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Civil Procedure
Reversal Report
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90-DAY NOTICE, FAILURE TO COMPLY, JUDGES.

CPLR 3216 IS A FORGIVING STATUTE WHICH ALLOWS BUT DOES NOT REQUIRE DISMISSAL OF THE COMPLAINT FOR FAILURE TO COMPLY WITH A 90-DAY NOTICE; HERE PLAINTIFFS PRESENTED AN ADEQUATE EXCUSE AND DEMONSTRATED THE ACTION HAS MERIT; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the complaint should not have been dismissed on "neglect to proceed" grounds after plaintiffs' failure to comply with the 90-day notice:

"CPLR 3216 is an extremely forgiving statute which never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed" … . In opposition to a motion to dismiss pursuant to CPLR 3216, a plaintiff may still avoid dismissal if he or she demonstrates "a justifiable excuse for the failure to timely abide by the 90-day demand, as well as the existence of a potentially meritorious cause of action" … . "Thus, even when all of the statutory preconditions are met, including plaintiff's failure to comply with the 90-day requirement, plaintiff has yet another opportunity to salvage the action simply by opposing the motion to dismiss with a justifiable excuse" and proof of a potentially meritorious cause of action … .

Here, the plaintiffs' belief that the action remained stayed in the absence of some affirmative act by the Supreme Court, although erroneous, constituted a justifiable excuse under the circumstances for their failure to respond to the defendant's 90-day notice. Notably, the 90-day notice was sent only three months after the stay had been lifted, and the record does not otherwise contain evidence of a pattern of persistent neglect or delay in prosecuting the action or an intent to abandon the action … . Furthermore, the plaintiffs established the existence of a potentially meritorious cause of action sounding in strict products liability … . Holness v Gigglesworld Corp., 2024 NY Slip Op 06031, Second Dept 12-4-24

Practice Point: CPLR 3216 is a forgiving statute which allows but does not require the dismissal of a complaint for failure to comply with a 90-day notice. Here plaintiffs presented an adequate excuse and demonstrated a meritorious cause of action. The complaint should not have been dismissed.

December 4, 2024

90-DAY NOTICE, CONDITIONAL ORDER OF DISMISSAL, JUDGES.

A CONDITIONAL ORDER OF DISMISSAL PURSUANT TO CPLR 3216 WHICH DOES NOT STATE THE FAILURE TO FILE A NOTE OF ISSUE WITHIN 90 DAYS WOULD BE THE BASIS OF A MOTION TO DISMISS THE COMPLAINT IS INEFFECTIVE AND CAN BE VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the conditional order of dismissal should have be vacated because it did not indicate that plaintiff's failure to file a note of issue within 90 days would be the basis for a motion to dismiss:

"'CPLR 3216 permits a court, on its own initiative, to dismiss an action for want of prosecution where certain conditions precedent have been complied with'" … . Pursuant to CPLR 3216(b), an action cannot be dismissed pursuant to CPLR 3216(a) "'unless a written demand is served upon the party against whom such relief is sought in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed'" … .

Here, the conditional dismissal order did not contain the requisite language advising that the failure to file a note of issue would be the basis for a motion to dismiss … . Under these circumstances, the action should have been restored to the active calendar without considering whether the plaintiff had a reasonable excuse for its delay in moving to vacate the conditional dismissal order … . Wells Fargo Bank v Wasersztrom, 2024 NY Slip Op 06231, Second Dept 12-11-24

Practice Point: A conditional order of dismissal for want of prosecution pursuant to CPLR must include a statement that the failure to file a note of issue within 90

days would be the basis for a motion to dismiss the complaint. If that language is not in the conditional order, the order may be vacated.

December 11, 2024

APPEALS TO COURT OF APPEALS, UPRESERVED ISSUES.

UNLIKE THE APPELLATE DIVISION, THE COURT OF APPEALS CANNOT CONSIDER UNPRESERVED ISSUES IN THE INTEREST OF JUSTICE; THE FAILURE TO RAISE THE ISSUE IN THE TRIAL COURT PRECLUDED REVIEW BY THE COURT OF APPEALS (CT APP).

The Court of Appeals, over a three-judge dissent, determined the preservation requirement precluded consideration of the appeal. The underlying question concerned when the period for calculation of prejudgment interest should begin to run:

"As we have many times repeated, this Court with rare exception does not review questions raised for the first time on appeal. Unlike the Appellate Division, we lack jurisdiction to review unpreserved issues in the interest of justice" … . "To demonstrate that a question of law is preserved for this Court's review, a party must show that it raised the specific argument in [the trial court] and asked the court to conduct that analysis in the first instance" … . …

Among the many salutary reasons for our preservation rule is that "in making and shaping the common law . . . this Court best serves the litigants and the law by limiting its review to issues that have first been presented to and carefully considered by the trial and intermediate appellate courts" … . In considering whether to disturb well-settled Appellate Division precedent, this Court should only act where it has the benefit of a full record, including a reasoned trial court decision

As it relates to the proceedings below, claimant never raised the question of the accrual date of prejudgment interest in the trial court. Further, when a party objects to a provision contained in a judgment, they generally have the ability to seek relief pursuant to CPLR 5015 and 5019, as plaintiff was invited to do here. Had plaintiff made such a motion, arguments in favor of and against earlier accrual of prejudgment interest could have been made, thereby providing a fully developed

record for appeal, an essential step for parties seeking review from the Court of Appeals. But, plaintiff did not preserve an objection to the imposition of prejudgment interest on the record before the trial court. As plaintiff had an opportunity to raise his objections in the trial court but failed to do so, the issue is unreviewable on appeal to this Court. Sabine v State of New York, 2024 NY Slip Op 06288, CtApp 12-17-24

Practice Point: Unlike the Appellate Division, the Court of Appeals cannot consider an unpreserved issue "in the interest of justice." If the issue was not raised and preserved in the trial court, the Court of Appeals will not consider it.

December 17, 2024

ARTICLE 78 PETITION, ADMINISTRATIVE LAW, COOPERATIVES, JUDGES.

THE JUDGE SHOULD NOT HAVE DENIED THE MOTION TO DISMISS THE ARTICLE 78 PETITION/COMPLAINT AND THEN CONSIDERED THE MERITS OF THE PETITION/COMPLAINT WITHOUT ALLOWING RESPONDENT TO INTERPOSE AN ANSWER; THE JUDGE SHOULD NOT HAVE DISMISSED THE PETITION/COMPLAINT ON GROUNDS NOT ADDRESSED BY THE UNDERLYING ADMINSTRATIVE RULING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge could not deny the motion to dismiss the Article 78 petition/complaint and then consider the merits and dismiss the petition/complaint before allowing the respondent to interpose an answer. In addition, the court did not have the authority to consider issues not addressed by the underlying administrative ruling. The action was brought by an owner of shares in a cooperative (petitioner) against the co-op board (respondent) which denied petitioner's application to convert an office to a residential unit:

… Supreme Court erred by considering the merits of the petition/complaint and, in effect, denying the petition/complaint and dismissing the proceeding/action, after it denied the co-op's motion, inter alia, pursuant to CPLR 3211(a) to dismiss the petition/complaint. In a CPLR article 78 proceeding, if a motion to dismiss the petition is denied, "the court shall permit the respondent to answer" … . Here, the court should not have decided the merits of the petition seeking relief under CPLR

article 78, as the co-op had not yet filed an answer … , and it cannot be said, on this record, “that the facts are so fully presented in the parties’ papers that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer” … .

Moreover, under all the circumstances, including that issue had not been joined and that branch of the co-op’s motion which pursuant to CPLR 3211(a) to dismiss the petition/complaint was not converted into a motion for summary judgment, there was no basis for the Supreme Court, in effect, to dismiss the proceeding/action after concluding that the co-op was not entitled to dismissal of the petition/complaint pursuant CPLR 3211(a) … .

Further, it has “long been the rule that judicial review of an administrative determination is limited to the grounds presented by the agency at the time of its determination” … . A reviewing court is “powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis” … . Here, when the Supreme Court, in effect, affirmed the board’s denial of the application, the court improperly “surmise[d] or [*3]speculate[d] as to how or why” the board reached its determination and improperly relied on grounds not mentioned in the denial letter … . Matter of 195 N. Vil. Ave., LLC v 195 Apts., Inc., 2024 NY Slip Op 06037, Second Dept 12-4-24

Practice Point: Once a judge denies a motion to dismiss a petition/complaint, the merits of the petition/complaint should not be considered before the respondent interposes an answer.

Practice Point: A judge reviewing an administrative ruling cannot decide the merits on grounds not addressed by the administrative ruling.

December 4, 2024

CHOICE OF FORUM CLAUSE, CONTRACT LAW.

THE CHOICE OF FORUM CLAUSE (ARIZONA) IN THE CONTRACT IS ENFORCEABLE AND IS NOT AFFECTED BY AN ARGUMENT QUESTIONING THE VALIDITY OF A CHOICE OF LAW CLAUSE; THE FACT THAT THE NEW YORK PLAINTIFF WILL HAVE TO TRAVEL TO ARIZONA DOES NOT AFFECT THE ENFORCEABILITY OF THE CHOICE OF FORUM CLAUSE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion to dismiss the New York complaint based upon the choice of forum clause (Arizona) in the contract should have been granted. Plaintiff argued the contract was illegal under New York law. But a choice of forum clause is independent from a choice of law clause:

The contract between the parties provided that Arizona law would govern "the rights and obligations" of the parties under the contract. It further provided that all disputes arising out of the contract "shall be subject to the exclusive jurisdiction and venue of the state or federal courts sitting in Maricopa County, Arizona." That forum selection clause is prima facie valid and enforceable unless shown by plaintiff 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 motion, plaintiff argued that the contract's "pay-if-paid" provision, together with a provision prohibiting plaintiff from contacting clients of defendant, rendered the contract void as against public policy of New York. Plaintiff's argument, however, "is misdirected [inasmuch as t]he issue [it] raise[s] is really one of choice of law, not choice of forum" … . " '[O]bjections to a choice of law clause are not a warrant for failure to enforce a choice of forum clause' " … . Plaintiff has not shown that enforcement of the forum selection clause contravenes New York public policy … . Nor has plaintiff shown that enforcement would be unreasonable or unjust or alleged that the clause was the result of fraud or overreaching … . Plaintiff's further argument in opposition to the motion—i.e., that it would be a hardship for plaintiff's owner to go to Arizona to litigate this dispute—is an insufficient basis on which to deny the motion … . The fact that New York may be a more convenient forum is immaterial inasmuch as defendant's

motion is based on the parties' contract and not on the doctrine of forum non conveniens … . Prestige Lawn Care of WNY, LLC v Facilitysource, LLC, 2024 NY Slip Op 06483, Fourth Dept 12-20-24

Practice Point: Consult this decision for a discussion of a choice of forum clause versus a choice of law clause versus the doctrine of forum non conveniens.

December 20, 2024

FAMILY LAW, OUT-OF-STATE DIVORCE, APPLICABLE SUPPORT LAW.

ALTHOUGH THE PARTIES WERE DIVORCED IN COLORADO, THEY AND THEIR CHILDREN RESIDE IN NEW YORK; THE SUPPORT MAGISTRATE SHOULD NOT HAVE APPLIED COLORADO LAW IN DETERMINING FATHER'S SUPPORT OBLIGATION (SECOND DEPT).

The Second Department, reversing Family Court, determined the support magistrate should not have applied Colorado law. Although the parties were divorced in Colorado, the parties and the children all reside in New York:

"The Uniform Interstate Family Support Act . . . , 'adopted in New York as article 5-B of the Family Court Act, grants continuing, exclusive jurisdiction over a child support order to the state that issued the order'" … . "As relevant herein, the issuing state loses such jurisdiction where none of the parties or children continue to reside in that state" … . Here, it is undisputed that the parties and their children reside in New York and that the mother registered the Colorado support order in this state. Thus, the Family Court, Westchester County, had jurisdiction to adjudicate the proceeding … .

Further, Family Court Act § 580-613(b) provides that, in a modification proceeding brought pursuant to section 580-613(a), the court "shall apply . . . the procedural and substantive law of this state" … . Here, the Support Magistrate improperly applied Colorado law in calculating the father's modified support obligation … . Accordingly, the Family Court should have granted the mother's objections. Matter of O'Connor v Shaw, 2024 NY Slip Op 06046, Second Dept 12-4-24

Practice Point: Here the parties were divorced in Colorado but they and their children reside in New York. New York has jurisdiction over the support

proceedings. The Support Magistrate should not have applied Colorado law to the support calculation.

December 4, 2024

FORECLOSURE, APPEALS, DEBTOR-CREDITOR, REAL PROPERTY LAW.

DEFENDANT BOUGHT THE FORECLOSED PROPERTY WITHOUT KNOWLEDGE THE JUDGMENT OF FORECLOSURE AND SALE HAD BEEN APPEALED; DEFENDANT WAS A PURCHASER IN GOOD FAITH AND FOR VALUE AND WAS THEREFORE INSULATED FROM THE EFFECTS OF THE APPELLATE REVERSAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant (Bartlett) was a purchaser in good faith and for value of the foreclosed property. The foreclosure was reversed on appeal. Defendant, as the fee owner of the property, was insulated from the effects of the reversal:

Where a judgment of foreclosure and sale is reversed on appeal, the successful appellant may seek restitution of the real property lost by the judgment (see CPLR 5015[d]; 5523). However, where the real property was sold pursuant to the judgment of foreclosure and sale, and the title is held by "a purchaser in good faith and for value," recovery is limited to the value of the real property (id. § 5523). In the absence of a stay of the sale or an outstanding notice of pendency, title of the purchaser in good faith and for value "is . . . insulate[d] . . . from the effects of an appellate reversal" … .

Here, in support of its cross-motion, Bartlett established, through an affidavit of its member, that Bartlett acquired title to the property subsequent to a foreclosure sale, without actual knowledge of a successful appeal by the plaintiffs in the underlying action that resulted in a vacatur of the judgment of foreclosure and sale … . The affidavit also demonstrated that the plaintiffs had not obtained a stay of the foreclosure sale in the underlying action. Under these circumstances, Bartlett established … that it was a purchaser in good faith and for value entitled to the protection of CPLR 5523 … . Puretz v Mae, 2024 NY Slip Op 06227, Second Dept 12-11-24

Practice Point: A buyer of foreclosed property who had no knowledge the judgment of foreclosure had been appealed is insulated from the effects of a reversal on appeal. The buyer, as a purchaser in good faith for value, is the fee owner of the property.

December 11, 2024

FORECLOSURE, REFORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PLAINTIFF BANK WAS NOT ENTITLED TO SUMMARY JUDGMENT IN THIS REFORECLOSURE ACTION; THERE WAS A QUESTION OF FACT WHETHER WILLFUL NEGLECT BY PLAINTIFF BANK OR ITS PREDECESSOR IN INTEREST RESULTED IN THE DEFECT IN THE ORIGINAL FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this reforeclosure action:

Where the interest of a necessary party has not been foreclosed upon in a judgment of foreclosure and sale, the purchaser of the foreclosed property has two potential remedies: a strict foreclosure action pursuant to RPAPL 1352, or a reforeclosure action pursuant to RPAPL 1503. RPAPL 1503 provides … that, when real property has been sold at a foreclosure sale 'and it appears from the public records or from the allegations of the complaint that such judgment, sale or conveyance was or may have been, for any reason, void or voidable as against any person, including an owner of the real property mortgaged, the purchaser . . . may maintain an action as provided in this article to determine the right of any person to set aside such judgment, sale or conveyance or to enforce an equity of redemption or to recover possession of the property, or the right of any junior mortgagee to foreclose a mortgage'" … . "[T]o prevail in a reforeclosure action, the plaintiff must demonstrate that the defect in the original foreclosure action 'was not due to fraud or wilful neglect of the [foreclosure] plaintiff and that the defendant or the person under whom he [or she] claims was not actually prejudiced thereby'" … .

Here, US Bank's [plaintiff's] predecessor in interest allowed the notice of pendency in the foreclosure action to lapse. During that lapse, Wilkshire obtained

and recorded title to the property by a referee’s deed pursuant to the foreclosure of a lien for unpaid homeowners association dues. Subsequently, US Bank filed a new notice of pendency, which was not served upon Wilkshire. Thereafter, US Bank obtained an order and judgment of foreclosure and sale in the foreclosure action. On its motion for summary judgment in the instant action, US Bank failed to submit any evidence to establish, prima facie, that the defect in the foreclosure action was not due to willful neglect by itself or by its predecessors in interest. Thus, US Bank failed to establish its entitlement to judgment as a matter of law … . U.S. Bank N.A. v 18 Wilkshire Circle, LLC, 2024 NY Slip Op 06372, Second Dept 12-18-24

Practice Point: Consult this decision for some discussion of the remedies of “strict foreclosure” and “reforeclosure” under the Real Property Actions and Proceedings Law (RPAPL) where there was some defect in the original foreclosure proceedings.

December 18, 2024

INJUNCTIONS, JUDGES.

A PERMANENT INJUNCTION IS NOT APPROPRIATE WHERE PLAINTIFFS DO NOT ALLEGE ANY NONECONOMIC DAMAGES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the issuance of a permanent injunction was error because the injury can be adequately compensated by money damages:

“‘A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction'” … To establish prima facie entitlement to a permanent injunction, a plaintiff must demonstrate: (a) that there was a violation of a right presently occurring, or threatened and imminent; (b) that he or she has no adequate remedy at law; (c) that serious and irreparable harm will result absent the injunction; and (d) that the equities are balanced in his or her favor … . Further, irreparable injury, for the purposes of equity, means any injury for which money damages are insufficient … . In contrast, where an injury can be adequately compensated by money damages, injunctive relief is inappropriate … .

Here, the plaintiffs failed to allege any noneconomic damages. Rockefeller v Leon, 2024 NY Slip Op 06370, Second Dept 12-18-24

Practice Point: If plaintiffs do not allege any noneconomic damages, a permanent injunction is not an appropriate remedy.

December 18, 2024

JURISDICTION OF THE COURT, DEATH OF A PARTY, TRUSTS AND ESTATES, APPEALS, ATTORNEYS.

THE DEATH OF A PARTY DIVESTS THE COURT OF JURISDICTION, STAYS THE PROCEEDINGS AND TERMINATES THE REPRESENTATION OF THE DECEASED'S ATTORNEY; ANY ORDERS ISSUED OR APPEALS TAKEN ARE VACATED OR DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, noted that the death of a party divests the court of jurisdiction and terminates the representation of the attorney for the deceased person:

"The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015 (a)[, and] any determination rendered without such substitution will generally be deemed a nullity" … . Here, the Supreme Court erred in considering the separate motions of the LMB defendants and Bear Stearns pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against each of them because the motions were made after [plaintiff] Roe's death and prior to any substitution of a personal representative of his estate (see id. § 1015 …). Accordingly, so much of the order … as granted the separate motions of the LMB defendants … to dismiss the complaint insofar as asserted against each of them must be vacated as a nullity (see CPLR 1015 …), and the appeal taken by the plaintiff Cheryl Lee from so much of the order … granting those branches of the LMB defendants' motion which were pursuant to CPLR 3211(a) to dismiss the first, third, and sixth causes of action must be dismissed.

Furthermore, the death of a party also terminates an attorney's authority to act on behalf of the deceased party … . Thus, Roe's former attorneys lacked the authority to file either the cross-motion or this appeal on his behalf. Accordingly the appeal

purportedly taken on Roe's behalf must be dismissed … . Lee v Leeds, Morelli & Brown, P.C., 2024 NY Slip Op 06624, Second Dept 12-24-24

Practice Point: The death of a party divests the court of jurisdiction, stays the proceedings until a substitution is made, and terminates the representation of the attorney for the deceased. Any orders issued or appeals taken after the party's death and before substitution must be vacated or dismissed.

December 24, 2024

JURY SELECTION, PEREMPTORY CHALLENGES, INSURANCE LAW, JUDGES, ATTORNEYS.

PLAINTIFFS WERE PREJUDICED BY THE JURY SELECTION PROCESS WHICH DID NOT ALTERNATE THE PEREMPTORY CHALLENGES; THE FIRST QUESTION POSED TO THE JURY EFFECTIVELY PRECLUDED THE JURORS FROM CONSIDERING THE APPROPRIATE LEGAL ISSUE, I.E., WHETHER THE PLAINTIFF SUFFERED A "SERIOUS INJURY" WITHIN THE MEANING OF THE INSURANCE LAW (THIRD DEPT).

The Third Department, reversing the jury verdict and ordering a new trial in this Insurance Law 5102(d) "serious injury" case, determined the plaintiffs were prejudiced by the jury selection method used the trial judge, and the first question on the verdict sheet was improper because it effectively precluded the jury from considering the relevant question, whether plaintiff suffered a "serious injury:"

The court's failure to alternate the peremptory challenge process … placed plaintiffs in the untenable position of having to utilize a peremptory challenge for a prospective juror that may not have been necessary had defendants been required to go first. This error compromised the fairness of the jury selection process.

Plaintiffs further contend that Supreme Court erred by including the first question on the verdict sheet — i.e., "[h]ave the plaintiffs . . . established that the incident . . . was a substantial factor in causing [Mormile's] injuries?" We agree. The specific issue for the jury to resolve was whether, as a result of the subject accident, Mormile sustained a "serious injury" as set forth in question 2 on the verdict sheet (did Mormile "sustain a significant limitation of use of a body function or system"); question 3 (did Mormile "sustain a permanent consequential limitation

of use of a body organ or member”); question 4 (did Mormile “sustain a injury that resulted in a significant disfigurement”); and question 5 (did Mormile “suffer a medically determined injury or impairment of a non-permanent nature . . . that prevented him from performing all of the material acts that constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident?”).

The first question effectively only asks whether there was probable cause to establish that Mormile’s injuries resulted from the accident (see PJI 2:70). Having answered “No” to that global question, the jury did not answer questions 2 through 5. In effect, the jury did not resolve the appropriate legal issue, i.e., whether Mormile sustained a “serious injury” in the accident, as defined under each of the four distinct categories at issue … . Mormile v Marshall, 2024 NY Slip Op 06390, Third Dept 12-19-24

Practice Point: Failure to alternate the peremptory challenges compromised the fairness of the jury selection process.

Practice Point: The first question on the verdict sheet effectively precluded the jury from considering the appropriate legal issue, i.e., whether plaintiff suffered a “serious injury” within the meaning of the Insurance Law.

December 19, 2024

JUSTICIABLE CONTROVERSY, MUNICIPAL LAW, CRIMINAL LAW, CONSTITUTIONAL LAW.

PLAINTIFF SUED THE COUNTY SHERIFF SEEKING A DECLARATORY JUDGMENT THAT A LOCAL COURT WHICH ISSUES A SECURING ORDER FOR A NONQUALIFYING OFFENSE VIOLATES THE ACCUSED'S CONSTITUTIONAL RIGHTS; THE FOURTH DEPARTMENT DETERMINED THERE WAS NO JUSTICIABLE CONTROVERY INVOLVING THE SHERIFF WHO IS BOUND TO OBEY A COURT'S SECURING ORDER; THE REAL DISPUTE IS WITH THE COURT WHICH ISSUES THE ORDER IN APPARENT VIOLATION OF A STATUTE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court and dismissing the declaratory judgment action, determined there was no justiciable controversy. Plaintiff sued the County Sheriff seeking a declaration that "assigning a local court to arraign a criminal defendant with two previous felony convictions violates the constitutional rights of the accused because local courts lack the ability to order release or set bail under those circumstances." The issue arose because of a conflict among provisions of the Criminal Procedure Law:

… City Court issued a securing order that committed [defendant] to the custody of the Sheriff on the basis of CPL 530.20 (2) (a) (double predicate provision). The double predicate provision states that a city, town, or village court (hereinafter, local court) may not order release on recognizance or bail when the criminal defendant, like plaintiff, has two previous felony convictions. Plaintiff further alleged that the double predicate provision conflicts with CPL 510.10 (4) (qualifying offense provision), which limits the court's ability to issue a securing order imposing bail or remand to situations in which the criminal defendant stands charged with an enumerated qualifying offense (see also CPL 510.10 [3]). * * *

We conclude that plaintiff's allegations fail to "demonstrate the existence of a bona fide justiciable controversy" inasmuch as there is no "real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" … . … "[T]he heart of the dispute is not any action taken by the Sheriff but rather whether the local . . . court must remand a given [criminal] defendant such as [plaintiff] to the custody of the Sheriff." * * * Plaintiff's real dispute is with the local court that issues a securing order ostensibly

in violation of the qualifying offense provision, not with the Sheriff who is bound to obey the securing order. Where, as here, "there is no genuine dispute between the parties, the courts are precluded, as a matter of law, from issuing a declaratory judgment" … . Parker v Hilton, 2024 NY Slip Op 06456, Fourth Dept 12-20-24

Practice Point: Here the plaintiff's dispute was not with the Sheriff, who is bound to obey a securing order, but was with the local court that issued the securing order which ostensibly violated a statute and the accused's constitutional rights. Therefore there was no justiciable controversy between plaintiff and the Sheriff.

December 20, 2024

LEAVE TO DISCONTINUE, JUDGES, REAL PROPERTY LAW.

ABSENT SUBSTANTIAL PREJUDICE OR OTHER IMPROPER RESULTS, A MOTION FOR LEAVE TO DISCONTINUE THE ACTION WITHOUT PREJUDICE SHOULD BE GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for leave to discontinue the action without prejudice should have been granted:

The plaintiff and the defendants own abutting real properties located in Brooklyn. In 2019, the plaintiff commenced this action against the defendants, inter alia, for injunctive relief, alleging that the defendants, among other things, erected a concrete wall and planted grass and trees on portions of the plaintiff's property without the plaintiff's permission. The defendants, inter alia, asserted a counterclaim for adverse possession of the disputed portions of the plaintiff's property. Thereafter, the plaintiff moved pursuant to CPLR 3217(b) for leave to discontinue the action without prejudice. In an order dated November 17, 2022, the Supreme Court denied the plaintiff's motion. …

The Supreme Court should have granted the plaintiff's motion pursuant to CPLR 3217(b) for leave to discontinue the action without prejudice. The determination of a motion pursuant to CPLR 3217(b) for leave to discontinue an action without prejudice is within the sound discretion of the court … . "Generally such motions should be granted unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results" … . Here, the court improvidently exercised its discretion in denying the plaintiff's motion, as

there was no showing of substantial prejudice or other improper results … . KNG Realty NY Co., LLC v Halpern, 2024 NY Slip Op 06329, Second Dept 12-18-24

Practice Point: If there is no showing of substantial prejudice, a motion for leave to discontinue an action without prejudice should be granted.

December 18, 2024

NOTICE OF CLAIM, MUNICIPAL LAW, MEDICAL MALPRACTICE.

THE MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM AND THE MOTION FOR LEAVE TO RENEW SHOULD HAVE BEEN GRANTED IN THIS MEDICAL MALPRACTICE ACTION AGAINST THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (NYCHHC); CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for leave to file a late notice of claim against the New York City Health and Hospitals Corporation (NYCHHC) for medical malpractice, as well as the motion for leave to renew based upon recently disclosed medical records, should have been granted:

… [P]etitioner established a reasonable excuse for the delay, to wit, the serious medical condition of the infant, which required hospitalization of the infant after his birth, feeding through a feeding tube, and numerous medical appointments while the condition of the infant was being assessed … . Considering the overall circumstances, including the petitioner's natural predisposition to be more concerned with the infant's medical condition and the treatment those injuries required, rather than with commencing legal action during the prescribed time period, the delay in serving a late notice of claim should have been excused … . Further, in support of that branch of the petitioner's motion which was for leave to renew the petition, the petitioner submitted her medical records and an expert's affidavit, which established that NYCHHC had actual knowledge of the essential facts constituting the claim since the alleged malpractice was apparent from an independent review of the medical records … . The medical records were not submitted earlier because, although the petitioner sought her medical records in August 2022, she only received those records on December 22, 2022 … . Further, the medical records were voluminous.

Since the conduct at issue was fully documented in the medical records, the petitioner made an initial showing that NYCHHC was not prejudiced by the delay in serving the notice of claim … , and, in response, the NYCHHC made no showing of prejudice. Matter of Bergado v New York City Health & Hosps. Corp., 2024 NY Slip Op 06039, Second Dept 12-4-24

Practice Point: Here the mother of the injured infant proffered an adequate excuse for failing to timely file a notice of claim in this medical malpractice action against the NYC Health and Hospitals Corporation (NYCHHC) and demonstrated the NYCHHC had timely notice of the nature of the action and suffered no prejudice from the delay through the medical records.

Practice Point: The motion for leave to renew was properly based upon mother's recent receipt of medicals records not previously provided.

December 4, 2024

NOTICE OF CLAIM, MUNICIPAL LAW, JUDGES, VEHICLE AND TRAFFIC LAW.

PLAINTIFF'S MOTION TO AMEND THE NOTICE OF CLAIM TO ADD ALLEGATIONS WHICH MERELY AMPLIFIED THE ALLEGATIONS IN THE ORIGINAL NOTICE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's motion to amend the notice of claim in this traffic accident case should have been granted to the extent the amendment merely amplified the allegations in the original notice. By contrast, the attempts to amend the notice by adding new theories of liability were properly denied. Plaintiff, a police officer, was a passenger in a police car driven by another officer, Lassen. Plaintiff sued Lassen for negligent operation of the police car and the city for negligent supervision and training:

… Supreme Court should have granted that branch of the plaintiff's motion which was for leave to amend the complaint to add allegations relating to purported acts or omissions regarding Lassen's operation of the police vehicle, including causes of action pursuant to General Municipal Law § 205-e asserted against the City defendants and predicated upon Lassen's alleged violation of various provisions of

the Vehicle and Traffic Law regulating the operation of motor vehicles … . These causes of action were based upon the same purported acts and omissions already set forth in the notice of claim … . Since Lassen's alleged negligent and/or reckless operation of the police vehicle and the City's concomitant negligence in failing to properly supervise and/or train Lassen were set forth in the notice of claim and the complaint, the new allegations effectively "amplif[ied]" the previously asserted allegations and did not constitute "new, distinct, and independent theories of liability" … . The fact that the proposed amended complaint alleged violations of statutory provisions not set forth in the notice of claim or original complaint, was not, standing alone, a basis to deny leave to amend … . Since the notice of claim "provided information . . . sufficient to alert the [defendants] to the potential [General Municipal Law § 205-e] cause[s] of action" predicated upon Lassen's alleged failure to properly operate the police vehicle … , the court should not have denied that branch of the plaintiff's motion which was for leave to amend the complaint to add those allegations on the ground that they were outside the existing notice of claim. Mitchell v Jimenez, 2024 NY Slip Op 06192, Second Dept 12-11-24

Practice Point: A motion to amend a notice of claim which seeks to amplify allegations in the original notice should be granted. A motion to amend a notice of claim which seeks to add new theories of liability is properly denied.

December 11, 2024

RENEW, MOTION TO, JUDGES.

WHERE A MOTION TO RENEW IS NOT BASED UPON A CHANGE IN THE LAW, THERE IS NO TIME LIMIT FOR BRINGING THE MOTION (SECOND DEPT).

The Second Department, reversing Supreme Court, noted that there was no time limit for bringing a motion to renew:

Contrary to the court's determination, "[e]xcept where a motion to renew is based upon a change in the law, which is not the case here, CPLR 2221 does not impose a time limit for making a motion for leave to renew" … . Since the plaintiff's prior motion had been denied with leave to renew, the plaintiff was not required to demonstrate a reasonable justification for his failure to submit the new facts on the

prior motion … . Smith v Realty on Fox Croft Corp., 2024 NY Slip Op 06371, Second Dept 12-18-24

Practice Point: If a motion to renew is not based upon a change in the law, there is no time limit for bringing the motion.

December 18, 2024

SERVICE OF PROCESS, CORPORATION LAW, EMPLOYMENT LAW.

PLAINTIFF DID NOT PROVE DEFENDANT OWNER OF DEFENDANT CORPORATION WAS PROPERLY SERVED WITH THE SUMMONS AND COMPLAINT BY SUBSTITUTE SERVICE; EVEN PROPER SUBSTITUTE SERVICE WOULD NOT BE SUFFICIENT TO ACQUIRE PERSONAL JURISDICTION OVER A CORPORATION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant owner of defendant corporation (Tatiana Batin) and the corporation (Godess … Spa …) were not properly served with the summons and complaint in this action alleging an employee of defendant corporation sexually abused plaintiff during a massage:

… [P]laintiff failed to demonstrate by a preponderance of the evidence that Batin was properly served with the summons and complaint pursuant to CPLR 308(2). The hearing evidence established that the address at which Batin was purportedly served pursuant to CPLR 308(2) was neither her actual dwelling place nor her usual place of abode as of the purported date of service … . Contrary to the Supreme Court's determination, "'[e]ven if a defendant eventually acquires actual notice of the lawsuit, actual notice alone will not sustain the service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions of service'" … .

… [P]laintiff failed to demonstrate by a preponderance of the evidence that Goddess was properly served pursuant to CPLR 311(a)(1), which required delivery of the summons and complaint to "an officer, director, managing or general agent, or . . . any other agent authorized . . . to receive service." "Personal service on a corporation must be made to one of the persons authorized by the statute to accept service, and an attempt to serve such person by substitute service pursuant to

CPLR 308(2) or (4) will be insufficient to acquire jurisdiction over the corporation" … . Here, even assuming, arguendo, that Batin had been properly served pursuant to CPLR 308(2), substituted service upon her pursuant to CPLR 308(2) would be insufficient to acquire personal jurisdiction over Goddess, as CPLR 311(a)(1) requires personal service directly upon a corporate representative … . Flatow v Goddess Sanctuary & Spa Corp., 2024 NY Slip Op 06029, Second Dept 12-4-24

Practice Point: At the hearing plaintiff did not prove defendant owner of defendant corporation was properly served with the summons and complaint by substitute service.

Practice Point: Personal jurisdiction over a corporation cannot be acquired by substitute service.

December 4, 2024

STANDING, ENVIRONMENTAL LAW, EVIDENCE.

SMI, A SOLID WASTE TREATMENT FACILITY, RAISED A SEQRA CHALLENGE TO A LOCAL LAW ALLOWING THE CONSTRUCTION OF A SOLID WASTE TREATMENT FACILITY IN THE TOWN OF SENECA FALLS; ALTHOUGH SMI ALLEGED THE NEW FACILITY WOULD CAUSE IT ECONOMIC LOSS, SMI DID NOT ALLEGE IT WOULD SUFFER ENVIRONMENTAL INJURY; THEREFORE SMI DID NOT HAVE STANDING TO CHALLENGE THE LOCAL LAW (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined SMI, the owner of a solid waste management facility, did not have standing to challenge, pursuant to the State Environmental Quality Review Act (SEQRA), a local law allowing the construction of a solid waste management facility in the Town of Seneca Falls. SMI's claim it would suffer economic loss if the new facility is constructed was not enough to confer standing:

Those seeking to raise a SEQRA challenge must establish both "an environmental injury that is in some way different from that of the public at large, and . . . that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA" … .

… Although "[a] property owner in nearby proximity to premises that are the subject of [an agency] determination may have standing to seek judicial review without pleading and proving special damages, because adverse effect or aggrievement can be inferred from the proximity" … , the "status of neighbor does not . . . automatically provide the entitlement . . . to judicial review in every instance" … . The petitioner must also establish "that the interest asserted is arguably within the zone of interest to be protected by the statute" … .

Here, SMI failed to establish, or even allege, that it had suffered or would suffer an environmental injury. SMI submitted, inter alia, the affidavit of its managing director, who averred only that SMI would suffer economic injuries if the local law was not annulled. Although SMI, as the owner of a solid waste management facility, is entitled to a presumption that it would, in fact, suffer such economic harm, it failed to establish that it has standing to raise a SEQRA challenge because economic injury does not fall within the zone of interest SEQRA seeks to protect … . Matter of Seneca Meadows, Inc. v Town of Seneca Falls, 2024 NY Slip Op 06435, Fourth Dept 12-20-24

Practice Point: To demonstrate standing, a party bringing a SEQRA challenge must demonstrate an environmental injury which is in some way different from that of the public at large. Here no environmental injury was alleged. Therefore standing was not demonstrated.

December 20, 2024

STATUTE OF LIMITATIONS, LEGAL MALPRACTICE, CONTINUOUS REPRESENTATION DOCTRINE.

PLAINTIFFS RAISED QUESTIONS OF FACT WHETHER THE CONTINUOUS REPRESENTATION DOCTRINE APPLIED TO RENDER THE LEGAL MALPRACTICE CAUSES OF ACTION TIMELY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact whether the continuous representation doctrine applied to render legal malpractice causes of action timely:

The statute of limitations for a cause of action alleging legal malpractice is three years (see CPLR 214[6]). "However, causes of action alleging legal malpractice

which would otherwise be barred by the statute of limitations are timely if the doctrine of continuous representation applies" … . "For the continuous representation doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice" … . "[A] person [is not] expected to jeopardize his [or her] pending case or his [or her] relationship with the attorney handling that case during the period that the attorney continues to represent the person. Since it is impossible to envision a situation where commencing a malpractice suit would not affect the professional relationship, the rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed" … . Dellwood Dev., Ltd. v Coffinas Law Firm, PLLC, 2024 NY Slip Op 06184, Second Dept 12-11-24

Practice Point: Here there were questions of fact whether the continuous representation doctrine applied to render the legal malpractice causes of action timely.

December 11, 2024

STATUTE OF LIMITATIONS, FORECLOSURE.

THE FORECLOSURE ACTION WAS TIMELY COMMENCED WHEN THE SUMMONS AND COMPLAINT WERE FILED IN 2013; THE COURT ERRED IN DEEMING THE ACTION COMMENCED WHEN THE SUMMONS AND COMPLAINT WERE SERVED IN 2022 (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the foreclosure action was timely, noting that the time the foreclosure action was commenced was when the summons and complaint were filed, not when they were served:

The sole issue this Court is tasked with addressing is whether the action was timely commenced. "An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213 [4]), which begins to run from the due date of each unpaid installment, from the date the mortgagee is entitled to demand full payment, or from the date the mortgage debt has been accelerated" … . Acceleration occurs when, among other things, a lender demands payment in full by commencing a foreclosure action … . The operative date for determining whether a claim was

interposed within the limitations period is the date of commencement, and "an action is commenced upon the filing of the summons and complaint, not service" … .

Supreme Court incorrectly determined that plaintiff's claim was interposed upon [defendant] Coppola when she was served with process in January 2022, rather than upon the filing of the summons and complaint in September 2013 … . Deutsche Bank Trust Co. Ams. v DiGioia, 2024 NY Slip Op 06403, Third Dept 12-19-24

Practice Point: The foreclosure action was commenced when the summons and complaint were filed in 2013, not when they were served in 2022.

December 19, 2024

STATUTE OF LIMITATIONS, COVID TOLLS.

THE STATUTE OF LIMITATIONS FOR THIS SLIP AND FALL CASE WAS SUSPENDED DURING THE COVID TOLLS, RENDERING THE ACTION TIMELY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the slip and fall action was timely brought because the running of the statute of limitations was suspended during the COVID tolls:

On March 20, 2020, then-Governor Andrew Cuomo issued Executive Order (A. Cuomo) No. 202.8, 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" … . Then-Governor Cuomo issued a series of nine subsequent executive orders that extended the tolling period, eventually through November 3, 2020 … . "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" … .

Here, 651 days of the 1,096-day limitation period had elapsed by the time the toll began on March 20, 2020. Upon the expiration of the toll on November 3, 2020,

the remaining 445 days of the limitation period began to run again, expiring on January 22, 2022. Thus, the action was timely commenced on June 17, 2021 … . Jackson v Goodfellas Pizzeria, Inc., 2024 NY Slip Op 06454, Fourth Dept 12-20-24

Practice Point: The COVID tolls suspended the running of statutes of limitations from March 20, 2020, to November 3, 2020.

December 20, 2024

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