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Weekly Reversal
Report
November 10 –
14, 2025

Contents

CIVIL PROCEDURE, ATTORNEYS, EVIDENCE, NEGLIGENCE.	2
ALTHOUGH PLAINTIFF’S COUNSEL IN THIS NEGLIGENCE ACTION DEMONSTRATED A JUSTIFIABLE EXCUSE FOR NOT TIMELY FILING A NOTE OF ISSUE AFTER A NINETY-DAY DEMAND, PLAINTIFF DID NOT DEMONSTRATE A MERITORIOUS CAUSE OF ACTION; PLAINTIFF SUBMITTED AN AFFIDAVIT WHICH RELIED ON HEARSAY PROVIDED BY TWO SOURCES, BUT DID NOT SUBMIT AFFIDAVITS FROM THOSE SOURCES (FIRST DEPT).	2
CIVIL PROCEDURE, CONTRACT LAW, EVIDENCE, JUDGES.	4
DEFENDANTS IN THIS BREACH OF CONTRACT ACTION SHOULD HAVE BEEN SANCTIONED FOR SPOILIATION OF EVIDENCE, I.E., THE DESTRUCTION OR LOSS OF EMAILS; PLAINTIFFS’ MOTION TO STRIKE THE ANSWER WAS PROPERLY DENIED; HOWEVER, PLAINTIFFS WERE ENTITLED TO AN ADVERSE INFERENCE JURY INSTRUCTION AT TRIAL (SECOND DEPT).	4
CIVIL PROCEDURE, CONTRACT LAW, EVIDENCE.	5
ALTHOUGH THE FAILURE TO SUBMIT A “NON-MILITARY AFFIDAVIT” DEMONSTRATING DEFENDANT IS NOT IN THE MILITARY IS A VALID GROUND FOR DENYING A MOTION TO ENTER A DEFAULT JUDGMENT, IT IS NOT A GROUND FOR VACATING A DEFAULT JUDGMENT UNLESS THE DEFENDANT DEMONSTRATES HE OR SHE WAS, IN FACT, IN THE MILITARY (SECOND DEPT).	5
CIVIL PROCEDURE, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), TRUSTS AND ESTATES.	7
IN THIS FORECLOSURE ACTION, THE REQUEST FOR A SETTLEMENT CONFERENCE PURSUANT TO CPLR 3408 WAS NOT APPROPRIATE BECAUSE THE BORROWER WAS DECEASED; BECAUSE, UNDER THE FACTS, A SETTLEMENT CONFERENCE WAS NOT A PREREQUISITE FOR FILING A DEFAULT JUDGMENT, THE REQUEST FOR A CONFERENCE DID NOT HOLD THE FORECLOSURE ACTION IN ABEYANCE AND IT SHOULD HAVE BEEN DISMISSED AS ABANDONED (FIRST DEPT).	7
CIVIL PROCEDURE, NEGLIGENCE.	9
IN THIS “BAR FIGHT” “INADEQUATE SECURITY” ACTION, THE DEFENDANT BAR HAD TIMELY SUED ITS SECURITY COMPANY AS A THIRD-PARTY DEFENDANT; AFTER THE STATUTE OF LIMITATIONS EXPIRED, PLAINTIFF SOUGHT TO SUE THE SECURITY COMPANY DIRECTLY UNDER A “RELATION BACK” THEORY; PLAINTIFF’S MOTION TO SERVE AND FILE AN AMENDED COMPLAINT AGAINST THE SECURITY COMPANY DIRECTLY SHOULD HAVE BEEN GRANTED (SECOND DEPT).	9

Table of Contents

NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.	11
QUESTIONS OF FACT WHETHER DEFENDANT POLICE OFFICER ACTED WITH “RECKLESS DISREGARD” FOR THE SAFETY OF OTHERS DURING A POLICE CHASE PRECLUDED SUMMARY JUDGMENT; PLAINTIFF POLICE OFFICER WAS INJURED WHEN HER PATROL CAR WAS STRUCK BY THE PURSUED CAR (SECOND DEPT).....	11
TRUSTS AND ESTATES, FIDUCIARY DUTY, CIVIL PROCEDURE, APPEALS.	12
THE PETITION ALLEGED THE DECEASED CO-TRUSTEE CONCEALED THE TRUST AND DISTRIBUTIONS TO THE TRUST BENEFICIARIES; PETITIONERS HAD STANDING TO SEEK DISGORGEMENT OF THE COMMISSIONS PAID TO THE DECEASED CO-TRUSTEE UNDER “BREACH OF FIDUCIARY DUTY” AND “FAITHLESS SERVANT” THEORIES (FIRST DEPT)..	12
WORKERS' COMPENSATION, EVIDENCE.....	13
CONTRARY TO THE STANDARD USED BY THE WORKERS’ COMPENSATION BOARD, AN SLU NEED NOT BE REDUCED BY THE AMOUNT OF ANY PRIOR SLU TO THE SAME PART OF THE BODY; MATTER REMITTED FOR APPLICATION OF THE PROPER STANDARD (THIRD DEPT).	13

CIVIL PROCEDURE, ATTORNEYS, EVIDENCE, NEGLIGENCE.

ALTHOUGH PLAINTIFF’S COUNSEL IN THIS NEGLIGENCE ACTION
DEMONSTRATED A JUSTIFIABLE EXCUSE FOR NOT TIMELY FILING A
NOTE OF ISSUE AFTER A NINETY-DAY DEMAND, PLAINTIFF DID NOT
DEMONSTRATE A MERITORIOUS CAUSE OF ACTION; PLAINTIFF
SUBMITTED AN AFFIDAVIT WHICH RELIED ON HEARSAY PROVIDED BY
TWO SOURCES, BUT DID NOT SUBMIT AFFIDAVITS FROM THOSE
SOURCES (FIRST DEPT).

The First Department, reversing Supreme Court, determined, although plaintiff offered a justifiable excuse for failing to timely file a note of issue, plaintiff did not demonstrate a meritorious cause of action. Therefore the complaint should have been dismissed. The complaint alleged the defendants negligently failed to provide

adequate mental health and substance abuse treatment to the decedent, who died of a drug overdose in a shelter owned and operated by defendants:

Following a period of over one year during which plaintiff failed to respond to their discovery demands, defendants served plaintiff with a written demand to serve and file a note of issue within 90 days (see CPLR 3216[b]). Plaintiff failed to respond within the 90-day period, resulting in defendants' motions to dismiss for failure to prosecute.

Although plaintiff's counsel offered a justifiable excuse for the failure to file a note of issue following defendants' service of 90-day notices, plaintiff failed to submit an adequate affidavit of merit demonstrating a meritorious cause of action in opposition to defendants' motions In her affidavit, plaintiff, who had no personal knowledge of the events in question, relied on two unnamed hearsay sources Plaintiff offered no excuse for failing to provide affidavits from the shelter residents who supplied her with the information upon which her affidavit was based . . . , and, in any event, she did not show that defendants' negligence was "a substantial cause of the events" resulting in her son's death [Felipe v Volunteers of Am.-Greater N.Y., 2025 NY Slip Op 06252, First Dept 11-13-25](#)

Practice Point: In seeking to avoid dismissal of a complaint for failing to timely file a note of issue after a 90-day demand, a plaintiff must offer a justifiable excuse and demonstrate a meritorious cause of action. Here plaintiff's counsel provided a justifiable excuse. But to demonstrate a meritorious cause of action plaintiff submitted an affidavit which relied on hearsay. Without affidavits from the sources of the hearsay, a meritorious cause of action was not demonstrated and the complaint should have been dismissed.

November 13, 2025

CIVIL PROCEDURE, CONTRACT LAW, EVIDENCE, JUDGES.

DEFENDANTS IN THIS BREACH OF CONTRACT ACTION SHOULD HAVE BEEN SANCTIONED FOR SPOILIATION OF EVIDENCE, I.E., THE DESTRUCTION OR LOSS OF EMAILS; PLAINTIFFS' MOTION TO STRIKE THE ANSWER WAS PROPERLY DENIED; HOWEVER, PLAINTIFFS WERE ENTITLED TO AN ADVERSE INFERENCE JURY INSTRUCTION AT TRIAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined defendants should have been sanctioned for spoliation of evidence, i.e., the failure to preserve relevant emails. The plaintiffs alleged defendants performed faulty renovation-work and thereby breached the renovation contract:

“Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126” “The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence” “A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable mind, and that the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense” “A culpable state of mind for [the] purposes of a spoliation sanction includes ordinary negligence” Further, “[s]triking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and, in order to impose such a sanction, the court ‘will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness’” “In contrast, where the moving party has not been deprived of the ability to establish his or her case or defense, a less severe sanction is appropriate” “[A]dverse inference charges have been found to be appropriate even in situations where the evidence has been found to have been negligently destroyed”

... [P]laintiffs demonstrated that the defendants were on notice that they had an obligation to preserve their email accounts and emails prior to the time that they were lost or destroyed. The plaintiffs also demonstrated that the emails were lost or destroyed with a culpable state of mind and that the emails were sufficiently relevant to the litigation Nonetheless, contrary to the plaintiffs' contention, the drastic remedy of striking the defendants' answer was not warranted Under the circumstances, the Supreme Court should have granted that branch of the plaintiffs' motion which was pursuant to CPLR 3126 to strike the defendants' answer to the extent of directing that an adverse inference charge be issued at trial against the defendants with respect to the loss or destruction of their email accounts and emails [Dorman v Luva of NY, LLC, 2025 NY Slip Op 06155, Second Dept 11-12-25](#)

Practice Point: Consult this decision for a concise explanation of the criteria for finding spoliation of evidence and the appropriate sanctions. In this breach of contract action, plaintiffs demonstrated defendants destroyed or lost relevant emails with a “culpable state of mind.”

November 12, 2025

CIVIL PROCEDURE, CONTRACT LAW, EVIDENCE.

ALTHOUGH THE FAILURE TO SUBMIT A “NON-MILITARY AFFIDAVIT” DEMONSTRATING DEFENDANT IS NOT IN THE MILITARY IS A VALID GROUND FOR DENYING A MOTION TO ENTER A DEFAULT JUDGMENT, IT IS NOT A GROUND FOR VACATING A DEFAULT JUDGMENT UNLESS THE DEFENDANT DEMONSTRATES HE OR SHE WAS, IN FACT, IN THE MILITARY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Genovesi, determined: (1) although the default judgement in this breach of contract action was improperly entered because a so-called “non-military affidavit” demonstrating defendant was not in the military was not submitted by the plaintiff, the absence of a “non-military affidavit” does not warrant vacatur of the default judgment unless

Table of Contents

the defendant demonstrates he or she was, in fact, in the military (not the case here); and (2) because the damages in this breach of contract action were estimated and were not for a “sum certain,” an inquest is required. Here plaintiff hired defendant to do concrete work for a construction project. The complaint alleged the work was not completed and sought estimated damages over \$900,000:

It is clear that a non-military affidavit is counted amongst the proof required for a movant to meet its burden on a motion for leave to enter a default judgment. A movant’s failure to provide a non-military affidavit is sufficient to warrant denial of such a motion in the first instance * * *

It . . . that the [New York State Soldiers’ and Sailors’ Civil Relief Act] carves out a remedy for vacatur of default judgments However, this remedy is limited to applications made “by or on behalf of the servicemember” and “for the purpose of allowing the servicemember to defend the action” under certain circumstances. The statutory text does not support the defendants’ assertion that any person may seek to vacate a default judgment based on a failure to comply with the Act. Therefore, we hold that a movant’s failure to provide a non-military affidavit does not entitle a defendant to vacatur of an otherwise validly entered default judgment as of right. Where, as here, the defaulting party has made no assertion of being on active military duty at the time of his or her default, he or she falls outside of the protection afforded by the Act. * * *

“Where the damages sought are for a ‘sum certain or for a sum which can by computation be made certain,’” CPLR 3215(a) permits the clerk, upon proper proof, to enter judgment up to the amount demanded in the complaint, without notice to the defendant Otherwise, an application to the court pursuant to CPLR 3215 is required and an inquest is appropriate to assess damages Where damages cannot be determined without extrinsic proof, an inquest is required . . .

. [Tri-Rail Designers & Bldrs., Inc. v Concrete Superstructures, Inc., 2025 NY Slip Op 06209, Second Dept 11-12-25](#)

Practice Point: The New York State Soldiers’ and Sailors’ Civil Relief Act requires a plaintiff seeking a default judgment to submit a “non-military affidavit” demonstrating defendant is not in the military. Consult this decision for instruction on how to do that. Failure to submit a “non-military affidavit” is a valid ground for

denial of a motion for a default judgment but, it is not enough to warrant vacatur of a default judgment. Defendant must prove he or she was, in fact, in the military to warrant vacatur on this ground.

Practice Point: If damages are not based on a “sum certain,” where plaintiff seeks a default judgment, an inquest to determine damages is required.

November 12, 2025

CIVIL PROCEDURE, FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), TRUSTS AND ESTATES.

IN THIS FORECLOSURE ACTION, THE REQUEST FOR A SETTLEMENT CONFERENCE PURSUANT TO CPLR 3408 WAS NOT APPROPRIATE BECAUSE THE BORROWER WAS DECEASED; BECAUSE, UNDER THE FACTS, A SETTLEMENT CONFERENCE WAS NOT A PREREQUISITE FOR FILING A DEFAULT JUDGMENT, THE REQUEST FOR A CONFERENCE DID NOT HOLD THE FORECLOSURE ACTION IN ABEYANCE AND IT SHOULD HAVE BEEN DISMISSED AS ABANDONED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the foreclosure action must be dismissed as abandoned. Plaintiff argued that its request for a settlement conference pursuant to CPLR 3408 constituted “the taking of proceedings” within one year of the default and therefore dismissal of the action as abandoned was precluded. The First Department agreed that, under the circumstances contemplated by CPLR 3408, requesting a settlement conference would demonstrate the action was not abandoned. Here, however, CPLR 3408 did not apply because the borrower was deceased and the action was brought by an executor. Because CPLR 3408 did not apply, the request for a settlement conference did not qualify as “the taking of proceedings:”

... [T]his foreclosure action must be dismissed as abandoned, because plaintiff’s argument is premised on its mistaken assumption that it was required to file an RJI seeking a mandatory conference before it could move for a default judgment. ...

... CPLR 3408(a)(1) requires a mandatory settlement conference in “a residential foreclosure action involving a home loan” where “the defendant is a resident of the property subject to foreclosure.” A mandatory conference is not required where the defendant does not reside at the property when the foreclosure action is commenced Watkins, the borrower, was not a resident of the property when the foreclosure action was commenced because he died two years earlier.

Additionally, a mandatory conference is required for “a home loan” which is defined, among other things, to include a requirement that “[t]he borrower is a natural person” (RPAPL 1304[6][a][1][i]). Here, the borrower was deceased when plaintiff commenced this action against Thomas in her capacity of executrix of Watkins’s estate. Thomas is neither a borrower, nor a natural person in this context [Municipal Credit Union v Thomas, 2025 NY Slip Op 06260, First Dept 11-13-25](#)

Practice Point: In a foreclosure action, where the criteria for a settlement conference pursuant to CPLR 3408 are met, a request for a conference within one year of a default will constitute “the taking of proceedings” and preclude dismissal of the action as abandoned. However where, as here, CPLR 3408 is inapplicable because the borrower is deceased, the request for a settlement conference did not constitute “the taking of proceedings” and did not preclude a finding of abandonment.

November 13, 2025

CIVIL PROCEDURE, NEGLIGENCE.

IN THIS “BAR FIGHT” “INADEQUATE SECURITY” ACTION, THE DEFENDANT BAR HAD TIMELY SUED ITS SECURITY COMPANY AS A THIRD-PARTY DEFENDANT; AFTER THE STATUTE OF LIMITATIONS EXPIRED, PLAINTIFF SOUGHT TO SUE THE SECURITY COMPANY DIRECTLY UNDER A “RELATION BACK” THEORY; PLAINTIFF’S MOTION TO SERVE AND FILE AN AMENDED COMPLAINT AGAINST THE SECURITY COMPANY DIRECTLY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for leave to serve and file an amended complaint adding defendant security company, MAS, after the statute of limitations had expired, should have been granted. Plaintiff was punched in a bar owned by defendant B&M. Plaintiff sued the bar alleging inadequate security, The bar then sued MAS, which provided security for the bar. MAS, therefore, was involved in the litigation as a third-party defendant before the statute of limitations expired:

Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff’s motion which was for leave to serve and file a supplemental summons and amended complaint adding MAS as a direct defendant. “In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” “Delay alone is insufficient to bar an amendment to the pleading; [i]t must be lateness coupled with significant prejudice to the other side”

Here, ... the three-year statute of limitations applicable to the plaintiff’s cause of action alleging negligence (see CPLR 214[5]) had expired by the time that the plaintiff moved ... for leave to serve and file a supplemental summons and amended complaint adding MAS as a direct defendant, whether the amendment may be allowed depends upon whether the relation-back doctrine applies (see CPLR 203[f] ...), with the burden being on the plaintiff to establish that the

doctrine applies B & M's third-party complaint and the plaintiff's proposed amended complaint arise out of the same conduct, transaction, or occurrence Also, there is no dispute that MAS was "a participant in the litigation" Moreover, "[t]he proposed amendment was not palpably insufficient or devoid of merit, and there was no prejudice to [MAS] in allowing the plaintiff to amend the complaint to add it as a direct defendant"

Contrary to the Supreme Court's determination, the plaintiff was not required to demonstrate that MAS and B & M were united in interest since the record demonstrates that MAS had actual notice of the plaintiff's potential cause of action against it within the applicable limitations period and was a third-party defendant in the action [Egelandsdal v Massaro, 2025 NY Slip Op 06156, Second Dept 11-12-25](#)

Practice Point: Consult this decision for insight into the criteria for the application of the "relation back" theory which allows suit after the statute of limitations has run. Here in this bar-fight "inadequate security" action against defendant bar, the bar had timely sued its security company as a third-party defendant. Because the security company was already involved in the litigation, and because the complaint against the bar and the security company arose out of the same conduct, the "relation back" criteria of CPLR 203(f) were met and plaintiff should have been allowed to sue the security company directly after the statute of limitations had expired.

November 12, 2025

NEGLIGENCE, MUNICIPAL LAW, EVIDENCE.

QUESTIONS OF FACT WHETHER DEFENDANT POLICE OFFICER ACTED WITH “RECKLESS DISREGARD” FOR THE SAFETY OF OTHERS DURING A POLICE CHASE PRECLUDED SUMMARY JUDGMENT; PLAINTIFF POLICE OFFICER WAS INJURED WHEN HER PATROL CAR WAS STRUCK BY THE PURSUED CAR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there were questions of fact whether defendant police officer, Encarnacion, acted with “reckless disregard” during a police chase. The pursued car crashed into plaintiff police officer’s, Corsi’s, patrol car. Defendant Encarnacion worked for the Village of Ossining police department. Plaintiff Corsi worked for the Village of Briarcliff Manor police department. Plaintiff sued both Encarnacion and the Village of Ossining:

The plaintiff commenced the instant action against, among others, the Village of Ossining and Encarnacion pursuant to General Municipal Law § 207-c(6) for the reimbursement of all salary, benefits, and expenses paid by the plaintiff to Corsi as a result of injuries she sustained in the line of duty due to the allegedly reckless or negligent conduct of the Village of Ossining and Encarnacion that took place during Encarnacion’s pursuit of Hester and Hester’s eventual crash into Corsi’s vehicle. * * *

... [T]he Village of Ossining and Encarnacion failed to eliminate all triable issues of fact as to whether Encarnacion acted with reckless disregard for the safety of others and whether such conduct was a proximate cause of Corsi’s injuries In support of their motion, the Village of Ossining and Encarnacion submitted, among other things, transcripts of the deposition testimony of Encarnacion, Hester, and Corsi, who collectively testified that on the day at issue, Encarnacion pursued Hester at high speeds through residential and commercial roads and that Hester struck another vehicle and narrowly avoided striking pedestrians during the chase. [Village of Briarcliff Manor v Village of Ossining, 2025 NY Slip Op 06214, Second Dept 11-12-25](#)

Practice Point: Consult this decision for insight into the evidence which will raise a question of fact whether a police officer, during an emergency car-chase, acted with “reckless disregard” for the safety of others such that a police officer injured when the pursued car crashed into her patrol car can sue pursuant to General Municipal Law 207-c (6).

November 12, 2025

TRUSTS AND ESTATES, FIDUCIARY DUTY, CIVIL PROCEDURE, APPEALS.

THE PETITION ALLEGED THE DECEASED CO-TRUSTEE CONCEALED THE TRUST AND DISTRIBUTIONS TO THE TRUST BENEFICIARIES; PETITIONERS HAD STANDING TO SEEK DISGORGEMENT OF THE COMMISSIONS PAID TO THE DECEASED CO-TRUSTEE UNDER “BREACH OF FIDUCIARY DUTY” AND “FAITHLESS SERVANT” THEORIES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the petition alleging Kendall Chen, the deceased co-trustee of his father’s trust, breached his fiduciary duty to the trust and to the trust beneficiaries, and alleging a “faithless servant” claim, should not have been dismissed. Kendall allegedly concealed the existence of the trust from the beneficiaries (his children). Petitioners had standing to seek disgorgement of the commissions paid to Kendall:

The petition alleged that Kendall actively subverted the trust’s stated purpose insofar as, from 2000 until 2016, he concealed from his children the existence of the trust and the joint bank accounts into which distributions from the trust were made for each grandchild, and converted a significant portion of those funds for his personal financial benefit. If proven, Kendall’s conduct constituted a breach of his fiduciary duty to the trust (as well as to his children), and the trust may recover the commissions paid to him at a time when he was a faithless servant, even if the trust suffered no damages

Indeed, the trust was damaged by Kendall's receipt of commissions at a time when he allegedly breached his fiduciary duty to the trust, and it is for that reason that petitioners have standing to seek disgorgement of the commissions paid to Kendall from 2000 to 2015. The corpus of the trust was diminished by the payment of the commissions when Kendall was diverting to himself the distributions intended for his children. ...

We reject the estate's argument that the faithless servant claim is unpreserved. The doctrine has a "close relationship and overlap" with breach of fiduciary duty, which petitioners did raise before the motion court [Matter of Chen, 2025 NY Slip Op 06255, First Dept 11-13-25](#)

Practice Point: Here it was alleged the co-trustee concealed the existence of the trust and distributions from the trust from his children, the beneficiaries of the trust. The petitioners had standing to seek disgorgement of the commissions paid to the co-trustee under "breach of fiduciary duty" and "faithless servant" theories.

November 13, 2025

WORKERS' COMPENSATION, EVIDENCE.

CONTRARY TO THE STANDARD USED BY THE WORKERS' COMPENSATION BOARD, AN SLU NEED NOT BE REDUCED BY THE AMOUNT OF ANY PRIOR SLU TO THE SAME PART OF THE BODY; MATTER REMITTED FOR APPLICATION OF THE PROPER STANDARD (THIRD DEPT).

The Third Department, reversing and remitting the matter to the Workers' Compensation Board, determined the Board applied the wrong standard for compensation for an injury to a member for which an SLU had been made for a prior injury. The Board used the erroneous standard that an SLU "must always be reduced by the amount of any prior SLU to the same statutory member."

The Court of Appeals has clarified ... that successive and "separate SLU awards for different injuries to the same statutory member are contemplated by [Workers'

Table of Contents

Compensation Law §] 15 and, when a claimant proves that the second injury, ‘considered by itself and not in conjunction with the previous disability,’ has caused an increased loss of use, the claimant is entitled to an SLU award commensurate with that increased loss of use” Thus, a claimant’s entitlement to an additional SLU award for a successive injury to the same statutory member “turns upon the sufficiency of the medical proof adduced” “Such demonstration may include medical evidence that a prior injury and the current injury to the same member are ‘separate pathologies that each individually caused a particular amount of loss of use of [the subject member]’ and that the current injury resulted in a greater degree of loss of use of the body member in question ‘beyond that . . . [of] the prior injury’ ”

... [T]he standard articulated and then applied by the Board, which relied solely upon *Matter of Genduso v New York City Dept. of Educ.* (164 AD3d at 1510), was that an SLU “must always be reduced by the amount of any prior SLU to the same statutory member” (emphasis supplied). The Board is not required to reduce or offset the SLU by the prior SLU where a “claimant demonstrates that a subsequent injury increased the loss of use of a body member beyond that resulting from the prior injury” (*Matter of Johnson v City of New York*, 38 NY3d at 444). Given that the Board’s decision did not consider, or otherwise ascertain the credibility of, the conflicting medical evidence that was before it — which included documentary and testimonial evidence from claimant’s treating physician — regarding the extent to which claimant’s injuries were “separate pathologies that each individually caused a particular amount of loss of use” of his right leg . . . , the Board’s finding of a 12.5% SLU of the right leg must be reversed and the matter remitted for further consideration by the Board in accordance with the holding in *Matter of Johnson* [supra]. [*Matter of Krein v Green Haven Corr. Facility*, 2025 NY Slip Op 06238, Third Dept 11-13-25](#)

Practice Point: When an SLU has been made for a prior injury, a subsequent SLU for the same part of the body need not be reduced by the amount of the prior SLU. The claimant can submit medical evidence that the injuries are separate pathologies which individually caused a specific amount of loss of use.

November 13, 2025

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