answer is served" (CPLR 511[a]). Here, since no demand to change venue was served with the answer or before the answer had been served, that branch of the defendants' motion which was to change venue on the ground that the county designated was improper (see CPLR 510[1]) was untimely (see CPLR 511[a] …). Thus, the defendants were not entitled to change

venue as of right, and their motion became one addressed to the Supreme Court's discretion … .

Contrary to the defendants' contention, the Supreme Court improvidently exercised its discretion in granting that branch of their motion which was to change venue, since the defendants failed to demonstrate that they moved promptly for a change of venue after the plaintiff testified at his deposition that he lived at an address in Richmond County … . Aguilar v Reback, 2024 NY Slip Op 04444, Second Dept 9-18-24

Practice Point: For a change of venue as of right the demand must be served with the answer or before the answer is served.

Practice Point: For a discretionary change of venue, the motion must be made promptly after learning of the ground for the change.

September 18, 2024