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THE MOTIONS TO AMEND THE COMPLAINT AND JOIN AN ACTION SHOULD HAVE BEEN GRANTED; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motions to amend the complaint and to join another action should have been granted. The proposed amendment was not time-barred because the original complaint gave notice of the transactions and occurrences upon which the amendment is based. The motion to join another action should have been granted because there were common questions of law or fact and defendants would not be prejudiced:

While a proposed amendment generally is considered patently devoid of merit if it is time-barred under the applicable statute of limitations" … , here, the proposed amendment relates back to the original complaint and is deemed to have been timely interposed because the original complaint gave "notice of the transactions, occurrences, or series of transactions or occurrences" on which the claims in the proposed amended complaint were based (CPLR 203[f] …). [Defendants] failed to establish that they were prejudiced or surprised by the plaintiff's delay in seeking leave to amend the complaint, as discovery was still ongoing at the time the plaintiff's motion was made … , the proposed amended complaint was "premised upon the same facts, transactions, or occurrences" alleged in the original complaint … , and the proposed amendment merely elaborated on the same theory of liability alleged in the original complaint … . …

The Supreme Court also improvidently exercised its discretion in denying that branch of the plaintiff's motion which was pursuant to CPLR 602(a) to join Action No. 2 with Action No. 1 for purposes of trial. "Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" … . Here, Action No. 1 and Action No. 2 both arise from the project, concern the same parties, and involve common questions of law and fact … , and a failure to try the two actions jointly would result in a "duplication of trials, unnecessary costs and expense, and a danger of an injustice resulting from divergent decisions" … . Contrary to the contentions of KGD and OLA, the

possibility of prejudice resulting from a joint trial can be mitigated by appropriate jury instructions … , and any potential prejudice is outweighed by the possibility of inconsistent verdicts if separate trials ensue … . Great Neck Lib. v Kaeyer, Garment & Davidson Architects, P.C., 2025 NY Slip Op 01613, Second Dept 3-19-24

Practice Point: Consult this decision for the criteria for amending a complaint, including a determination whether the amendment is time-barred (it is not if the original complaint gave notice of the transactions or occurrences referenced in the amendment).

Practice Point: Consult this decision for the criteria for consolidating two actions which involve common questions of law or fact.

March 19, 2025

CHILD VICTIMS ACT, INSUFFICIENT CLAIM, COURT OF CLAIMS.

THE INFORMATION IN THE CHILD-VICTIMS-ACT CLAIM WAS NOT SPECIFIC ENOUGH TO ALLOW THE STATE TO INVESTIGATE THE ALLEGATIONS OF SEXUAL ABUSE BETWEEN 1986 AND 1990; CLAIM DISMISSED (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Halligan,, determined the Child Victims Act claim did not provide sufficient information to allow the State to investigate the allegations of sexual abuse between 1986 and 1990:

… [W]e conclude that Wright's [claimant's] claim lacks the specificity section [Court of Claims Act] 11 (b) requires. Because the allegations are too spare to enable the State promptly to investigate and ascertain the existence and extent of its liability, the claim suffers a jurisdictional defect and therefore must be dismissed.

The claim lacks critical information about the abusers. It alleges that the perpetrators included teachers, coaches, counselors, and perhaps other employees of the State, but it does not explain whether those employees were Wright's

teachers, coaches, and counselors, or why, as a child, he was in their company multiple times between 1986 and 1990. The claim also alleges that members of the public were responsible for some of the abuse he suffered, but it does not explain why Wright came into contact with those persons as a child, the context in which adult supervision of any particular activity allegedly should have been provided, or the extent to which the State bore responsibility for Wright's contact with the abusers. Nor does the claim adequately allege what repeatedly brought Wright to The Egg [a State performing arts center] over a four-year period in the late 1980s, or why, once on the premises, he frequently engaged with both members of the public and State employees.

In the absence of such information, the State cannot promptly investigate the claim and determine its liability under Wright's theories of negligence. … The State is left to "guess" whether at any point during the four-year period alleged in the claim it owed some duty to Wright and, if so, whether it breached that obligation … . But it "is not the State's burden . . . to assemble information" not included in a claim so that it may promptly investigate and assess its liability … . Section 11 (b) places that burden on the claimant. Wright v State of New York, 2025 NY Slip Op 01564, CtApp 3-18-25

Practice Point: If the claim in a Child Victims Act suit against the State does not provide enough information to allow the State to investigate, it will be deemed to lack the specificity required by Court of Claims Act section 11 (b) and will be dismissed.

March 18, 2025

CONTRACTUAL STATUTE OF LIMITATIONS, EMPLOYMENT LAW, CIVIL RIGHTS LAW, CONTRACT LAW.

THE SIX-MONTH STATUTE OF LIMITATIONS IN THE EMPLOYMENT CONTRACT WITH PLAINTIFF WAS REASONABLE AND ENFORCEABLE; THEREFORE PLAINTIFF'S EMPLOYMENT DISCRIMINATION ACTION, WHICH WAS COMMENCED SIX MONTHS AND ONE DAY AFTER PLAINTIFF'S EMPLOYMENT WAS TERMINATED, WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the six-month statute of limitations in the employment contract with plaintiff was reasonable and enforceable. Therefore plaintiff's action, which was commenced one day after the six-month limitation period had expired, was time-barred:

"Parties to a contract may agree to limit the period of time within which an action must be commenced to a period shorter than that provided by the applicable statute of limitations" … . "'[A]n agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to [*2]commence an action is enforceable provided it is in writing'" … . CPLR 201 provides that an action "must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement."

Pursuant to CPLR 3211(a)(5), "'a moving defendant must establish, prima facie, that the time within which to commence the action has expired'" … . Once this threshold showing is met, the burden then shifts to the plaintiff to "'raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether the action was actually commenced within the applicable limitations period'" … .

Here, the defendants produced the employment application, which contained the provision regarding the six-month limitations period and which was signed by the plaintiff. The plaintiff does not dispute that her employment was terminated on November 23, 2021. The defendants therefore established … that the limitations period expired on May 23, 2022. The plaintiff commenced this action on May 24,

2022, one day after the expiration of the limitations period. Salati v Northwell Health, 2025 NY Slip Op 01660, Second Dept 3-19-25

Practice Point: Here the six-month statute of limitations in plaintiff's employment contract was deemed reasonable and enforceable. Therefore plaintiff's employment discrimination action, commenced six months and one day after her employment was terminated, was time-barred.

March 19, 2025

FRAUDULENT SCHEME TO INFLATE RENTS, FOUR-YEAR LOOKBACK, LANDLORD-TENANT, MUNICIPAL LAW.

TO SUFFICIENTLY ALLEGE THE APPLICABILITY OF THE FRAUD EXCEPTION TO THE FOUR-YEAR LOOKBACK FOR A "FRAUDULENT SCHEME TO INFLATE RENTS" ACTION, THE PLAINTIFF NEED NOT ALLEGE RELIANCE ON A FRAUDULENT REPRESENTATION; IT IS ENOUGH TO ALLEGE SUFFICIENT INDICIA OF FRAUD OR A COLORABLE CLAIM OF FRAUD (CT APP).

The Court of Appeals, reversing (modifying) the Appellate Division, in a full-fledged opinion by Judge Garcia, determined that to sufficiently allege the applicability of the fraud exception to the four-year statute of limitations ("lookback" period) in a "fraudulent scheme to inflate rents" action, a plaintiff need not allege satisfaction of each element of common-law fraud (including reliance), rather the plaintiff need only allege "sufficient indicia" of fraud:

… [T]he fraud exception serves a far different purpose than an allegation of common law fraud. The fraud exception, applicable only to an overcharge claim, simply allows for review of the rental history outside the four-year lookback period and then … "solely to ascertain whether fraud occurred—not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations" … . The exception operates to protect not only current tenants, who may or may not have relied on a fraudulent representation, but future tenants and the overall rent regulatory system. Requiring that a tenant show

reliance on a landlord's fraudulent representation would exempt an "unscrupulous landlord in collusion with a tenant" from the consequences of engaging in a scheme to evade the law's protection … . Given the narrow purpose and scope of the fraud exception, there is no basis for imposing the pleading requirements of a common law fraud claim. Instead, we require plaintiffs to put forth "sufficient indicia of fraud" or a "colorable claim" of a fraudulent scheme but do not impose a burden to establish each element of a common law fraud claim.

… [T]o invoke the fraud exception, a plaintiff must allege sufficient indicia of fraud, or a colorable claim of a fraudulent scheme to evade the protections of the rent stabilization laws, to withstand a motion to dismiss on statute of limitations grounds. Such allegations must include more than an assertion that a tenant was overcharged—a mere allegation of a high rent increase is insufficient for the fraud exception to apply … We address only the reliance issue here. On remittal the Appellate Division should apply our established standard—assessing whether plaintiffs' complaint alleges sufficient indicia of fraud or a colorable claim of a fraudulent scheme "to remove tenants' apartment from the protections of rent stabilization" … . Burrows v 75-25 153rd St., LLC, 2025 NY Slip Op 01669, CtApp 3-20-25

Practice Point: Consult this opinion for insight into what the complaint must allege to invoke the fraud exception to the four-year lookback period for a "fraudulent scheme to inflate rents" action.

March 20, 2025

DISCOVERY, NEGLIGENCE, JUDGES.

PLAINTIFF ALLEGED DEFENDANT HOSPITAL WAS NEGLIGENT IN PLACING HIM IN A ROOM WITH A PERSON WITH COVID; PLAINTIFF WAS ENTITLED TO DISCOVERY OF THAT PERSON'S MEDICAL RECORDS TO DETERMINE WHEN THE HOSPITAL BECAME AWARE OF THE COVID DIAGNOSIS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff was entitled to discovery of another's medical records. Plaintiff alleged the hospital was negligent in placing plaintiff in a room with a person with COVID. The sought medical records may reveal when the hospital became aware of the COVID diagnosis:

Although "discovery determinations rest within the sound discretion of the trial court, the Appellate Division is vested with a corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse" … . CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "What is material and necessary is left to the sound discretion of the lower courts and includes any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" … .

Pursuant to CPLR 4504 (a), "a person authorized to practice medicine . . . shall not be allowed to disclose any information which [they] acquired in attending a patient in a professional capacity, and which was necessary to enable [them] to act in that capacity." The physician-patient privilege may be overcome, however, where the plaintiff establishes that the information in the medical records is material and necessary to their claim … . Here, plaintiffs established that the nonparty patient's hospital records would show when defendant, its agents, servants and employees became aware that the patient had tested positive for COVID-19 and that such information is material and necessary to establish whether defendant had notice that it was placing plaintiff in the same room as a person who had COVID-19 … . Martin v Kaleida Health, 2025 NY Slip Op 01756, Fourth Dept 3-21-25

Practice Point: Here plaintiff was entitled to limited discovery of another's medical records because the records were "material and necessary to the prosecution of the action."

March 21, 2025

DUE PROCESS, FAMILY LAW, JUDGES, ATTORNEYS, EVIDENCE.

MOTHER, WHO WAS REPRESENTING HERSELF IN THIS TERMINATION-OF-PARENTAL-RIGHTS PROCEEDING, WAS DENIED DUE PROCESS BY THE JUDGE'S (1) COMMENCING THE HEARING WITHOUT HER, (2) SUBSEQUENTLY EXCLUDING HER FROM THE COURTROOM, (3) DENYING HER REQUEST FOR DOCUMENTS WHICH WERE IN EVIDENCE, (4) AND DENYING HER REQUEST FOR AN ADJOURNMENT TO CONSULT WITH HER LEGAL ADVISOR (SECOND DEPT).

The Second Department, reversing Family Court, determined mother, who was representing herself, was deprived of her right to due process in this termination of parental rights proceeding by "a confluence of factors:"

"A parent has a due process right to be present during proceedings to terminate parental rights". Nonetheless, "[a] parent's right to be present for fact-finding and dispositional hearings in proceedings to terminate parental rights is not absolute" … . "The child whose guardianship and custody is at stake also has a fundamental right to a prompt and permanent adjudication" … . "Thus, when faced with the unavoidable absence of a parent, a court must balance the respective rights and interests of both the parent and the child in determining whether to proceed" … .

Here … the mother was deprived of her due process right to be present in the proceedings seeking to terminate her parental rights. First, the Family Court determined to commence the hearing in the mother's absence, even though she was proceeding pro se and had made representations to the court through her legal advisor that she had been directed to quarantine by her medical provider and was requesting an adjournment … . Notably, the record does not indicate that the

mother had a history of failing to appear, nor did the court apparently rely on that factor in deciding to commence the hearing in the mother's absence … .

Furthermore, when the hearing continued one week later, the Family Court improvidently exercised its discretion in denying the mother's requests, among other things, for a copy of her own court-ordered psychiatric evaluation, which, at that point, was in evidence, and for additional time to obtain a court transcript and to consult with her legal advisor. Perhaps most significantly, the court abused its discretion in excluding the mother from the courtroom for the remainder of the hearing, without the issuance of a warning and with knowledge of the mother's diagnoses contained in the psychiatric evaluation … . Thus, on both dates of the hearing, the mother was left without an advocate … . Matter of Justina C. M. J. (Chantilly J.), 2025 NY Slip Op 01805, Second Dept 3-26-25

Practice Point: Here mother was denied the right to be present in the termination-of-parental-rights proceeding, was denied access to evidence and her request for an adjournment to consult with her legal advisor was denied. Cumulatively mother was denied her right to due process.

March 26, 2025

FACTUAL HEARING REQUIRED BEFORE LEGAL ISSUE IS ADDRESSED, APPEALS, ATTORNEYS, JUDGES.

WHERE THERE IS A FACTUAL DISPUTE ON A MATERIAL ISSUE WHICH MUST BE RESOLVED BEFORE THE COURT CAN DECIDE A LEGAL ISSUE, THE FACTUAL DISPUTE MUST BE RESOLVED IN A HEARING BEFORE THE COURT CAN DECIDE THE LEGAL ISSUE; WHETHER THE RECORD GIVES RISE TO A FACTUAL DISPUTE ON A MATERIAL ISSUE IS A QUESTION OF LAW (CT APP).

The Court of Appeals, reversing the Appellate Division, determined a factual dispute about whether an attorney (Santamarina) validly waived personal jurisdiction on behalf of defendant Koukis required a hearing:

Supreme Court decided Mr. Koukis's motion without a factual hearing, holding that Mr. Santamarina lacked authority to act on Mr. Koukis's behalf and vacating his waiver of personal jurisdiction and service defenses. But Supreme Court concluded that personal jurisdiction existed over Mr. Koukis pursuant to CPLR 302 (a) (2). It therefore set the matter down for a traverse hearing to determine if service on Mr. Koukis of the summons and complaint was proper.

Before the traverse hearing occurred, the Appellate Division modified the order of Supreme Court by vacating the default judgment and granting Mr. Koukis's motion to dismiss based upon a lack of jurisdiction. The Appellate Division held that "there was no basis to conclude that Koukis authorized Santamarina to appear and waive all jurisdictional defenses on his behalf" … . Additionally, the majority departed from Supreme Court in its analysis of CPLR 302 (a) (2), concluding that the court did not have personal jurisdiction and dismissing the complaint in its entirety … . Two Justices partially dissented on the ground that Supreme Court should have held a hearing to determine whether Mr. Santamarina had the authority to represent Mr. Koukis … . We now reverse on the basis that there is a material factual dispute as to whether Mr. Koukis authorized or ratified the waiver of personal jurisdiction

[Plaintiff] was entitled to a factual hearing to determine whether Mr. Santamarina validly appeared on Mr. Koukis's behalf and waived personal jurisdiction. Where

the record shows a "factual dispute on a material point which must be resolved before the court can decide the legal issue," the court may not grant the motion without first holding a hearing (… see … CPLR 2218). Whether the record gives rise to such a factual dispute is a question of law … .Gibson, Dunn & Crutcher LLP v Koukis, 2025 NY Slip Op 01565, CtApp 3-18-25

Practice Point: Here there was a factual dispute on a material issue which had to be decided before the related legal question could be answered. Therefore a hearing was required to resolve the factual issue before the court addressed the legal issue. Whether a factual dispute on a material issue exists raises a question of law.

March 18, 2025

LAW OFFICE FAILURE, FAILURE TO ANSWER SUMMARY JUDGMENT MOTION, LABOR LAW-CONSTRUCTION LAW, JUDGES.

IN REINSTATING THE ACTION AFTER VACATING THE ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS', THE SECOND DEPARTMENT EXPLAINED WHAT SHOULD BE ALLEGED IN A COMPLAINT FOR LABOR LAW 240(1), 241(6) AND 200 CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate the order granting defendants' motion for summary judgment in this Labor Law 240(1), 241(6) and 200 action should have been granted. Plaintiff fell through the roof of the building he was working on. Apparently plaintiff failed to answer the summary judgment motion because of law office failure. In reinstating the action, the Second Department noted that the causes of action had been adequately pled as follows:

"'Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks'" … . "'To impose liability pursuant to Labor Law § 240(1), there must be a violation of the statute and that violation must be a proximate cause of the plaintiff's injuries'" … . Here, the plaintiff alleged that his fall through the roof was

the result of an elevation-related hazard caused by the failure to keep necessary safety devices in place and identified the defendants as the owners of the premises. …

"'Labor Law § 241(6) imposes on owners and contractors a nondelegable duty to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed'" … . "'To establish liability under Labor Law § 241(6), a plaintiff or a claimant must demonstrate that his [or her] injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case'" … . Here, the plaintiff alleged that he was employed in an area where construction was being performed and that his injuries were proximately caused by the failure to comply with applicable statutes, ordinances, rules, and regulations. ….

"'Labor Law § 200 essentially codifies landowners' and general contractors' common-law duty to maintain a safe workplace'" … . "'Where a plaintiff's claims implicate the means and methods of the work, an owner or contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work'" … . Here, the plaintiff alleged that the defendants failed to provide a safe place to work and that the defendants controlled and supervised the work at issue. Bayron Chay Mo v Ultra Dimension Place, LLC, 2025 NY Slip Op 01338, Second Dept 3-12-25

Practice Point: Consult this decision for a clear explanation of what should be alleged in the complaint for Labor Law 240(1), 241(6) and 200 causes of action.

March 12, 2025

NOTICE BEFORE ENTRY OF DEFAULT JUDGMENT, FORECLOSURE.

WHERE IT HAS BEEN MORE THAN A YEAR SINCE DEFENDANT FAILED TO ANSWER THE COMPLAINT, THE DEFENDANT IS ENTITLED TO NOTICE BEFORE ENTRY OF A DEFAULT JUDGMENT; HERE THE FAILURE TO GIVE DEFENDANT NOTICE RENDERED THE DEFAULT JUDGMENT A NULLITY (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined it had been more than a year since defendant Callahan had failed to answer the complaint and, therefore, Callahan was entitled to notice before a default judgment could be entered. No notice was given:

"Pursuant to CPLR 3215(g)(1), 'whenever application [for judgment by default] is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise'" … . "[T]he failure to provide a defendant who has appeared in an action with the notice required by CPLR 3215(g)(1), like the failure to provide proper notice of other kinds of motions, is a jurisdictional defect that deprives the court of the authority to entertain a motion for leave to enter a default judgment" … . As such, "'the failure to provide a defendant with proper notice of a motion renders the resulting order and judgment entered upon that order nullities'" … . Flagstar Bank, FSB v Powers, 2025 NY Slip Op 01610, Second Dept 3-19-25

Practice Point: Where it has been more than a year since defendant failed to answer a complaint, the defendant is entitled to notice before entry of a default judgment. Failure to provide notice renders the judgment a nullity.

March 19, 2025

PLENARY ACTION VS ARTICLE 78, EMPLOYMENT LAW, CONTRACT LAW, EDUCATION-SCHOOL LAW.

IN ORDER TO SEEK COURT REVIEW OF AN ALLEGED VIOLATION OF A COLLECTIVE BARGAINING AGREEMENT BY AN EMPLOYER AND/OR A UNION, AN EMPLOYEE MUST BRING A PLENARY ACTION, NOT AN ARTICLE 78 PROCEEDING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, affirming the dismissal of appellant-employee's Article 78 petition, determined an employee who has exhausted the contractual grievance process and alleges the employer breached a collective bargaining agreement must bring a plenary action, not an Article 78 proceeding, for any further review:

… [W]hen a claim arises under a collective bargaining agreement that creates a mandatory grievance process, the employee "may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract. Unless the contract provides otherwise, only when the union fails in its duty of fair representation can the employee go beyond the agreed procedure and litigate a contract issue directly against the employer" … . Allegations that an employer has breached the collective bargaining agreement are contract claims that may not be resolved in an article 78 proceeding … . Thus, when an employee alleges that an employer has breached a term in a collective bargaining agreement, the proper mechanism is a plenary action alleging both breach of contract by the employer and breach of the duty of fair representation by the union … . * * *

The procedure applicable to an employee's claim depends on the source of the right or benefit the employee asserts. Statutory or constitutional claims are appropriately brought in an article 78 proceeding … . Claims arising exclusively from an alleged breach of a term in a collective bargaining agreement must be brought through a civil action for breach of contract … and must meet the requirements set out in Ambach (70 NY2d at 508). Matter of Dourdounas v City of New York, 2025 NY Slip Op 01671, CtApp 3-20-25

Practice Point: An employee who, after exhausting the grievance mechanism in a collective bargaining agreement, seeks court review of whether the employer

and/or the union breached the collective bargaining agreement must bring a plenary action, not an Article 78 proceeding.

March 20, 2025

PIERCE CORPORATE VEIL, LIMITED LIABILITY COMPANY LAW, CORPORATION LAW, FRAUD.

THE COMPLAINT SUFFICIENTLY ALLEGED FACTS THAT WOULD SUPPORT PIERCING THE CORPORATE VEIL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the cause of action alleging that the corporate veil should be pierced should not have been dismissed. The complaint alleged failure to adhere to LLC formalities, inadequate capitalization, commingling of assets, and the personal use of LLC funds:

"To survive a motion to dismiss the complaint, a party seeking to pierce the corporate veil must allege facts that, if proved, establish that the party against whom the doctrine is asserted (1) exercised complete domination over the corporation with respect to the transaction at issue, and (2) through such domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the plaintiff such that a court in equity will intervene" … . "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to LLC formalities, inadequate capitalization, commingling of assets, and the personal use of LLC funds" … . "Additionally, the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" … . "[A] fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss" … . Goldberg v KOSL Bldg. Group, LLC, 2025 NY Slip Op 01790, Second Dept 3-26-25

Practice Point: Here the allegations in the complaint that defendant failed to adhere to LLC formalities, inadequately capitalized the corporate entities, commingled assets, and personally used LLC funds sufficiently supported plaintiff's seeking to pierce the corporate veil.

March 26, 2025

PUNITIVE DAMAGES, MUNICIPAL LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

THE TREBLE DAMAGES PROVISION IN RPAPL 861 FOR THE IMPROPER TRIMMING OR REMOVAL OF TREES FROM ANOTHER'S PROPERTY IS PUNITIVE IN NATURE; HERE THE TOWN TRIMMED AND REMOVED TREES FROM PLAINTIFF'S LAND; BECAUSE A MUNICIPALITY CANNOT BE ASSESSED PUNITIVE DAMAGES, THE TREBLE DAMAGES AWARD WAS REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the treble damages provision in RPAPL 861 is punitive in nature and therefore cannot be imposed upon a municipality. Here the town removed and trimmed trees along a roadway. Plaintiff, the owner of the land abutting the road, sued and was awarded treble damages. The Appellate Division had concluded the treble damages provision was compensatory, not punitive:

RPAPL 861 provides that "[i]f any person, without the consent of the owner thereof, cuts, removes, injures or destroys . . . tree[s] or timber on the land of another . . . an action may be maintained against such person for treble the stumpage value of the tree or timber or two hundred fifty dollars per tree, or both and for any permanent and substantial damage caused to the land or the improvements thereon . . . ." … .

* * * Treble damages are the default measure for any recovery, but the statute also provides that "if the defendant establishes by clear and convincing evidence, that when the defendant committed the violation, he or she had cause to believe the land was his or her own, or that he or she had an easement or right of way across

such land which permitted such action, or he or she had a legal right to harvest such land, then he or she shall be liable for the stumpage value or two hundred fifty dollars per tree, or both . . . .” …

In other words, the defendant’s good faith “does not insulate that person from the imposition of statutory damages, but merely saves him or her from having to pay the plaintiff treble damages” .. . * * *

The “good faith” provision in RPAPL 861 demonstrates the punitive nature of the treble damages available under the statute. Matter of Rosbaugh v Town of Lodi, 2025 NY Slip Op 01406, CtApp 3-13-25

Practice Point: Here the statute allowed treble damages for the removal of trees only if the removal was not in good faith. Therefore the treble damages provision was punitive in nature. Punitive damages cannot be assessed against a municipality, here the town which removed the trees.

March 13, 2025

RES JUDICATA, CONTRACT LAW, FRAUD.

HERE THE PLAINTIFF WAS IN PRIVITY WITH A NONPARTY WHICH WAS DEEMED TO HAVE HAD A “VICARIOUS DAY IN COURT” SUCH THAT THE DOCTRINE OF RES JUDICATA PRECLUDED PLAINTIFF’S ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-ledged opinion by Justice Scarpulla, determined the doctrine of res judicata required dismissal of plaintiff’s fraudulent conveyance cause of action. The lawsuit concerned disputed ownership of precious gems. The opinion is fact-specific and too complex to fairly summarize here. With respect to the application of the res judicata doctrine, the court wrote:

This appeal stems from a dispute between precious gemstone traders. Plaintiff Shanghai Pearls & Gems, Inc. … alleges that defendants … improperly transferred gems they received on consignment from nonparty Diamond Corporation Capital Group, LLC (D&M). The transferred gems included the “Pink Diamond,” in which plaintiff held a one-third interest, and the “Kashmir Sapphire.” * * *

Although defendants' settlement with D&M did not release plaintiff's original one-third interest in the Pink Diamond, plaintiff's fraudulent conveyance claims based on that interest should be dismissed because the claims are barred by res judicata. Pursuant to the doctrine of res judicata, a valid final judgment precludes "future actions between the same parties or those in privity with them on any claims arising out of the same transaction or series of transactions . . . , even if based upon different theories or if seeking a different remedy" … .

A determination that privity exist", in'the context of res judicata, must be based on a "flexible analysis" of the relationship between the party and the nonparty in the previous litigation … . This analysis, in turn, requires courts to consider "whether the circumstances of the actual relationship, the mutuality of interests, and the manner in which the nonparty's interest were represented in the earlier litigation established a functional representation such that the nonparty may be thought to have had a vicarious day in court" … .

Here, plaintiff was in privity with D&M vis-À-vis the assignment of the interests in the Pink Diamond and Kashmir Sapphire. D&M's claims against defendants in the bankruptcy proceeding and plaintiff's claims against defendants in this action "are closely related in time, space, motivation, or origin" such that the claims "arise out of the same transaction, and res judicata should apply" … . Shanghai Pearls & Gems, Inc. v Paul, 2025 NY Slip Op 01433, First Dept 3-13-25

Practice Point: Although this opinion is complicated and fact-specific, it provides useful insight into the flexibility of the "privity" element of the res judicata doctrine. Here the nonparty with which plaintiff was in privity was deemed to have had a "vicarious day in court" triggering the application of the res judicata doctrine to the plaintiff's action.

March 13, 2025

STIPULATION OF SETTLEMENT, CONTRACT LAW, LEGAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

THERE WAS NO EVIDENCE SUBSTANTIATING THE PURPORTED "OFF THE RECORD" STIPULATION OF SETTLEMENT; THE TERMS OF THE SETTLEMENT AGREEMENT WERE NEVER FILED WITH THE COUNTY CLERK; A PRETRIAL CONFERENCE WITH THE JUDGE'S CLERK DOES NOT MEET THE "OPEN COURT" REQUIREMENT FOR A STIPULATION OF SETTLEMENT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the purported stipulation of settlement of this legal malpractice action did not meet the requisite criteria and could not be enforced:

It is well settled that " '[a]n oral stipulation of settlement that is made in open court and stenographically recorded is enforceable as a contract and is governed by general contract principles for its interpretation and effect' " (… see generally CPLR 2104). Here, however, in support of her cross-motion, plaintiff failed to attach any transcripts or other evidence substantiating the purported settlement agreement. Indeed, we conclude that "[t]he record provides no basis for concluding that an enforceable stipulation was entered into between the parties" inasmuch as "[p]ertinent discussions took place off the record" … . Plaintiff also failed to establish that the terms of the settlement agreement were ever filed with the county clerk (see CPLR 2104 …).

Even if plaintiff had submitted written evidence of the parties' purported stipulation of settlement, we conclude that said stipulation was not entered in "open court" inasmuch as there is no dispute that the alleged settlement was reached during a pretrial conference with the court's law clerk … . Indeed, the "open court requirement . . . is not satisfied in locations without a Justice presiding . . . , and it is not satisfied during less formal stages of litigation, such as a pretrial conference" … . Guzman-Martinez v Rosado, 2025 NY Slip Op 01483, Fourth Dept 3-14-25

Practice Point: Consult this decision for the criteria for an enforceable stipulation of settlement, i.e., a transcript or other evidence of the terms of any oral agreement,

the filing of the terms of the agreement with the county clerk, and the entering of the agreement in open court with a judge presiding.

March 14, 2025

SUBJECT MATTER JURISDICTION, FAMILY LAW, JUDGES.

FAMILY COURT LOST SUBJECT MATTER JURISDICTION AFTER THE NEGLECT PETITION WAS DISMISSED; THEREFORE THE COURT SHOULD NOT HAV E CONTINUED THE CHILD'S PLACEMENT IN FOSTER CARE (FIRST DEPT).

The First Department, reversing Family Court, ©n a full-fledged opinion by Justice Gesmer, determined Family Court lost subject matter jurisdiction after the neglect petition against mother was dismissed. Therefore the child's placement in foster should not have been continued by the court. The First Department also noted that mother's mental-health records from the period after the filing and after the dismissal of the neglect petition were improperly admitted:

We … find that Family Court lacked subject matter jurisdiction to continue R.C.'s foster care placement for the reasons articulated in Matter of Jamie J. (Michelle E.C.) (30 NY3d 275 [2017]), in which the Court of Appeals held that "Family Court's jurisdiction terminates upon dismissal of the original neglect or abuse petition" … .

The "court's lack of subject matter jurisdiction is not waivable, but may be raised at any stage of the action, and the court may . . . on its own motion . . . at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action" … .

Here, once the neglect petition against the mother was dismissed, Family Court lacked subject matter jurisdiction to continue the child's temporary removal from the mother's care and placement in foster care … . Accordingly, it should have immediately returned the child to the mother's care and terminated the child's foster care placement. It erred when it determined that it could hold permanency hearings based on the pending neglect petition against the putative father, since the

child was not removed from his care, but from the mother's. … Indeed, there is no evidence in the record that the child ever resided with the putative father and no indication that he ever sought custody of the child.

Furthermore, we find that the failure of Family Court to immediately return the child to the care of the mother after the dismissal of the neglect petition against her—as well as the subsequent protracted proceedings, including the dispositional hearing, which lasted nearly a year and a half—violated her due process rights … . Matter of R.C. (D.C.–R.R.), 2025 NY Slip Op 01859, First Dept 3-27-25

Practice Point: Here Family Court lost subject matter jurisdiction after the neglect petition against mother was dismissed and did not have the authority to continue the child's placement in foster care.

Practice Point: The protracted proceedings after the dismissal of the neglect petition, during which the child remained in foster care, violated mother's right to due process.

March 27, 2025

SUPREME COURT VS COURT OF CLAIMS, CORRECTION LAW, NEGLIGENCE.

ALTHOUGH THE DEFENDANT STATE PAROLE OFFICER WAS DRIVING A STATE-OWNED VEHICLE AND ACTING WITHIN THE SCOPE OF HER EMPLOYMENT WHEN THE TRAFFIC ACCIDENT OCCURRED, PLAINTIFF PROPERLY BROUGHT SUIT IN SUPREME COURT AS OPPOSED TO THE COURT OF CLAIMS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the Correction Law did not require that plaintiff bring this traffic accident case involving a Department of Corrections and Community Supervision (DOCCS) parole officer in the Court of Claims. Although the defendant officer was driving a State-owned vehicle and was acting within the scope of her employment at the time of the accident, the lawsuit was properly brought in Supreme Court:

"Not every suit against an officer of the State, however, is a suit against the State" … . "A suit against a State officer will be held to be one which is really asserted against the State when it arises from actions or determinations of the officer made in his or her official role and involves rights asserted, not against the officer individually, but solely against the State" … . If, however, "the suit against the State agent or officer is in tort for damages arising from the breach of a duty owed individually by such agent or officer directly to the injured party, the State is not the real party in interest—even though it could be held secondarily liable for the tortious acts under respondeat superior" … .

Correction Law § 24 (2) provides that claims for damages "arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties" of any State employee shall be brought in the Court of Claims as claims against the State. Thus, Correction Law § 24 "places actions for money damages against [DOCCS] employees within the jurisdiction of the Court of Claims only where the conduct alleged is within the scope of the officer's employment and in the discharge of his or her official duties" … .

Here, the complaint asserts a single cause of action based on allegations that defendant operated the vehicle in a negligent manner, i.e., that defendant's alleged negligence arises from her violation of a duty she owed plaintiff as a fellow driver, and not as a DOCCS employee. Thus, plaintiff's action is "against . . . defendant individually for an alleged breach of a duty of care owed by the defendant directly to [plaintiff], and not one against State officers as representatives of the State in their official capacity which had to be brought in the Court of Claims pursuant to Correction Law § 24" … . Maiorana v Green, 2025 NY Slip Op 01518, Fourth Dept 12-14-25

Practice Point: Although the defendant parole officer was acting within the scope of her employment when she was driving the state-owned vehicle, the traffic accident allegedly breached a duty of care owed directly to the plaintiff by the defendant as a fellow driver, not as a state employee.

March 14, 2025

SUSPENDED ATTORNEY, FORECLOSURE.

WHEN DEFENDANT'S ATTORNEY WAS SUSPENDED ANY FURTHER PROCEEDINGS IN THIS F ORECLOSURE ACTION WERE STAYED; NEITHER PROCEDURE FOR LIFTING THE STAY WAS INVOKED; DEFENDANT'S MOTION TO VACATE SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a stay of the foreclosure action was in effect because of the suspension of defendant McGrath's attorney. Because plaintiff never served McGrath with the required notice to lift the stay, the summary judgment order should have been vacated:

When an attorney is suspended from the practice of law, "as with an attorney's death, incapacitation, removal from an action, or other disability, CPLR 321© protects the client by automatically staying the action from the date of the disabling event" … . "The express language of CPLR 321© sets no particular time limit to the stay of proceedings that is automatically triggered by a qualifying event" … .

"[D]uring the stay imposed by CPLR 321©, no proceedings against the party will have any adverse effect" … , and "[o]rders or judgments that are rendered in violation of the stay provisions of CPLR 321© must be vacated" … .

"[T]here are actually two ways in which a CPLR 321© stay may be lifted. One way is if the party that lost its counsel retains new counsel at its own initiative, or otherwise communicates an intention to proceed pro se" … . "The second way is by means of [a] notice procedure pursuant to CPLR 321©" … .

Here, the plaintiff did not serve McGrath with the notice to appoint "either personally or in such manner as the court direct[ed]" (CPLR 321[c]). It is undisputed that no attempt was made to personally serve the required notice, nor is it alleged that the Supreme Court directed that service of the notice be made in some other manner … . Moreover, it is undisputed that McGrath did not communicate an intention to proceed pro se … . Therefore, the automatic stay was not lifted until McGrath opposed the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale and cross-moved to vacate the

summary judgment order … . HSBC Bank USA, N.A. v McGrath, 2025 NY Slip Op 01614, Second Dept 3-19-25

Practice Point: When a party's attorney is suspended, the proceedings are automatically stayed. There are two statutory procedures for lifting the stay, neither of which was invoked here.

March 19, 2025