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Weekly Reversal
Report
August 24 – 28,
2026

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CIVIL PROCEDURE, CONTRACT LAW, FRAUD.

THE PRELIMINARY INJUNCTION SHOULD NOT HAVE BEEN GRANTED; THE “LIKELIHOOD OF SUCCESS” ELEMENT WAS NOT ADEQUATELY DEMONSTRATED BY ALLEGATIONS MADE BASED ON “INFORMATION AND BELIEF;” AND THE “IRREPARABLE HARM” ELEMENT WAS NOT DEMONSTRATED BECAUSE PLAINTIFF DID NOT EXPLAIN WHY THE INJURY COULD NOT BE ADEQUATELY ADDRESSED BY MONEY DAMAGES (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the criteria for a preliminary injunction were not met. The “likelihood of success”

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element was not demonstrated by allegations based upon “information and belief.” In addition plaintiff did not demonstrate the “irreparable harm” element because plaintiff failed to explain why money damages would not adequately compensate for the injury:

In an affidavit in support of the motion for a preliminary injunction, the plaintiff’s statements ... were made only upon “information and belief,” and the plaintiff submitted no evidence

The plaintiff also failed to establish irreparable harm. To establish irreparable harm, the plaintiff must demonstrate an injury for which money damages are insufficient Here, the plaintiff attested in his affidavit that, if the defendant were permitted to enforce the agreement, the defendant would be entitled to 100% of the plaintiff’s business’s revenue and the business would inevitably cease operation. The plaintiff ... failed to demonstrate that this injury could not be adequately compensated by money damages. [Culp v Silverline Servs., Inc., 2026 NY Slip Op 05077, Second Dept 8-26-26](#)

August 26, 2026

CIVIL PROCEDURE, JUDGES.

A JUDGE DOES NOT HAVE THE AUTHORITY TO DISMISS AN ACTION FOR “NEGLECT TO PROSECUTE” UNLESS THE STATUTORY PREREQUISITES FOR DISMISSAL SPELLED OUT IN CPLR 3216 ARE MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, dismissed the action for “neglect to prosecute.” CPLR 3216 spells out the conditions which must be met before dismissal of an action is appropriate:

The October 2024 order directed the plaintiff to file a note of issue 10 days prior to the inquest and noted that “[t]he failure to file a Note of Issue as directed or appear as directed may be deemed an abandonment of the claims giving rise to the Inquest.”

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The plaintiff did not file the note of issue by the date of the inquest. In an order entered February 4, 2025, the Supreme Court, pursuant to the October 2024 order, sua sponte, directed dismissal of the action with prejudice. The plaintiff appeals.

“A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met” ... Pursuant to CPLR 3216(b), an action cannot be dismissed pursuant to CPLR 3216(a) “unless a written demand is served upon ‘the party against whom such relief is sought’ in accordance with the statutory requirements, along with a statement that the ‘default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him [or her] for unreasonably neglecting to proceed’” ... The statute also requires “where, as here, a written demand to resume prosecution of the action is made by the court, ‘the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation’” ...

Here, the Supreme Court was without power to, sua sponte, direct dismissal of the action pursuant to CPLR 3216, as the statutory prerequisites for dismissal under that statute were not met ... [Avanza Group, LLC v Bugz Innovations, LLC, 2026 NY Slip Op 05068, SEcond Dept 8-26-26](#)

Practice Point: Absent fulfilling the prerequisites for dismissal of an action for “neglect to prosecute” spelled out in CPLR 3216 a judge does not have the authority to dismiss on that ground.

August 26, 2026

CIVIL PROCEDURE, JUDGES.

DEFENDANTS DID NOT SUBMIT AN AFFIRMATION DEMONSTRATING A GOOD FAITH EFFORT TO RESOLVE THE DISCOVERY ISSUES; DEFENDANTS, IN THEIR MOTION TO PRECLUDE THE PLAINTIFF FROM PRESENTING EVIDENCE AS A DISCOVERY SANCTION, DID NOT DEMONSTRATE PLAINTIFF’S FAILURE TO COMPLY WITH COURT-ORDERED DISCOVERY WAS “WILLFUL AND CONTUMACIOUS;” DEFENDANTS’ MOTION TO PRECLUDE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants’ motion to preclude plaintiff from offering evidence or responding to a dispositive motion as a discovery sanction should not have been granted for two reasons: (1) the defendants did not submit an affirmation demonstrating a good faith effort to resolve the discovery issues (22 MYCRR 202.1(a)); and (2), the defendants failed to demonstrate plaintiff’s failure to comply with court-ordered discovery was willful and contumacious:

‘Pursuant to CPLR 3126, a court may impose discovery sanctions, including the . . . preclusion of evidence, where a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed”’ “Before a court invokes the drastic remedy of precluding a party from offering evidence at trial, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious” Here, the defendants failed to make a clear showing of a willful and contumacious failure by the plaintiff to comply with discovery demands. The defendants’ motion papers failed to identify precisely what discovery was demanded and never provided. In addition, the August 2022 order only referred vaguely to, among other things, “authorizations,” and the March 2024 order directed the plaintiff to submit “complete responses” to the defendants’ combined discovery demands without any indication of the nature of the alleged outstanding discovery. Under the circumstances, the defendants failed to make the requisite showing justifying the

Supreme Court’s imposition of the subject discovery sanctions [Noh Soon Park v Food Bazaar Supermarket, 2026 NY Slip Op 05108, Second Dept 8-26-26](#)

Practice Point: Consult this decision for insight into what a defendant must demonstrate to win a motion to preclude the plaintiff from presenting evidence as a sanction for failure to comply with court-ordered discovery.

August 26, 2026

CIVIL PROCEDURE, JUDGES.

HERE SUPREME COURT PROPERLY FOUND THERE WAS “GOOD CAUSE SHOWN” FOR AN EXTENSION OF TIME FOR SERVICE OF THE SUMMONS AND COMPLAINT AND THE EXTENSION WAS PROPERLY GRANTED BEFORE THE TRAVERSE HEARING ON THE INITIAL ATTEMPT AT SERVICE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Lasalle, determined the judge properly granted plaintiff an extension of time to serve the summons and complaint for “good cause shown. ” pursuant to CPLR 306-b. In addition, the judge properly granted the extension before holding the traverse hearing to determine the validity of the initial service of process:

... Supreme Court properly determined that the plaintiff established good cause. The plaintiff established reasonable diligence in ascertaining Brown’s [defendant’s] address. The plaintiff’s counsel reasonably relied upon the representation made by Brown in response to the information subpoena, and counsel confirmed those representations by conducting database inquiries. Moreover, the process server established that he acted with reasonable diligence in effecting service. In response, ...

... Supreme Court providently exercised its discretion in granting relief pursuant to CPLR 306-b before holding the traverse hearing [re: the initial attempt at service].. CPLR 306-b does not contain any language stating that a court must decide whether an initial attempt at service of process was valid before granting an extension of time to re-attempt service A court may, in the interests of judicial

economy, grant an extension before holding a traverse hearing [M&T Bank v Global Sign Cleaning & Maintenance, Inc., 2026 NY Slip Op 05092, Second Dept 8-25-26](#)

Practice Point: This opinion fleshes out the criteria for an extension of time to serve the summons and complaint “for good cause shown” pursuant to CPLR 306-b.

August 26, 2026

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

DEFENDANT TREATING NEUROLOGIST INDICATED ON A DMV FORM FOR REINSTATEMENT OF THE PATIENT-DRIVER’S LICENSE THAT THE DRIVER’S LAST SEIZURE WAS TWO YEARS BEFORE WHEN, IN FACT, THE LAST SEIZURE WAS FOUR MONTHS BEFORE; TWO MONTHS AFTER REINSTATEMENT OF THE LICENSE, THE DRIVER HAD A SEIZURE-RELATED ACCIDENT IN WHICH PLAINTIFFS’ DECEDENTS DIED; THE ACTION AGAINST THE NEUROLOGIST SOUNDED IN ORDINARY NEGLIGENCE, NOT MEDICAL MALPRACTICE, AND WAS THEREFORE TIMELY BROUGHT (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Higgitt, determined the action sounded in negligence, not medical malpractice, rendering the action timely brought. Defendant neurologist was treating the non-party driver for seizures. In filling out a NYS Department of Motor Vehicles (DMV) form for reinstatement of the driver’s license, defendant stated that the driver’s last seizure was about two years before, when in fact the last seizure was four months before. To be entitled to reinstatement of the driver’s license, the driver must have been free of seizures for the previous 12 months. Two months after the driver’s license was reinstated, the driver had a seizure which resulted in a horrific traffic accident in which two people died. The lawsuit was brought by their estates:

... [P]laintiffs’ survival-action claims, premised on the theory that Dr. Avila erroneously recorded the date of the driver’s last seizure in the DMV form, which error led to the DMV reinstating the driver’s license, sound in ordinary negligence. The crux of the survival-action claims is not Dr. Avila’s negligence in furnishing medical treatment to the driver; rather, the essence of the claims is that Dr. Avila failed to fulfill a different duty. The nature of the act underlying those claims — transcribing a date from a treatment note to a governmental administration form — “is more administrative than medical in nature” Because the act underpinning the survival-action claims is administrative in nature, jurors can use their common everyday experience to evaluate whether Dr. Avila exercised due care That a physician made the alleged administrative error does not transform the claim from one sounding in ordinary negligence to one for medical malpractice; the characterization of a particular claim depends not on the title of the actor but on the nature of the challenged act

Ultimately, the core issue related to plaintiffs’ survival-action claims — whether Dr. Avila failed to exercise due care in recording a fact on the DMV form — may not implicate questions of medical competence or judgment regarding the treatment of the driver Unlike the inquiry on a medical malpractice claim, whether Dr. Avila breached his duty to exercise due care in recording a fact on the DMV form does not depend on an analysis of the medical treatment rendered to the driver [Lafferty v Avila, 2026 NY Slip Op 05147, First Dept 8-27-26](#)

Practice Point: If a jury does not need to analyze the medical treatment rendered by a doctor to determine a doctor’s negligence, the action does not sound in medical malpractice and is subject to a three-year statute of limitations for ordinary negligence.

August 27, 2026

CONTRACT LAW, NEGLIGENCE.

PLAINTIFF-TEACHER WAS STRUCK IN THE BACK BY A BASKETBALL THAT BOUNCED OFF THE RIM DURING A RECESS-PERIOD BASKETBALL GAME; PLAINTIFF SUED THE COMPANY WHICH CONTRACTED WITH THE SCHOOL TO PROVIDE A BASKETBALL COACH FOR RECESS GAMES; NO “ESPINAL” EXCEPTIONS APPLIED SO PLAINTIFF, AS A NON-PARTY, COULD NOT SUE UNDER THE CONTRACT; IN ADDITION, PLAINTIFF, BY STANDING 10 TO 12 FEET FROM THE BASKETBALL COURT, ASSUMED THE RISK OF BEING STRUCK BY A BASKETBALL (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff-teacher’s action against the company hired by the school (Asphalt Green) to provide a basketball coach for school recess-periods should have been dismissed. Plaintiff was standing 10 to 12 feet from the basketball court when a basketball bounced off the rim and struck her in the back. Plaintiff was not a party to the contract between the school and Asphalt Green and none of the Espinal exceptions applied. In addition, plaintiff assumed the risk of being struck by a basketball:

A contracting party can assume a duty of care toward a third party where: 1) “the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm”; 2) “the plaintiff detrimentally relies on the continued performance of the contracting party’s duties”; or 3) “the contracting party has entirely displaced the other party’s duty to maintain the premises safely” (Espinal, 98 NY2d at 140 [internal citations omitted]). However, none of these exceptions apply to this case.

The facts do not establish that defendants launched an instrument of harm. * * * A missed basketball shot that bounces off the rim is a frequent occurrence in basketball games. * * * There is no claim that this was anything other than a normal basketball game being played during recess. * * *

Under the primary assumption of risk doctrine, “one is deemed to have assumed, as a voluntary participant, spectator, or even bystander certain risks occasioned by

athletic or recreational activity, and to the extent of such an assumption, any legally enforceable duty to reduce the risks of such activity is limited” [Carrero-Santiago v Asphalt Green, Inc., 2026 NY Slip Op 05144, First Dept 8-27-26](#)

Practice Point: Plaintiff-teacher was not a party to the contract between the school and the company which provided a recess basketball coach. Because no “Espinal” exceptions applied, plaintiff, who was struck by an errant basketball while supervising recess, could not sue under the contract.

Practice Point: Plaintiff-teacher, who was standing 10 to 12 feet from the basketball court while supervising recess, assumed the risk of being struck by a basketball.

August 27, 2026

FAMILY LAW, JUDGES.

IN A MODIFICATION-OF-CHILD-SUPPORT PROCEEDING, EVEN WHERE THE MOVING PARTY MAKES OUT A PRIMA FACIE CASE SUPPORTING A REDUCTION, IF THE SUBMISSIONS RAISE QUESTIONS OF FACT A HEARING MUST BE HELD BEFORE A RULING IS MADE (SECOND DEPT).

The Second Department, reversing Family Court, determined that, even though defendant presented evidence supporting a downward modification of child support, the submissions by the parties raised questions of fact. Therefore the judge should not have ruled without holding a hearing. A recurring reason for Family Court reversals is the failure to hold a hearing:

The court may modify an order of child support where “there has been a change in either party’s gross income by fifteen percent or more since the order was entered, last modified, or adjusted” (Domestic Relations Law § 236[B][9][b][2][ii][B] ...). “However, such reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience” “On an application for modification of child support, a hearing is

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necessary where the parties' evidentiary submissions disclose the existence of genuine issues of fact"

Here, although the defendant demonstrated, prima facie, that his income had decreased by more than 15%, the reduction of income occurred through no fault of his own, and he made diligent efforts to secure comparable employment, a hearing is necessary because the parties' evidentiary submissions disclosed the existence of genuine issues of fact [Feldsherova v Lee, 2026 NY Slip Op 05080, Second Dept 8-26-26](#)

Practice Point: Family Court reversals are often the result of the failure to hold a hearing.

August 26, 2026

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

SERVICE OF A VALID RPAPL 1304 NOTICE IS A CONDITION PRECEDENT TO A FORECLOSURE ACTION; HERE THE AMOUNT OWED INDICATED IN THE RPAPL 1304 NOTICES DIFFERED FROM THE AMOUNT OWED INDICATED IN THE COMPLAINT, RAISING A QUESTION OF FACT WHETHER THE RPAPL 1304 NOTICE WAS INCORRECT AND THEREFORE INVALID (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this foreclosure action, determined there were questions of fact about whether the RPAPL 1304 notices were defective on their faces. The amount owed indicated in the RPAPL 1304 notices differed from the amount owed described in the complaint. Service of a valid RPAPL 1304 notice is a condition precedent to a foreclosure action. There must be strict compliance with the RPAPL 1304 content requirements:

... [P]laintiff failed to tender sufficient evidence demonstrating the absence of triable issues of fact as to its strict compliance with the content requirements of RPAPL 1304. RPAPL 1304(1) requires that the 90-day notice state: "As of ___,

your home loan is ____ days and ____ dollars in default.” The instant RPAPL 1304 notices stated: “As of 07/05/2023, your home loan is 4954 days and \$735,151.56 dollars in default.” In contrast, the complaint stated that “there is now due and owing to the Plaintiff under said Note and Mortgage the principal sum of \$440,882.36, with interest thereon from September 1, 2009.” Although the complaint noted that the plaintiff “only seeks to collect those installments which are within 6 years past due as of the date of commencement,” the complaint clarified in a footnote that the amount of \$440,882.36 “reflects the unpaid principal balance as of the default date and interest paid through date.” At least one of these documents, then, contained an error concerning the amount due on the note—information that was required under RPAPL 1304. [Residential Mtge. Loan Trust 2013-TT2 v Elshiekh. 2026 NY Slip Op 05124, Second Dept 8-26-26](#)

Practice Point: If the amount owed indicated in the RPAPL 1304 notice is incorrect, the notice is invalid and this condition precedent for a foreclosure action has not been fulfilled.

August 26, 2026

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