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CLASS ACTIONS, CONTRACT LAW, JUDGES.

BASED UPON AN INTERPRETATION OF THE CLASS-ACTION SETTLEMENT AGREEMENT WHICH DID NOT SPECIFICALLY ADDRESS THE ISSUE, SUPREME COURT PROPERLY RULED THAT UNCLAIMED SETTLEMENT FUNDS CAN BE REDISTRIBUTED TO THE OTHER CLASS MEMBERS, REJECTING DEFENDANTS' ARGUMENT THAT ANY UNCLAIMED FUNDS SHOULD BE RETURNED TO THEM (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Fisher, determined Supreme Court properly ruled that unclaimed checks payable to class members as part of a class action settlement can be redistributed to the other class members. The ruling was based upon an interpretation of the settlement agreement which did not specifically address the "unclaimed checks" issue. Defendants argued the unclaimed funds should be returned to them. The opinion is too fact-specific and detailed to fairly summarize here. O'Brien v Sagbolt LLC, 2025 NY Slip Op 05280, Third Dept 10-2-25

October 2, 2025

CLASS ACTIONS, REAL PROPERTY TAX LAW, CONSTITUTIONAL LAW, COUNTY LAW, MUNICIPAL LAW.

THE CLASS HAD STANDING TO SEEK DECLARATORY, INJUNCTIVE AND MONETARY RELIEF BASED UPON ALLEGATIONS THE COUNTY REAL PROPERTY TAX SYSTEM WAS IRRATIONAL, DISCRIMINATORY AND UNCONSTITUTIONAL RESULTING IN A SHIFT OF THE TAX BURDEN FROM THE WEALTHIER PREDOMINANTLY WHITE COMMUNITIES TO THE LOWER INCOME PREDOMINANTLY NONWHITE COMMUNITIES (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Barros, determined the class of property owners in Nassau County had standing to seek declaratory, injunctive and monetary relief stemming from the "irrational, discriminatory and unconstitutional" real property tax system:

… [T]he plaintiffs allege that the County's tax assessment policies and procedures, i.e., its freeze on reassessments from January 2010 until January 2018 and its use of a grievance procedure which was voluntary and yielded unscientific results unrelated to property values, shifted the property tax burden from wealthier, predominantly white communities in the County to lower income, predominantly nonwhite communities. The plaintiffs allege that from 2010 through 2016, property taxes on 61% of the County's residential and commercial properties increased by only $466, or 5%, on average, whereas the average increase for the other 39% of County properties was six times that amount: $2,748, or 35.7%. They allege that most properties in predominantly nonwhite communities comprised that 39%, which amounted to an aggregate shift in the property tax burden onto the plaintiffs and those similarly situated in a sum in excess of $1.7 billion. * * *

… [T]he allegations in the complaint, if true, … establish standing, including that the plaintiffs suffered an injury-in-fact … . The plaintiffs "allege[d] that publicly-criticized systemic inequities have resulted in [more expensive] properties increasingly shouldering less of a tax burden than properties worth far less" … and alleged that they were "being treated differently from other, similarly-situated property owners, and that no rational basis exists for this allegedly disparate

treatment" … . Hall v Nassau County, 2025 NY Slip Op 05796, Second Dept 10-22-25

Practice Point: Here the allegations made by the plaintiff class demonstrated an injury-in-fact stemming from the county's property tax system, i.e., a shift in the tax burden from the wealthier predominantly white communities to the lower income predominantly nonwhite communities. Therefore the class demonstrated standing to bring the lawsuit.

October 22, 2025

COOPERATIVES, CORPORATION LAW, FIDUCIARY DUTY.

WITH RESPECT TO A RESIDENTIAL COOPERATIVE, INDIVIDUAL MEMBERS OF THE BOARD OF DIRECTORS CAN BE SUED BY A SHAREHOLDER FOR BREACH OF A FIDUCIARY DUTY, BUT THE BOARD OF DIRECTORS IS NOT AMENABLE TO SUIT APART FROM A SUIT AGAINST THE CORPORATION (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Scarpulla, determined the board of directors of a residential cooperative is not amenable to a lawsuit separate and apart from a suit against the cooperative. Here plaintiff shareholder sued the board of directors for breach of fiduciary duty after the dismissal of a similar suit against the directors individually:

New York trial courts have explicitly held that a board of directors is not an entity that may be sued separately from the corporation … . * * *

Applying the Business Corporation Law … , the residential cooperative board of defendant … is not an entity with the capacity to sue and be sued separate and apart from the corporation on whose behalf it acts. * * *

While a shareholder cannot assert allegations of breach of fiduciary duty against a board of directors, a shareholder may assert the claim against the individual directors … . Here, plaintiff originally brought breach of fiduciary duty causes of action against fourteen of the individual board members and the corporation … .

Those causes of action were largely dismissed, and plaintiff may not simply replace those parties with "the board" to revive those now dismissed claims. Tahari v 860 Fifth Ave. Corp., 2025 NY Slip Op 05584, First Dept 10-8-25

Practice Point: This opinion clarifies the law. The board of directors of a corporation is not amenable to suit for breach of a fiduciary duty separate and apart from a suit against the corporation. However, individual members of the board of directors may be sued for breach of a fiduciary duty.

October 8, 2025

COVID, FORECLOSURE, JUDGES.

IT WAS A PROPER EXERCISE OF DISCRETION TO EXTEND THE DEADLINE FOR THE FORECLOSURE SALE DUE TO THE COVID PANDEMIC; HOWEVER IT WAS AN ABUSE OF DISCRETION TO DENY THE MOTION TO TOLL THE ACCRUAL OF INTEREST DURING THE DELAY (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this foreclosure action, determined the deadline for the foreclosure sale mandated by RPAPL 1351 was properly extended due to the COVID pandemic, but the accumulation of interest during the delay should have been tolled:

… Supreme Court providently exercised its discretion in granting the plaintiff's motion pursuant to CPLR 2004 to extend the time to conduct the foreclosure sale to the extent of extending the time to conduct the sale to 90 days from the date of the order … . The plaintiff demonstrated that "the delay [wa]s largely attributable to, among other things, . . . the COVID-19 pandemic" … . Further, the defendant failed to establish that the delay caused him any prejudice … .

"A foreclosure action is equitable in nature and triggers the equitable powers of the court" … . "Once equity is invoked, the court's power is as broad as equity and justice require" … . Thus, "[i]n an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by

either party" … . "Further, a tolling and cancellation of interest may also be warranted where there is an unexplained delay in prosecution of a mortgage foreclosure action" … . "[A] plaintiff should not benefit financially, in the form of accrued interest, from an unexplained delay in the prosecution of a mortgage foreclosure action" … .

… Supreme Court improvidently exercised its discretion in denying the defendant's cross-motion to toll the accrual of interest on the subject mortgage loan … . The plaintiff asserted that the COVID-19 pandemic impacted its ability to proceed with the sale of the property … . However, the pandemic-related stays on foreclosure sales did not go into effect until after the expiration of the 90-day deadline to conduct the sale of the property … , and the plaintiff failed to adequately explain its failure to conduct the sale within that 90-day period … . Under the circumstances presented, the court should have granted the defendant's cross-motion to the extent of tolling the accrual of interest on the subject mortgage loan after February 17, 2020 … . M&T Bank v Givens, 2025 NY Slip Op 05677, Second Dept 10-15-25

Practice Point: A foreclosure is an equitable proceeding triggering the exercise of discretion by the the judge. Here the extension of the deadline for the foreclosure sale due to the COVID pandemic was a proper exercise of discretion, but the denial of the motion to toll the accrual of interest during the delay was an abuse of discretion.

October 15, 2025

DEFAULT JUDGMENTS, DAMAGES TRIAL, EVIDENCE.

DEFENDANT DEFAULTED IN THIS CHILD VICTIMS ACT CASE ALLEGING HE SEXUALLY ABUSED PLAINTIFF; DEFENDANT SHOULD NOT HAVE BEEN ALLOWED TO DENY THE ABUSE IN THE DAMAGES TRIAL; NEW DAMAGES TRIAL ORDERED (SECOND DEPT).

The Second Department, ordering a new trial on damages, determined defendant, who had defaulted in this Child Victims Act case alleging sexual abuse of the

plaintiff by the defendant, should not have been allowed to deny the abuse in the damages trial:

…Supreme Court erred in permitting the defendant to testify that the plaintiff's allegations of sexual abuse were untrue and that he had never sexually abused the plaintiff. The testimony violated the court's pretrial order expressly prohibiting such testimony. Moreover, a defaulting defendant "admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages" … . "Accordingly, at a trial to determine the amount of a plaintiff's real damages, the defendant will not be allowed to introduce evidence tending to defeat the plaintiff's cause of action" … . The defendant's testimony denying the basic allegation of liability prejudiced a substantial right of the plaintiff, as that issue had been decided in her favor, and possibly affected the jury's verdict on the issue of damages. Accordingly, the court should have granted the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages in the interest of justice and for a new trial on the issue of damages … . Reilly v Grieco, 2025 NY Slip Op 05711, Second Dept 10-15-25

Practice Point: Here defendant defaulted in this Child Victims Act case but was allowed to deny the abuse in the damages trial. That was error requiring an new trial on damages.

October 15, 2025

DEFAULT JUDGMENTS, JUDGES.

A DEFAULT JUDGMENT CANNOT EXCEED IN AMOUNT OR DIFFER IN THE KIND OF RELIEF DEMANDED IN THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the default judgment must be vacated because the judgment awarded relief which was not requested in the complaint:

"A default judgment cannot exceed in amount or differ in the kind of relief from that demanded in the complaint" … . Moreover, "'at an inquest, the court may not permit amendments of the pleadings which would broaden the scope of the inquest and increase the amount of damages provable by the plaintiff'" … . Here, the complaint only sought damages … in the principal sum of $20,357. Accordingly, the judgment must be vacated and the matter remitted … for entry of an amended judgment limiting the award … to the amount originally demanded in the complaint. Deutsch v Levy, 2025 NY Slip Op 05790, Second Dept 10-22-25

Practice Point: A default judgment cannot exceed in amount or differ in the kind of relief requested in the complaint.

October 22, 2025

DISCOVERY IN FOREIGN JURISDICTION, HAGUE CONVENTION, EVIDENCE, JUDGES.

A JUDGE CANNOT ORDER DISCOVERY IN A FOREIGN JURISDICTION WHICH IS A SIGNATORY TO THE HAGUE CONVENTION WITHOUT COMPLYING WITH THE REQUIREMENTS OF THE CONVENTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judge should not have ordered discovery of a nonparty's electronic devices in a foreign jurisdiction without complying with the Hague Convention. The nonparty, de Putron, resides in the island country of Jersey in the United Kingdom:

… Supreme Court improperly directed the discovery of de Putron's electronic devices. First, "when discovery is sought from a nonparty in a foreign jurisdiction [that is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters … , application of the . . . Convention . . . is virtually compulsory" … . An order directing discovery of such a party without complying with the Hague Convention is therefore an "improper assertion of power beyond the . . . Court's jurisdiction" … . As it is undisputed that de Putron is a nonparty in a foreign jurisdiction that is a signatory to the Hague Convention, Supreme Court

lacked the power to direct discovery of his electronic devices without complying with the Hague Convention. Dorilton Capital Mgt. LLC v Stilus LLC, 2025 NY Slip Op 05744, First Dept 10-16-25

Practice Point: Here discovery of a foreign nonparty's electronic devices was improperly ordered by the judge. The country in which the nonparty resided was a signatory to the Hague Convention. Compliance with the Convention is a prerequisite to any discovery order.

October 16, 2025

FORECLOSURE ABUSE PROTECTION ACT (FAPA), REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), CONSTITUTIONAL LAW.

RETROACTIVE APPLICATION OF THE FORECLOSURE ABUSE PREVENTION ACT (FAPA) WHERE FINAL JUDGMENT HAS NOT BEEN RENDERED DOES NOT VIOLATE PLAINTIFF'S DUE PROCESS RIGHTS; HERE THE DEBT WAS ACCELERATED IN 2008 AND THE CURRENT FORECLOSURE PROCEEDING IS THEREFORE UNTIMELY PURSUANT TO THE FAPA (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, determined the Foreclosure Abuse Prevention Act (FAPA) applied retroactively to render the foreclosure action untimely because the debt had been accelerated by a prior foreclosure proceeding in 2008. The Third Department determined the retroactive application of the FAPA to foreclosure actions where final judgment has not been rendered did not violate plaintiff's due process rights:

In drafting FAPA, the Senate and Assembly sponsors both expressed an urgent need to correct judicial interpretation with unintended consequences which allowed noteholders to unilaterally "manipulate statutes of limitations to their advantage" and to the detriment of homeowners … . … [W]e find that FAPA should be applied retroactively to effect its beneficial purpose … . * * *

… [W]e find that retroactive application of FAPA to foreclosure actions where a final judgment has not been enforced does not violate plaintiff's due process rights … . U.S. Bank N.A. v Lynch, 2024 NY Slip Op 05261, Third Dept 10-24-24

Practice Point: Where there has been no final judgment, retroactive application of the Foreclosure Abuse Prevention Act (FAPA) to render a foreclosure action untimely does not violate a plaintiff's due process rights.

October 24, 2024

INSTRUMENT FOR THE PAYMENT OF MONEY ONLY, AFFIRMATIVE DEFENSE TO SUMMARY JUDGMENT, CONTRACT LAW, FRAUD, EVIDENCE.

DEFENDANTS RAISED QUESTIONS OF FACT SUPPORTING A "FRAUD IN THE INDUCEMENT" DEFENSE TO THE ACTION BASED UPON AN EXECUTED PROMISSORY NOTE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined defendants raised a valid "fraud in the inducement" defense to the action seeking payment on an executed promissory note. Defendants executed the note to purchase protein powder from plaintiffs. Plaintiffs described the powder as having 23 to 25 grams of protein per 33/5 grams of powder. After the purchase defendants had the powder tested which revealed the powder contained a significantly lower percentage of protein:

"When an action is based upon an instrument for the payment of money only . . . , the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint" (CPLR 3213). Therefore, "[t]o prevail on [their] motion for summary judgment in lieu of complaint based on a promissory note, plaintiff[s] w[ere] required to present evidence that defendant[s] executed the note and defaulted thereon" … . Plaintiffs demonstrated their prima facie burden by supplying the note at issue, signed by [defendant], and evidence of defendant's failure to pay; therefore, the burden shifted to defendants to establish the existence of a triable issue of fact as to a bona fide defense to liability … . …

Fraud in the inducement is a defense to the enforcement of a promissory note … , and, as such, defendants were required to "allege that (1) the plaintiff made a representation or a material omission of fact which was false and the plaintiff knew to be false, (2) the misrepresentation was made for the purpose of inducing the

defendant to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury" … . * * *

Generally, "what constitutes reasonable reliance is always [a] nettlesome" inquiry best left to the trier of fact … . Furthermore, "[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact" … . Panessa v Lederfeind, 2024 NY Slip Op 05252, Third Dept 10-24-24

Practice Point: Fraud in the inducement is a valid defense to an action for summary judgment based upon an instrument for the payment of money only (CPLR 3213), here a promissory note.

October 24, 2024

"JOHN DOE" DEFENDANTS.

PLAINTIFF DID NOT EXERCISE DUE DILIGENCE IN IDENTIFYING THE PARTY INITIALLY SUED AS "JOHN DOE TRUCKING COMPANY;" COMPLAINT DISMISSED AS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court and dismissing the complaint as time-barred, determined plaintiff did not exercise due diligence in identifying the party initially sued as "John Doe Trucking Company" prior to the expiration of the statute of limitations:

Pursuant to CPLR 1024, "[a] party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his [or her] name and identity as is known." "However, a plaintiff cannot rely on CPLR 1024 unless he or she 'exercise[s] due diligence, prior to the running of the statute of limitations, to identify the defendant by name and, despite such efforts, [is] unable to do so'" … . "Any failure to exercise due diligence to ascertain the 'Jane Doe's' [or 'John Doe's'] name subjects the complaint to dismissal as to that party" … . Additionally, the "Jane Doe" or "John Doe" party must "be described in such form as will fairly apprise the party that she [or he] is the intended defendant" … .

Here, the plaintiff failed to establish that it made diligent efforts to ascertain Werner's identity prior to the expiration of the statute of limitations … . Further, the description in the amended complaint was insufficient to fairly apprise Werner that it was the intended defendant … . Abrego v Tile World Import Corp., 2025 NY Slip Op 05661, Second Dept 10-15-25

Practice Point: Failure to exercise due diligence in identifying a party initially sued as a "John Doe" before the expiration of the statute of limitations will result in dismissal of the complaint.

October 15, 2025

PIERCING THE CORPORATE VEIL, REQUIRED ALLEGATIONS, CORPORATION LAW, CONTRACT LAW.

CONCLUSORY AND SPECULATIVE ALLEGATIONS WILL NOT SUPPORT PIERCING THE CORPORATE VEIL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiffs' motion to amend the complaint to "pierce the corporate veil" should not have been granted: The allegations in the proposed amended complaint were "conclusory" rather than fact-based:

"'Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, "pierce the corporate veil," whenever necessary "to prevent fraud or to achieve equity"'" … . "'Generally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury'" … . The mere contention that a corporation was completely dominated by its owners or conclusory assertions that a corporation acted as the owners' "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil … . "Factors to be considered in determining whether the owner has 'abused the privilege of doing business in the corporate form' include whether there was a 'failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use'" … .

Moreover, even under the liberal standards of CPLR 3025(b), the proposed amended complaint must still sufficiently allege the material elements of the cause of action asserted … .

Here, the proposed amended complaint contains only conclusory allegations that the Berkovics [the principals of defendant corporation] breached a settlement agreement, thereby acting in bad faith and in furtherance of their own interests, and that the Berkovics exercised complete domination over the defendant in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form. The proposed amended complaint fails to assert that the Berkovics acted other than in their alleged capacity as the principals of the defendant or that they failed to respect the separate legal existence of the defendant. Thus, the proposed cause of action seeking to pierce the corporate veil was palpably insufficient and patently devoid of merit as it was speculative and conclusory … . Anderson v ML Real Estate Holdings, LLC, 2025 NY Slip Op 05931, Second Dept 10-29-25

Practice Point: Consult this decision for insight in the the nature of the allegations required to "pierce to corporate" veil. The allegations must be fact-based. Conclusory or speculative allegations will not suffice.

October 29, 2025

PRE-JUDGMENT INTEREST, CONTRACT LAW, DEBTOR-CREDITOR.

THE SURETY BOND, A CONTRACT, WAS UNAMBIGUOUS AND MADE NO MENTION OF PREJUDGMENT INTEREST; THE SURETY THEREFORE WAS NOT OBLIGATED TO PAY PREJUDGMENT INTEREST; THE ARGUMENT THAT CPLR 5001 MAKES PAYMENT OF PREJUDGMENT INTEREST MANDATORY WAS REJECTED (THIRD DEPT).

The Third Department, modifying Supreme Court, determined that the terms of the surety bond governed whether the surety was obligated to pay prejudgment interest. Because the bond, a contract, did not mention prejudgment interest, the surety was not obligated to pay it. The argument that CPLR 5001 makes an award

of prejudgment interest mandatory, regardless of the language of the surety bond, was rejected:

Here, the contract states that the surety will "pay for labor, materials, and equipment furnished for use in the performance of the [c]onstruction [c]ontract"; importantly to this case, there is no commitment to remit — or even mention of — prejudgment interest. "Surety bonds — like all contracts — are to be construed in accordance with their terms under established rules of contract construction. . . . [A] surety's obligation upon its undertaking is defined solely by the language of the bond and cannot be extended by the court" … . In the matter before us, the damage claimed by plaintiff is the amount of prejudgment interest it did not receive in the judgment against the surety. However, under the clear and unambiguous terms of the payment bond, the surety had no obligation to remit same. Stone Cast, Inc. v Couch, Dale Marshall P.C., 2025 NY Slip Op 05860, Third Dept 10-23-25

Practice Point: CPLR 5001 does not make payment of prejudgment interest mandatory in breach of contract cases. The language of the surety bond, a contract, controls.

October 23, 2025

PUNITIVE DAMAGES, LABOR LAW-CONSTRUCTION LAW.

ONE OF THE THREE DEFENDANTS, THE OWNER OF THE OTHER TWO, WAS NOT SHOWN TO BE LIABLE UNDER THE LABOR LAW; THEREFORE THE $10,000,000 PUNITIVE-DAMAGES JUDGMENT AGAINST THE OWNER SHOULD NOT HAVE BEEN AWARDED; NEW YORK DOES NOT RECOGNIZE AN INDEPENDENT CAUSE OF ACTION FOR PUNITIVE DAMAGES (SECOND DEPT).

The Second Department, reversing the $10,000,000 judgment for punitive damages in this Labor Law 220, 240(1) and 241(6) action, noted that New York does not recognize an independent cause of action for punitive damages. Summary judgment was granted against two defendants. but was denied with respect to

Berger, the owner of the other two defendants. The jury was instructed to decide whether to award punitive damages based on Berger's conduct and did so:

The plaintiff and his wife …, with leave of court, served an amended complaint to add a claim for punitive damages. The defendants answered the amended complaint, and the matter proceeded to a trial limited to the issue of damages. After both parties rested, the jury was instructed to decide whether to award punitive damages based upon conduct of Berger. The jury awarded the plaintiff and his wife punitive damages in the sum of $10,000,000, and the Supreme Court entered a judgment … in favor of the plaintiff and his wife and against the defendants … in the principal sum of $10,000,000 for punitive damages. The defendants appeal from that portion of the judgment.

"New York does not recognize an independent cause of action for punitive damages. Instead, '[a] demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action'" … . Here, the Supreme Court erroneously instructed the jury that the issue of Berger's liability had already been determined against him, and the jury was not asked to consider Berger's liability under the Labor Law or otherwise. Because Berger was never determined to be liable with respect to any substantive cause of action, no punitive damages could be awarded based upon his alleged conduct … . Petrosian v B & A Warehousing, Inc., 2025 NY Slip Op 05708, Second Dept 10-15-25

Practice Point: Here plaintiffs were awarded a $10,000,000 punitive-damages judgment against a defendant who was not determined to have been liable. New York does not recognize an independent cause of action for punitive damages. The punitive-damages judgment was therefore reversed.

October 15, 2025

SEALING THE RECORD, NAME CHANGE, TRANSGENDER PETITIONER, CIVIL RIGHTS LAW, JUDGES.

PETITIONER, A TRANSGENDER INDIVIDUAL, WAS ENTITLED, FOR PERSONAL SAFETY REASONS, TO THE SEALING OF THE RECORD OF HER NAME-CHANGE PROCEEDING (THIRD DEPT).

The Third Department, reversing Supreme Court, determined petitioner, a transgender individual, was entitled, for her personal safety, to the sealing of the record of her name-change proceeding:

We analyzed Civil Rights Law § 64-a in Matter of Cody VV. (Brandi VV.) (226 AD3d 24 [3d Dept 2024]). There, Supreme Court — the same justice — denied an applicant's request to seal the record of the applicant's name-change proceeding … . Reversing the court's denial and ordering the applicant's record sealed, we observed, in sum and substance, that the relevant statutory language reflects the Legislature's determination that transgender individuals face threats to their personal safety that are real, constant and everywhere … . Thus, only in an "extraordinary" case will there be a "substantial basis" to find that an open court record of a name change proceeding would not place a transgender applicant's safety at risk … .

In a "customary" case like this one, protecting the applicant from the threat of harm posed by an open court record of a name change proceeding necessarily takes priority over the public's ability to access that court record … . To reverse those priorities is to intrude upon the policymaking authority of the Legislature. To deny a sealing request based upon those inverted priorities is to abuse the limited judicial discretion available under Civil Rights Law § 64-a. To decline to seal the record despite the applicant's showing of jeopardy is to place the applicant at risk of the very harms the statute is meant to guard against … .

… [P]etitioner affirmed her transgender status and that she was seeking to change her name to one that reflects her female gender identity, which is the name she uses in her personal and professional life. She expressed her fear that public access to her name change would disclose her transgender status and place her at increased risk of hate crimes, harassment and other discrimination. In view of the totality of

circumstances … , petitioner has demonstrated that she is entitled to have the record of her name change proceeding sealed pursuant to Civil Rights Law § 64-a … . Matter of Kieran B., 2025 NY Slip Op 06006, Third Dept 10-30-25

Practice Point: In Civil Rights Law 64-a, the legislature recognized the personal safety issues raised when a transgender individual seeks a name-change. Therefore, sealing of the name-change record reflects the legislative intent and should be the general rule.

October 30, 2025

SERVICE OF PROCESS, DUE DILIGENCE, EVIDENCE, FORECLOSURE.

THE PROCESS SERVER KNEW WHERE DEFENDANT LIVED AND WORKED AND MADE SEVERAL UNSUCCESSFUL ATTEMPTS TO SERVE DEFENDANT AT HOME; WITHOUT MAKING ANY ATTEMPT TO SERVE DEFENDANT AT WORK, THE PROCESS SERVER RESORTED TO "NAIL AND MAIL;" THE PROCESS SERVER DID NOT DEMONTRATE "DUE DILIGENCE;" THE COURT NEVER ACQUIRED PERSONAL JURISDICTION OVER DEFENDANT IN THIS FORECLOSURE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court in this foreclosure action, determined the process server did not demonstrate due diligence in attempting to serve defendant, therefore the court did not acquire personal jurisdiction:

"Service of process upon a natural person must be made in strict compliance with the statutory methods of service set forth in CPLR 308" … . "Service pursuant to CPLR 308(4) may be used only where personal service under CPLR 308(1) and (2) cannot be made with due diligence" … . "The term due diligence is not defined by statute, and is interpreted on a case-by-case basis" … . To satisfy the "due diligence" requirement, the plaintiff must demonstrate that the process server made genuine inquiries about the defendant's whereabouts and place of employment … . "The failure to serve process in an action leaves the court without personal

jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void" … .

… [T]he process server's prior attempts at service did not demonstrate due diligence. Two out of three of the process server's prior attempts at personal delivery at the defendant's residence occurred during weekday hours when it could reasonably have been expected that the defendant was either working or in transit to or from work. The prior attempts were made on Thursday, April 17, 2008, at 6:15 p.m.; on Saturday, April 19, 2008, at 1:30 p.m.; and on Monday, April 21, 2008, at 8:20 a.m. The Saturday attempt occurred at a time when the defendant may have had reasons not to be home. The process server averred that a neighbor confirmed that the defendant resided at that address, but gave a negative reply when asked if the neighbor was aware of the defendant's normal routine and place of business. Attached to the affidavit of service were the results of a "people at work" search, which revealed a company address for the defendant. Yet the process server made no inquiries about the defendant at that address before resorting to affix and mail service. Under the circumstances, the plaintiff failed to act with due diligence before relying on affix and mail service pursuant to CPLR 308(4) … . Bank of N.Y. Mellon v DeFilippo, 2025 NY Slip Op 05933, Second Dept 10-29-25

Practice Point: Consult this decision for insight into what constitutes "due diligence" in attempting to serve a defendant. Here several failed attempts at defendant's residence was not enough. The process server did not attempt to serve defendant at work before resorting to "nail and mail."

October 29, 2025

SERVICE OF PROCESS, CORPORATION LAW.

THE PROCESS SERVER'S AFFIDAVIT DID NOT DEMONSTRATE THE PERSON SERVED WAS AN AGENT OF DEFENDANT CORPORATION; CLERK'S JUDGMENT VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court and vacating the clerk's (default) judgment for over $420,000, determined the process server's affidavit did

not demonstrate the person served with the summons and complaint was an agent of defendant corporation:

The plaintiff failed to establish that personal jurisdiction had been acquired over the defendant through proper service of process. Although a process server's affidavit of service ordinarily constitutes prima facie evidence of proper service … , here, the affidavit of service contained no indication that Lewis was an agent of the defendant authorized to accept service on the defendant's behalf (see CPLR 311[1][a] …). Accordingly, the Supreme Court should have granted, pursuant to CPLR 5015(a)(4), that branch of the defendant's motion which was to vacate the clerk's judgment. Bold Broadcasting, LLC v Wawaloam Reservation, Inc., 2024 NY Slip Op 05196, Second Dept 10-23-24

Practice Point: Here the process server's affidavit did not demonstrate the person served with the summons and complaint had the authority to accept service for defendant corporation. The default judgment was vacated.

October 23, 2024

SUBSTITUTION FOR DECEASED PLAINTIFF, NEGLIGENCE, TRUSTS AND ESTATES.

THE ADMINSTRATOR'S SIX-YEAR DELAYING IN SEEKING SUBSTITUTION FOR THE DECEASED PLAINTFF, COUPLED WITH THE PREJUDICE TO THE DEFENDANT IN THIS PERSONAL INJURY CASE, WARRANTED DISMISSAL OF THE COMPLAINT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the administrator's six-year delay in substituting the estate for the deceased in this personal injury case, warranted dismissal of the complaint:

"The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made" … . CPLR 1021 provides that "[a] motion for substitution may be made by the successors or representatives of a party or by any party" … and requires that such substitution "be made within a reasonable time" …. If substitution is not made within a reasonable time, "the action may be dismissed as to the party for whom substitution should have been

made" (CPLR 1021). "[T]he determination of whether the timing is reasonable requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit" … .

Here, the administrator's protracted delay of almost six years in obtaining limited letters of administration so as to be substituted in this action, for which he provided no explanation in his initial motion papers and only an unsubstantiated, partial explanation in his reply attorney affirmation, demonstrated a lack of diligence. Furthermore, in this 16-year-old personal injury action, in which the deposition of the bus driver was never obtained, the administrator failed to rebut the defendants' showing of prejudice arising both from the passage of time and the unavailability of the bus driver. Finally, the administrator did not submit in support of his motion the complaint, a bill of particulars, deposition transcripts, or any proof at all as to the potential merit of the cause of action. Under these circumstances, the Supreme Court improvidently exercised its discretion in granting the administrator's motion and, in effect, denying the defendants' application to dismiss the complaint for failure to timely seek substitution ..Watson v New York City Tr. Auth., 2025 NY Slip Op 05718, Second Dept 10-15-25

Practice Point: Here an administrator's six-year delay in seeking substitution for the deceased plaintiff, coupled with prejudice to the defendant, warranted dismissal of the personal injury complaint.

October 15, 2025