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RECENT DEVELOPMENTS IN NEW YORK CIVIL PRACTICE

FALL 2015

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PROFESSOR PATRICK M. CONNORS

ALBANY LAW SCHOOL
80 New Scotland Avenue
Albany, New York 12208-3494

Program Coordinator: Judge James P. Flanagan

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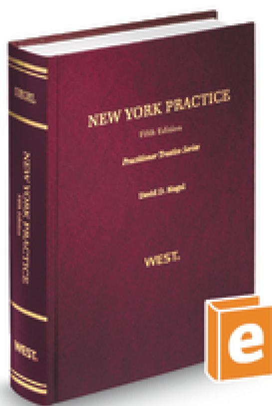

New York Practice, 5th (Practitioner Treatise Series)

By David D. Siegel, Patrick M. Connors

This title provides authoritative guidance on New York practice, reflecting statutory and caselaw changes, and amended disclosure provisions.

New York Practice, 5th is a source of authority and review of significant aspects of the law, including developments in pretrial disclosure and discovery, subpoenas and their service, arbitration, malpractice actions against lawyers and other professionals, emerging issues of service, long-arm jurisdiction, and more. This volume discusses the similarities and differences between state and federal practices, as well as principles, rules, and exceptions.

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- Motions practice
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New features and recent developments discussed in the July 2015 Pocket Part include:

- Discussion of status of mandatory and consensual e-filing (§ 63)
- 2015 amendment to CPLR 2106 ("Affirmation of truth of statement"), allowing those outside the United States to affirm under penalties of perjury (§ 205)
- 2015 amendments to CPLR 3216 ("Want of Prosecution") to address several concerns arising after Court of Appeals 2011 decision in Cadichon (§ 356)
- 2014 amendment to CPLR 2214 ("Motion papers; service; time), permitting mere reference to previously filed papers in e-filed actions (§ 246)
- 2104 amendment to CPLR 3113 ("Conduct of the [deposition]"), legislatively overruling Fourth Department caselaw by permitting lawyer for non-party deponent to fully participate at deposition (§ 356)
- Analysis of new Uniform Rules addressing default judgment applications in consumer credit cases (§ 295)
- Analysis of new Uniform Rule requiring the redaction of certain confidential personal information from court filings (§ 201)
- Analysis of Court of Appeals' recent decision addressing the "separate entity" rule governing the enforcement of judgments (§ 487)
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Patrick M. Connors
Biography

Patrick M. Connors is a Professor of Law at Albany Law School where he teaches New York Practice and Legal Ethics. He was an Adjunct Professor of Law at Syracuse University College of Law where he taught Professional Responsibility from 1991 to 1999.

He received his B.A. degree from Georgetown University and his J.D. degree from St. John's Law School, where he was an editor of the Law Review and research assistant to Professor David D. Siegel.

Upon graduation from St. John's in 1988, Professor Connors served as a personal law clerk to Judge Richard D. Simons of the New York Court of Appeals until 1991. From 1991 until May of 2000 he was an associate and then member of the litigation department at Hancock & Estabrook, LLP, in Syracuse, New York.

Commencing with the January 2013 supplement, Professor Connors became the author for Siegel, New York Practice (5th ed.). In addition, he is the author of the McKinney's Practice Commentaries for CPLR Article 22, Stay, Motions, Orders and Mandates, Article 23, Subpoenas, Oaths and Affirmations, Article 30, Remedies and Pleading, and Article 31, Disclosure. He also authors the Practice Commentaries for the New York Rules of Professional Conduct (available on Westlaw; in progress) and several articles in the Surrogate's Court Procedure Act. He is also the author of the New York Practice column and the annual Court of Appeals Roundup on New York Civil Practice, which are published in the New York Law Journal. From 1992 through 2003, he was a Reporter for the Committee on New York Pattern Jury Instructions ("PJI"), the panel of New York State Supreme Court Justices that drafts and oversees the frequent revisions of the standard jury charges in civil cases. His publications have been cited in over 130 reported cases.

He is a member of the New York State Bar Association's Committee on Professional Ethics. He served on the New York State Attorney Grievance Committee for the Fifth Judicial District from 1997 until 2000. He was the Reporter for the New York State Bar Association's Special Committee on the Code of Judicial Conduct, which published a report recommending substantial amendments to New York's Code of Judicial Conduct. He was also the Reporter for the New York State Bar Association's Task Force on Non-lawyer Ownership of Law Firms. He is a member of the Office of Court Administration's Advisory Committee on Civil Practice and served as a member of the New York State Bar Association's CPLR Committee from 2003 through 2007.

Professor Connors is a frequent lecturer at continuing legal education seminars on recent developments in New York Practice, professional ethics and legal malpractice. He has also served as an expert witness and consultant on issues pertaining to attorney ethics, legal malpractice, and civil procedure.

In the Fall of 2015, Professor Connors will be a Visiting Scholar in Residence at Touro College Jacob D. Fuchsberg Law Center.

RECENT DEVELOPMENTS IN NEW YORK CIVIL PRACTICE & PROCEDURE
October 13, 2015

The Suffolk County Bar Association

PROFESSOR PATRICK M. CONNORS

ALBANY LAW SCHOOL
80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494

VISITING SCHOLAR IN RESIDENCE
TOURO LAW SCHOOL
225 EASTVIEW DRIVE
CENTRAL ISLIP, NY 11722

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I. General Municipal Law § 50-e. Notice of Claim.

General Municipal Law Section 50–i(1) Does Not Require Notice of Claim for Cause of Action Against City Based on the Human Rights Law

In *Margerum v. City of Buffalo*, 24 N.Y.3d 721, 5 N.Y.S.3d 336, 28 N.E.3d 515 (2015), plaintiffs alleged that defendant city engaged in racial discrimination in violation of the Human Rights Law, the Civil Service Law, and the New York State Constitution. The city moved to dismiss based, in part, on the plaintiffs' failure to serve a notice of claim. The Court of Appeals affirmed the denial of the motion, ruling that General Municipal Law section 50–i(1) does not encompass a cause of action based on the Human Rights Law. In sum, the Court held that "[h]uman rights claims are not tort actions under 50–e and are not personal injury, wrongful death, or damage to personal property claims under 50–i."

Judge Read authored a concurring opinion "to highlight an inconsistency in New York law, which the Legislature might choose to address." She noted that the Court has "held that an employment discrimination claim brought against a *county* under the Human Rights Law is subject to County Law § 52(1)'s notice-of-claim requirement." *See Mills v. County of Monroe*, 89 A.D.2d 776, 453 N.Y.S.2d 486 (4th Dept.1982), *affd.* 59 N.Y.2d 307, 309, 464 N.Y.S.2d 709, 451 N.E.2d 456 (1983). The case is discussed in further detail in section 32 of the January 2016 Supplement to Siegel, New York Practice (5th ed.).

Notice of Claim Served During Plaintiff's Lifetime Sufficient to Provide Notice of Wrongful Death Action Against Port Authority

The Unconsolidated Laws contain notice of claim provisions governing claims against the Port Authority of New York and New Jersey. *See* Unconsolidated Laws §§ 7107, 7108. In *Matter of New York City Asbestos Litigation*, 24 N.Y.3d 275, 998 N.Y.S.2d 150, 22 N.E.3d 1018 (2014), plaintiff and his wife served a "Notice of Claim for Personal Injury from Asbestos" on the Port Authority.

After plaintiff died, his widow became the administratrix of plaintiff's estate and sought to join the Port Authority in an action asserting claims for personal injury and wrongful death. She did not, however, serve a new notice of claim. The Court of Appeals noted that it was not disputed that the

previously served notice of claim would have been valid as to a personal injury case filed during plaintiff's lifetime. The central issue was whether plaintiff's death required service of a new notice of claim, and the Court of Appeals held that it did not. *See Holmes v. City of New York*, 269 A.D. 95, 54 N.Y.S.2d 289 (2d Dep't 1945)("an administrator can have the benefit of a notice of claim and intention to sue a municipality which was filed by his intestate prior to her death.").

The case is discussed in further detail in section 32 of the January 2016 Supplement to Siegel, New York Practice (5th ed.).

Whistleblower Who Fails to Serve Notice of Claim Prior to Commencing Action Under Civil Rights Law § 75-b Can Still Pursue Claim for Reinstatement

Civil Service Law § 75-b forbids retaliatory personnel action by a public employer against an employee who disclosed to a governmental body information regarding violations of regulations that would present a danger to public health or safety, or about what the employee believes to be an improper governmental action. The statute allows an employee to obtain various forms of relief, including damages and reinstatement to the employee's former position. In *Rose v. New York City Health & Hospitals*, 122 A.D.3d 76, 991 N.Y.S.2d 602 (1st Dep't 2014), the court held that an employee bringing a whistleblower action seeking the full range of relief afforded by the statute must serve a notice of claim. Furthermore, the court concluded that if an employee brings such an action without first serving a notice of claim, the employee may have the claim for reinstatement severed from the remainder of the action (thereby preserving that claim) because the claim is equitable, and a notice of claim is only required when a claimant is seeking monetary damages.

II. CPLR 205(a). Six Month Extension.

CPLR 205(a) now provides:

> Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall

> demonstrate a general pattern of delay in proceeding with the litigation.

At first blush, the amendment to CPLR 205(a) might seem to be primarily a matter of concern for the plaintiff who is attempting to commence a new action within the six-month extension. However, it is actually the defendant moving to dismiss the earlier action for neglect to prosecute under one of these miscellaneous provisions who will want to ensure that the court sets forth the "specific conduct constituting the neglect" and the plaintiff's "general pattern of delay in proceeding with the litigation" so as to prevent the plaintiff from invoking CPLR 205(a) in a subsequent action.

While the new language added to CPLR 205(a) specifically refers to dismissals under CPLR 3216, which are usually based on a failure to timely serve and file a note of issue, it also applies to any dismissal "otherwise" granted for a "neglect to prosecute." Therefore, the new requirement applies to the full panoply of dismissals grounded upon a neglect to prosecute. *See* CPLR 3126 (dismissal for failure to provide disclosure); CPLR 3404 (failure to restore case to trial calendar within a year after being marked "off" constitutes a "neglect to prosecute"); CPLR 3012(b) (dismissal for failure to timely serve complaint in response to demand; caselaw holding that this dismissal is one for "neglect to prosecute"); Connors, McKinney's CPLR 3012 Practice Commentaries, C3012:13 ("Dismissal Is Neglect to Prosecute for Limitations' Purposes"); CPLR 3012-a (requiring filing of certificate of merit in medical malpractice cases); CPLR 3406 (requiring filing of notice of medical malpractice action; McKinney's Practice Commentary CPLR 3012-a, C3012-a:3 ("Commencing a New Action After Dismissal for Failure to Comply with CPLR 3012-a")).

Second Action Relying on CPLR 205(a)'s Six-Month Gift Need Not Also Satisfy CPLR 202

In *Norex Petroleum Ltd. v. Blavatnik*, 23 N.Y.3d 665 (2014), plaintiff commenced a New York state court action after a timely New York federal action was ultimately dismissed under Federal Rule 12(b)(6) for failure to state a claim. Under CPLR 202, the federal action was subject to the statute of limitations of Alberta, Canada because plaintiff was not a resident of New York and the claims accrued in that province. In *Norex*, the Court of Appeals held that plaintiff's second action was not again subject to CPLR 202 and the laws of Alberta, which had no savings provision similar to CPLR 205(a). Rather, the action was timely because it was commenced within six months

from the dismissal of the timely federal action. The case is discussed in further detail in section 57 of the January 2015 Supplement to Siegel, New York Practice (5th ed.).

Court of Appeals Holds That Action "Is Terminated" Under CPLR 205(a) When Appeal as of Right Is Dismissed Due to Failure to Perfect Appeal

In *Lehman Bros. v. Hughes Hubbard & Reed*, 92 N.Y.2d 1014 (1998), the Court of Appeals held that a prior action terminates for purposes of CPLR 205(a) when an appeal taken as of right is exhausted. In *Malay v. City of Syracuse*, 25 N.Y.3d 323 (2015), the Court held that where an appeal is taken as of right, but is dismissed by the intermediate appellate court due to the plaintiff's failure to perfect the appeal, the prior action terminates for the purposes of CPLR 205(a) when the intermediate appellate court dismisses the appeal, not when the underlying order appealed from is entered.

Entry of Order Dismissing Action Starts Running of CPLR 205(a)'s Six Month Gift

When an order has terminated the prior action, the six-month period for a new action under CPLR 205(a) runs from the order itself, and not from a later judgment entered on it. *See* Siegel, New York Practice § 52 (5th ed.). In *Ross v. Jamaica Hospital Medical Center*, 122 A.D.3d 607, 996 N.Y.S.2d 118 (2d Dep't 2014), the court vividly made the point, dismissing plaintiff's medical malpractice action after holding that the six-month period runs from the entry of the order of dismissal of action #1. The entry of that order occurred on August 17, 2011, and plaintiff commenced action #2 on February 23, 2012, six months and six days later. *Id.* at 607, 996 N.Y.S.2d at 118-19. We assume that the order dismissing action #1 was also served on the plaintiff, possibly more than six days after its entry, but the *Ross* decision highlights that the date the order was served is irrelevant to the CPLR 205(a) calculation.

III. CPLR 213. Actions to be commenced within six years.

Court of Appeals Holds That Trust's Cause of Action for Breach of Representations and Warranties Accrued at Moment of Contract Execution

In *ACE Sec. Corp. v. DB Structured Products, Inc.*, 2015 WL 3616244 (June 11, 2015), an important decision addressing the statute of limitations in a transaction involving residential mortgage-backed securities, the Court held that a pre-suit remedial provision is not a separately enforceable right that gives rise to a separate breach of contract claim. The Court of Appeals found that the cure, repurchase, or substitution provision of the contract "was dependent on, and indeed derivative of, [the sponsor's] representations and warranties, which did not survive the closing and were breached, if at all, on that date." The Court of Appeals concluded that the "cure or repurchase obligation" was "the Trust's sole remedy in the event of [a] breach of representations and warranties" and was not "an independently enforceable right." *Compare Bulova Watch Co. v. Celotex Corp.*, 46 N.Y.2d 606 (1979) (holding that separate repair clause in a contract for the sale of a roof constituted a future promise of performance, the breach of which created a cause of action); *see* Siegel, New York Practice § 41 ("Accrual in Warranty Cases").

Second Department Holds That Application or Motion for Issuance of a QDRO Is Not Barred by the Statute of Limitations

In *Kraus v. Kraus*, 2015 WL 4097055 (2d Dep't 2015), the court addressed the novel "question of whether the submission for judicial approval of a proposed qualified domestic relations order (hereinafter QDRO), instead of a motion made on notice, may be employed by a party to a matrimonial action to obtain pension arrears."

The court held that a QDRO may be used for such a purpose and also noted that:

> "[a]n action to enforce a distributive award in a matrimonial action is governed by a six-year statute of limitations (see CPLR 213[1], [2]; Bayen v. Bayen, 81 A.D.3d 865, 866, 917 N.Y.S.2d 269). However, this Court, in both Bayen and Denaro, made clear that since a QDRO is derived from the bargain struck by the parties, there is no need to commence a separate, plenary action to formalize the agreement, and

that “an application or motion for the issuance of a QDRO is not barred by the statute of limitations”

Furthermore, the court concluded “that there is also no requirement under 22 NYCRR 202.48 or otherwise that proposed QDROs be submitted within 60 days of the execution of a stipulation of settlement of a matrimonial action or the issuance of a judgment of divorce, as QDROs are merely procedural mechanisms for effectuating payment of a spouse's share of the other spouse's pension.” *See* Siegel, New York Practice § 250 (“Deciding the Motion; Drawing and Entering the Order”).

IV. CPLR 214. Actions to be commenced within three years.

Court of Appeals Concludes That Doctrine of Continuous Representation Creates a Question of Fact on Timeliness of Legal Malpractice Action

In *Grace v. Law*, 24 N.Y.3d 203, 997 N.Y.S.2d 334, 21 N.E.3d 995 (2014), a law firm withdrew from representing the plaintiff in a medical malpractice action in federal court after discovering it had a conflict of interest. Following this withdrawal, another law firm took over the prosecution of the federal action. The exact date of the transfer of the representation was not clear, but on December 8, 2008, an order was signed by the federal district court directing the substitution of counsel.

Plaintiff commenced a legal malpractice action against both law firms on December 5, 2011. The law firm that withdrew from the representation in the federal court action moved for summary judgment based on the three-year statute of limitations in CPLR 214(6), claiming that plaintiff should have known by September 26, 2008, that the firm was no longer able to represent him and that successor counsel would be taking over the representation. The Court of Appeals affirmed the Fourth Department’s denial of defendant’s motion for summary judgment, agreeing that it was “unclear” when the firm’s representation of plaintiff in the federal action concluded. *See also Farage v. Ehrenberg*, 124 A.D.3d 159, 996 N.Y.S.2d 646 (2d Dep’t 2014) (“[W]here… facts establish a client's discharge of counsel on a date preceding execution and filing of the Consent to Change Attorney form, the continuing representation toll of the statute of limitations for legal malpractice runs only to the date of the actual discharge and not to the date of the later Consent to Change Attorney.”).

The decision is discussed in further detail in Siegel, New York Practice § 42 (Connors ed., July 2015 Supplement).

Court of Appeals Holds That Continuous Representation Doctrine Generally Cannot Toll Statute of Limitations for Claim Seeking Refund of Gifts Made to Lawyers by Client During Representation

The facts in the Court of Appeals decision in *In re Lawrence*, 24 N.Y.3d 320, 998 N.Y.S.2d 698, 23 N.E.3d 965 (2014), are nothing short of remarkable. The defendant law firm represented the client in estate litigation for over twenty years with hundreds of millions of dollars at stake. The estate litigation ended with a mammoth and unexpected settlement of over $100 million. Thereafter, a dispute arose over the amount of the lawyer's contingency fee calculated under a revised retainer agreement, which totaled approximately $44 million, and several gifts that the client had made to individual lawyers during the representation ranging in amounts from $1.5 to $2 million!

The estate's claims for refund of the gifts, which were made in 1998, were subject to dismissal under the statute of limitations unless they were subject to the continuous representation doctrine. The *Lawrence* Court noted that the continuous representation doctrine can only be applied if "two prerequisites" are met: "a claim of misconduct concerning the manner in which professional services were performed, and the ongoing provision of professional services with respect to the contested matter or transaction." *In re Lawrence*, 24 N.Y.3d at 341, 998 N.Y.S.2d 712, 23 N.E.3d at 980. The Court ultimately dismissed the claim as time-barred, concluding that the continuous treatment doctrine generally cannot be applied to a financial dispute between the professional and her client, such as a dispute over a fee or a gift. *See* Siegel, New York Practice, § 42 (Connors ed., July 2015 Supplement).

Malpractice Claims Arising from Chiropractor's Services Do Not Get Benefit of Shorter Medical Malpractice Statute

Claims arising out of the services performed by a psychologist are subject to the three-year statute of limitations in CPLR 214(6), rather than the 2 1/2-year period applicable to claims against doctors in CPLR 214-a. Similarly, in *Perez v. Fitzgerald*, 981 N.Y.S.2d 5, 2014 WL 463318 (1st Dep't 2014)

(SPR 266:2), the court concluded that the three-year statute of limitations in CPLR 214(6) applies to claims arising from the services of a chiropractor, where the treatment is separate and apart from any other treatment provided by a licensed physician and is not performed at the request of a physician.

V. CPLR 214-a. Action for medical, dental or podiatric malpractice to be commenced within two years and six months; exceptions.

Court of Appeals Holds That Fragment Remaining from Catheter Placed in Plaintiff's Heart During Surgery is a Foreign Object

In *Walton v. Strong Memorial Hospital*, 25 N.Y.3d 554 (2015), the Court of Appeals revisited its caselaw on the foreign object exception to the statute of limitations and ruled that a fragment remaining from a catheter that was placed in plaintiff's heart during surgery in 1986 is a foreign object for purposes of the discovery rule of CPLR 214-a.

After conducting a comprehensive review of its jurisprudence on the foreign object exception, the Court stated several general principles : (1) tangible items (clamps, scalpels, sponges, etc.) introduced into a patient's body solely to carry out or facilitate a surgical procedure are foreign objects if left behind; (2) the alleged failure to timely remove a fixation device does not transform the device into a foreign object; (3) a fixation device does not become a foreign object if inserted in the wrong place in the body; (4) the failure to timely remove a fixation device is generally akin to misdiagnosis; (5) improper placement of a fixation device is most readily characterized as negligent medical treatment; (6) in enacting CPLR 214-a, the legislature essentially directed courts not to expand the discovery exception for foreign objects beyond the rare *Flanagan v. Mount Eden General Hospital*, 24 N.Y.2d 427 (1969) fact pattern; and (7) the last sentence in CPLR 214-a expressly provides that chemical compounds, fixation devices and prosthetic aids or devices are never to be classified as foreign objects.

VI. Equity Actions; Laches

Court of Appeals Addresses Doctrine of Laches

In *Capruso v. Village of Kings Point*, 23 N.Y.3d 631, 641, 992 N.Y.S.2d 469, 474, 16 N.E.3d 527, 532 (2014), the Court of Appeals highlighted a few

important points regarding the doctrine of laches. First, "laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest." *Id.* at 641-42, 992 N.Y.S.2d at 475, 16 N.E.3d at 533. Furthermore, the defense is not available against a claim of continuing wrong. This was the situation in *Capruso* where the State and various individual plaintiffs sought to enjoin the defendant village from building a Department of Public Works facility.

VII. CPLR 301. Jurisdiction over persons, property or status.

United States Supreme Court Issues Decision That Limits Application of General Jurisdiction to a Corporation and Renders "Doing Business" Test Obsolete

The standard used for decades to measure whether a corporate defendant is subject to general jurisdiction in New York, the famous "corporate presence" or "doing business" test, has been all but declared unconstitutional by the Supreme Court in its 2014 decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (SPR 265:1).

In *Daimler*, twenty-two Argentinian residents commenced an action in federal court in California against defendant, an automobile manufacturer headquartered in Germany. The complaint sought damages arising from criminal actions committed by defendant's Argentinian subsidiary outside the United States. Plaintiffs claimed general jurisdiction over defendant in California predicated on the acts of another one of its other subsidiaries, which distributed defendant's cars in California and various other states. Even though defendant's subsidiary was present in California with a fair degree of permanence and continuity, the Supreme Court held that the "Due Process Clause of the Fourteenth Amendment precludes the [California] Court from exercising jurisdiction over [defendant] in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint." *Daimler*, 134 S. Ct. at 751.

The Supreme Court stressed that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Daimler*, 134 S. Ct. at 760. Therefore, "[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place," such as its "place of incorporation and principal place of business." *Id.* The Court conceded that it was not

holding that these are the "*only*" two places where a corporation can be subject to general jurisdiction, but specifically concluded that a corporation is not subject to general jurisdiction "in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business'." *Id.* at 761.

The decision is discussed in further detail in sections 82, 86 and 95 of the July 2014 Supplement to Siegel, New York Practice (Connors ed., July 2014 Supplement) and in two articles appearing in the New York Law Journal: "Impact of Supreme Court Decisions on New York Practice [Part I]," 251 (no. 116) New York Law Journal (June 18, 2014) and "Impact of Recent U.S. Supreme Court Decisions on New York Practice [Part II]," 252 (no. 13) New York Law Journal (July 21, 2014).

First Department Rules That a New York Bank Branch That Appoints Superintendent of Department of Financial Services as Agent Is Subject to General Jurisdiction in New York

In *B & M Kingstone, LLC v. Mega International Commercial Bank Co., Ltd.*, _ A.D.3d _, 15 N.Y.S.3d 318 (1st Dep't 2015), petitioner served an information subpoena on the New York branch of respondent, Mega International Commercial Bank, Co., Ltd. (Mega), to enforce a money judgment obtained against a group of judgment debtors over ten years ago. Mega, which has its principal place of business in Taiwan, complied with demands for information pertaining to its sole New York branch, but refused to produce similar information regarding accounts and records at its 127 branches outside New York State. It argued, among other things, that New York courts lacked personal jurisdiction over it with respect to that information.

Petitioner commenced a proceeding seeking, among other things, an order restraining bank accounts pursuant to CPLR 5222(b) and compliance with the subpoena duces tecum and the information subpoena restraining notice and questionnaire served pursuant to CPLR 5224, and finding Mega in contempt for its failure to fully respond to the subpoenas pursuant to CPLR 5251.

Citing *Daimler AG v. Bauman,* 134 S Ct 746, 760 (2014), Mega argued that petitioner had no jurisdiction over it as a whole because it was not "at home" in New York and the presence of a Mega branch office in the State was not sufficient to establish general jurisdiction. The supreme court found that it

did not have general jurisdiction over the entirety of Mega, and that portion of the petition seeking turnover of assets in branches outside New York was therefore denied. However, since Mega's New York branch had the ability to access information concerning the bank's accounts around the world, the court ordered it to comply with the information subpoena. The court also relied upon CPLR 5223 ("Disclosure"), which permits a judgment creditor to demand information on the judgment debtor's property from any person who can provide it, including the judgment debtor and his family and friends.

The First Department affirmed that portion of supreme court's order that granted petitioner's motion to direct Mega to fully respond to the information subpoena. The *B&M* court concluded that under *Daimler*, New York did not have general jurisdiction over Mega's worldwide operations. Mega's New York branch was, however, subject to jurisdiction requiring it to comply with the information subpoenas because it consented to the necessary regulatory oversight in return for permission to operate as a bank in New York.

The decision is discussed in further detail in Siegel, New York Practice § 95 (Connors ed., January 2016 Supplement).

VIII. CPLR 302. Personal jurisdiction by acts of non-domiciliaries.

Court of Appeals Finds No Longarm Jurisdiction Over Florida Surgical Facility Where Plaintiff Received Surgery Despite Numerous Communications with Plaintiff in New York

In *Paterno v. Laser Spine Institute*, 24 N.Y.3d 370, 998 N.Y.S.2d 720, 23 N.E.3d 988 (2014), plaintiff clicked on an internet advertisement for Laser Spine Institute ("LSI"), a facility specializing in spinal surgery with its principal place of business in Florida. After numerous telephone and electronic communications with LSI to ascertain if surgical procedures might alleviate his pain, he ultimately travelled from his home in New York to LSI's Florida facility for evaluation and surgery. Plaintiff made two separate trips to Florida and underwent three surgeries in two months at LSI, but experienced severe pain following each procedure.

Plaintiff commenced a medical malpractice action in New York against LSI and several LSI surgeons relying on longarm jurisdiction under CPLR

302(a)(1) and (3). The Court of Appeals unanimously affirmed the dismissal of the action based on lack of personal jurisdiction. The Court acknowledged that "[t]he lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York," citing to its prior decisions in *Fischbarg* and *Deutsche Bank*. In *Paterno*, however, the Court concluded that the defendants' contacts with New York, when viewed on the whole, did not rise to the level of conducting a transaction of business in New York under CPLR 302(a)(1). The Court also rejected plaintiff's argument that longarm jurisdiction existed under CPLR 302(a)(3), concluding that "the situs of the injury in medical malpractice cases is the location of the original event which caused the injury, and not where a party experiences the consequences of such injury."

The decision is discussed in further detail in Siegel, New York Practice § 86 (Connors ed., July 2015 Supplement).

Supreme Court Issues Decision on Longarm Jurisdiction That May Affect Application of CPLR 302(a)(3)

Walden v. Fiore, 571 U.S. ___, 134 S. Ct. 1115 (2014), involved the assertion of longarm jurisdiction, commonly referred to today as "specific jurisdiction," to be distinguished from the "general or all-purpose jurisdiction" involved in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (SPR 265:1), *supra*. The statute at issue was a general longarm statute, but the decision will most likely affect New York actions relying on CPLR 302(a)(3) for jurisdiction.

In *Walden*, plaintiffs were on route to Las Vegas, Nevada from a very profitable venture in Puerto Rico and were carrying their alleged gambling winnings of approximately $97,000 in cash. At a stopover in Georgia, their booty was seized by a Drug Enforcement Agency ("DEA") agent with the promise that it would be returned if plaintiffs could prove that the cash emanated from a legitimate source. The defendant DEA agent helped draft an allegedly false and misleading affidavit to establish probable cause for forfeiture of the funds and forwarded it to a United States Attorney's Office in Georgia. Ultimately, no forfeiture complaint was filed and the DEA returned the funds to plaintiffs seven months after their seizure. *Walden*, 134 S. Ct. at 1119-20.

Plaintiffs commenced an action against the defendant DEA agent in federal district court in Nevada alleging, among other things, that defendant violated

their Fourth Amendment rights by seizing the cash without probable cause, retaining the money after concluding it did not come from drug-related activity, and drafting a false affidavit. The Nevada longarm statute relied upon by plaintiffs to assert jurisdiction over the Georgia DEA agent was a general one, permitting its courts to exercise jurisdiction over persons "on any basis not inconsistent with . . . the Constitution of the United States." *Walden*, 134 S. Ct. at 1120; Nev. Rev. Stat. § 14.065 (2014).

In a unanimous opinion, the Supreme Court reversed the Ninth Circuit and concluded that the Nevada district court lacked personal jurisdiction over defendant. The Court stressed that the central jurisdictional inquiry is the contacts that "defendant himself" creates with the forum state, and not plaintiff's connection with same. *Walden*, 134 S. Ct. at 1122. Furthermore, the Court observed that "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* While the Court acknowledged that "physical presence in the forum is not a prerequisite to jurisdiction . . . physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact." *Id.*

Applying these principles, the Court concluded that defendant's conduct toward plaintiffs, whom he knew had Nevada connections, and the fact that "it was foreseeable that plaintiffs would suffer harm in Nevada" were insufficient to establish minimum contacts with the forum state. *Id.* The key jurisdictional inquiry "is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 1125. In this regard, it was "undisputed that no part of petitioner's course of conduct occurred in Nevada."

We wonder whether the decision that occasioned the adoption of CPLR 302(a)(3), *Feathers v. McLucas*, 15 N.Y.2d 443 (1965), would itself be a casualty of the tightened jurisdictional standards imposed by the Supreme Court in *Walden*. *See* July 2014 Supplement to Siegel, New York Practice, § 88 (Connors ed., July 2015 Supplement). The *Daimler* and *Walden* decisions are discussed in further detail in two articles appearing in the New York Law Journal: "Impact of Supreme Court Decisions on New York Practice [Part I]," 251 (no. 116) New York Law Journal (June 18, 2014) and "Impact of Recent U.S. Supreme Court Decisions on New York Practice [Part II]," 252 (no. 13) New York Law Journal (July 21, 2014).

IX. CPLR 303. Designation of attorney as agent for service.

Defendant in Action #1 in Supreme Court Employs CPLR 303 to Serve Process on Plaintiff's Attorney in Action #2, Also in Supreme Court

In *Deutsche Bank AG v. Vik*, 2015 WL 458284 (Sup. Ct., New York County 2015), a nondomiciliary corporation had commenced an action against a bank in New York County Supreme Court (Action #1). The bank subsequently commenced an action (Action #2), also in New York County Supreme Court, against several defendants, including the nondomiciliary corporation and its sole shareholder. The bank sought, among other things, a declaration of alter ego liability against the sole shareholder for a judgment the bank obtained against the corporation in the United Kingdom that was recognized in New York on June 19, 2014, pursuant to a prior action under CPLR 3213. *Id.* at *2.

In Action #2, plaintiffs relied on CPLR 303 and served process on the attorneys who appeared on behalf of the corporation when it commenced Action #1. As the *Deutsche Bank* court noted, CPLR 303 contains a limitation on this method of service and requires that the claims stated in Action #2 be of such a nature that they could have been prosecuted as counterclaims in Action #1 "had the action been brought in the supreme court." *Id*, at *5; CPLR 303.

Although the bank's claims in Action #2 were asserted against both the nondomiciliary corporation and its sole shareholder, the court concluded that it would have been proper for the bank to have added him as a counterclaim defendant in Action #1. *Deutsche Bank*, at *5. Therefore, the *Deutsche Bank* court ruled that service upon the corporation's attorney pursuant to CPLR 303 in Action #2 was proper and denied the motion to dismiss. *Id.* Regarding jurisdiction over the sole shareholder, who was also apparently served pursuant to CPLR 303, the court concluded that "the same service of process and jurisdictional basis that enable the court's jurisdiction over [the corporation] would be effective over [the sole shareholder]" if it is ultimately determined that the corporation was his alter ego. *Id.* at *6.

The decision is discussed in further detail in Siegel, New York Practice § 96 (Connors ed., July 2015 Supplement).

X. CPLR 304. Method of commencing action or special proceeding.

Chapter 237 of Laws of 2015 Expands Judiciary's Powers to Adopt E-filing

On September 1, 2015, the Governor signed Chapter 237 of the laws of 2015 on August 31, 2015, which became effective immediately. The new law vests OCA with the authority to implement mandatory e-filing in any county and in almost all types of cases. This authorization is now permanent and will not sunset in the future. The legislation contains an important restriction of sorts, requiring that the local county clerk consent to the adoption of mandatory e-filing before it can become effective in that county. CPLR 2111(a).

Several categories of action are excluded from mandatory e-filing, including matrimonial actions, *see* CPLR 105(p) (defining "matrimonial action"), Election Law proceedings, CPLR Article 70 habeas corpus proceedings, CPLR Article 78 proceedings, and Mental Hygiene Law proceedings. *See* CPLR 2111(b)(2)(A).

An attorney for a party may opt out of mandatory e-filing in certain designated situations. CPLR 2111 (b)(3). The opt-out is accomplished through the filing of a prescribed form with the county clerk in the county where the action is pending. *Id.* An unrepresented party is free to participate in e-filing and, after participating, is free "to opt out of the program for any reason via presentation of a prescribed form to be filed with the clerk of the court where the proceeding is pending." CPLR 2111 (b)(3)(B).

Among other things, the law creates a new Article 21-A of the CPLR, entitled "Filing of Papers in the Courts by Facsimile Transmission and by Electronic Means." A new CPLR 2111 addresses the commencement of actions and filing and service of papers in the trial courts by electronic means (e-filing) and by facsimile transmission. Filing by facsimile transmission is only permitted in the Court of Claims. CPLR 2111(a). CPLR 2112 addresses the filing of papers by electronic means in the Appellate Division.

If a county has adopted mandatory e-filing in a particular category of action, it is important to note that the filing and service of a notice of appeal pursuant to CPLR 5515(1) is subject to the e-filing rules. CPLR 2111(c).

For more detailed discussion of the new law, see Siegel New York Practice §§ 11, 63, 531, 533 (Connors ed., January 2016 Supplement)(available in December 2015).

Second Department Rules That Plaintiff Who Obtains Index Number, But Fails to File Initiatory Papers, Cannot be Saved by CPLR 2001

Applying *Goldenberg v. Westchester County Health Care Corp*., 16 N.Y.3d 323 (2011), the Second Department dismissed an action in which the plaintiff had obtained an index number and made a motion by order to show cause within the action, but somehow never filed a summons and complaint or summons and notice. *O'Brien v. Contreras*, 126 A.D.3d 958 (2d Dep't 2015). In no uncertain terms, the *O'Brien* court concluded that this omission was beyond the reach of CPLR 2001 and noted that "[t]he failure to file the initial papers necessary to institute an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity."

Court Invokes CPLR 2001 to Forgive E-Filing of Incorrect Initiatory Papers That Did Not Name Defendant

In *McCord v. Ghazal*, 43 Misc.3d 767 (Sup. Ct., Kings County 2014), plaintiffs purchased an index number in conjunction with their e-filed action, but filed incorrect papers from a related case with a similar caption. The defendant was not named as a party in the papers. Relying on the Second Department's decision in *Grskovic*, *supra*, the court concluded that it is "permitted to correct a mistake caused 'in large part, by the glitches in the new e-filing system and counsel's unfamiliarity with it'." Therefore, it denied defendant's motion to dismiss for lack of subject matter and personal jurisdiction.

The court emphasized that plaintiffs' counsel timely electronically commenced a new action, properly identified defendant as a party in the e-filing system, paid the proper fee for an index number, uploaded a document identified as a "summons with notice" in the e-filing system, served defendant with the proper summons with notice the following day, properly uploaded an affidavit of service for the summons with notice with the corresponding index number purchased, and promptly uploaded the correct summons with notice upon learning of the initial filing error. This latter act occurred after the statute of limitations expired.

The court observed that "[t]he only error in commencing this action was the selection of the wrong file on plaintiffs' counsel's computer when prompted by the e-filing system to select the file to be uploaded. Accordingly, the plaintiffs' counsel's uploading of the Summons With Notice was performed in a mistaken manner and method and, pursuant to CPLR 2001, the court may correct the mistake."

Supreme Court Distinguishes *Grskovic* and Refuses to Forgive Late E-filing After County Clerk Rejected Hard-Copy Filing

In *Feld v. Ginsburg*, 2015 WL 466135 (Sup. Ct., Westchester County 2015), the client disputed the counsel fee charged by his lawyer and the matter proceeded to arbitration under 22 NYCRR Part 137. The notice of arbitration award and arbitration award ($6.6011.38) were mailed to plaintiff on September 2, 2014. On October 7, 2014, plaintiff commenced this action for de novo review pursuant to section 137.8, which provides:

> A party aggrieved by the arbitration award may commence an action on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding.

The *Feld* court noted that the "30-day period is absolute and the court does not have discretion to excuse the late commencement of the action for de novo review." Therefore, plaintiff client's action for de novo review, which was commenced by e-filing 35 days after the mailing of the notice of arbitration award, was dismissed as untimely.

Distinguishing *Grskovic v. Holmes*, 111 A.D.3d 234 (2d Dep't 2013), the court noted that the county clerk actually rejected plaintiff's attempt to file a hard copy of the summons and complaint and notified plaintiff before the expiration of the thirty-day period that the initiatory papers had to be e-filed. Nonetheless, plaintiff failed to e-file the summons and complaint until after the expiration of the thirty-day period.

XI. Commercial Division of Supreme Court

New York County's Commercial Division Threshold Raised to $500,000

There are monetary thresholds for adjudicating an action in the commercial division, which vary from county to county. In New York County, effective February 17, 2014, the threshold was increased from $150,000 to $500,000.

The monetary thresholds for the commercial division in several other counties were raised effective September 2, 2014. The current thresholds are:

Seventh Judicial District and Albany and Onondaga Counties—$50,000

Eighth Judicial District and Queens and Suffolk Counties—$100,000

Kings County—$150,000

Nassau County—$200,000

Westchester County—$100,000

Uniform Rule 202.70(a) lists these applicable thresholds and should be checked periodically by attorneys who litigate in the commercial division.

Several other amendments were made to the Rules of the Commercial Division, 22 NYCRR 202.70, which are tracked in Siegel, New York Practice § 12 (Connors ed., July 2015 Supplement).

22 NYCRR 202.70(d) Assignment to the Commercial Division (Admin. Order 117/2014, July 1, 2014): The amended Uniform Rule requires a party to seek assignment of a case to the Commercial Division within 90 days following service of the complaint. The failure to do so may preclude the parties from seeking a Commercial Division assignment.

Query what happens when an action is commenced by summons and notice under CPLR 305(b)?

XII. Uniform Rule 202.5-bb. Electronic Filing in Supreme Court; Mandatory Program.

This new rule, requiring that actions be filed electronically in certain counties, took effect on May 19, 2010. Uniform Rule 202.5-bb(a)(1) now provides:

> There is hereby established a pilot program in which all documents filed and served in Supreme Court in the following civil actions (in the counties specified) shall be filed and served by electronic means: (i) **commercial actions in New York County**; (ii) **tort actions in Westchester County**; and (iii) **such classes of actions as shall be specified by order of the Chief Administrator of the Courts** (excluding matrimonial actions as defined by the Civil Practice Law and Rules, Election Law proceedings, proceedings brought pursuant to Article 78 of the Civil Practice Law and Rules, and proceedings brought pursuant to the Mental Hygiene Law) in any additional counties outside the City of New York as authorized by statute. Except to the extent that this section shall otherwise require, the provisions of section 202.5-b of these rules shall govern this pilot program.

Chapter 543 of the Laws of 2011, signed the Governor on September 23, 2011, allows for a substantial expansion of both the mandatory and consensual e-filing programs.

By Administrative Order dated March 18, 2015 and effective March 23, 2015, Chief Administrative Judge A. Gail Prudenti established or continued mandatory e-filing in certain actions in the following counties:

Supreme Court, Bronx County-all medical, dental, and podiatric malpractice actions;

Supreme Court, Erie County- all actions except CPLR Article 78 proceedings, Election Law Proceedings, in rem tax foreclosures, matrimonial and Mental Hygiene Law matters, and proceedings under RPTL § 730;

Supreme Court, Essex County-all tax certiorari (excluding proceedings under RPTL § 730) and eminent domain matters, and all foreclosure actions

involving real property (excluding mechanics liens and in rem tax foreclosures);

Supreme Court, Kings County-all Commercial Division matters (commercial cases as defined in 22 NYCRR §§ 202.70(a), (b), and (c));

Supreme Court, Nassau County-all commercial matters (without regard to the amount in controversy), civil forfeitures, in rem tax foreclosures, and tax certiorari (including proceedings under RPTL § 730);

Supreme Court, New York County-all actions except CPLR Article 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters;

Supreme Court, Onondaga County-all actions except CPLR Article 78 proceedings, CPLR Article 70 proceedings, Election Law proceedings, matrimonial matters, Mental Hygiene Law matters, foreclosure actions, proceedings under RPTL § 730, name change applications, and emergency medical treatment applications;

Supreme Court, Queens County-all medical, dental, and podiatric malpractice actions, and all foreclosure actions (including commercial foreclosures) addressing real property and mechanics liens. A separate Administrative Order announced the launch of a pilot project for residential foreclosure actions subject to mandatory electronic filing in Supreme Court, Queens County. Effective March 23, 2015, a "Residential Foreclosure Addendum" and a "What is E-Filing?" Information Sheet shall accompany the initiating papers that must be personally served upon a party in residential foreclosure actions. *See* AO/59/15, March 18, 2015.

Supreme Court, Rockland County-all actions except CPLR Article 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters;

Supreme Court, Suffolk County-all Commercial Division matters (commercial cases as defined in 22 NYCRR §§ 202.70(a), (b), and (c)), medical, dental, and podiatric malpractice actions, proceedings under RPTL § 730, and all foreclosure actions addressing real property and mechanics liens;

Supreme Court, Westchester County-all actions except CPLR Article 78 proceedings, Election Law proceedings, matrimonial and Mental Hygiene Law matters;

Surrogate's Court in Cayuga, Chautauqua, Erie, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne, and Yates Counties-all probate and administration proceedings and related miscellaneous proceedings.

The Administrative Order references the dates that mandatory and consensual e-filing became effective in the above counties. The specifics on all of the above matters, and any changes (which have been occurring with some frequency), can be checked at: https://iapps.courts.state.ny.us/nyscef/RulesAndLegislation?CSRT=10541687203380054452.

The status of e-filing, and the pitfalls associated with it, are discussed in further detail in Siegel, New York Practice § 63 (Connors ed., July 2015 Supplement).

* * *

***Global Custom Integrations, Inc. v. JDP Wholesale Enterprises, Inc.*, 40 Misc.3d 909, 968 N.Y.S.2d 852 (Sup. Ct., Westchester Co. 2013)**

On December 19, 2012, plaintiff electronically filed a verified complaint and also served a "courtesy" copy of the complaint upon defendant via first class mail. Defendant electronically filed its answer on January 11, 2013.

Plaintiff moved for a default judgment on the ground that it electronically served defendant with the complaint on December 19, 2012, and, therefore, the time to serve an answer expired 20 days later on January 7, 2013. The court cited 22 N.Y.C.R.R. section 202.5–b(f)(2)(ii), which permits a party in an e-filed action to "utilize other service methods permitted by the CPLR provided that, if one of such other methods is used, proof of that service shall be filed electronically." The court concluded that this phrase was intended "to not have NYSCEF usurp the provisions of the CPLR should a litigant elect to use that method of service."

The court ruled "that once a litigant serves papers upon an adversary pursuant to the CPLR, all the parties' actions are governed by the CPLR." Therefore, when service is made by first class mail, rather than solely by e-

filing, the 5 day extension to respond in CPLR 2103(b)(2) applied. With the five day extension, defendant's answer was timely.

Global Custom is one of the first decisions on the books addressing the service provisions of the e-filing rules and lawyers need to be careful before relying on it. The rule quoted above allowing "other service methods permitted by the CPLR" comes from the supreme court's consensual e-filing program. 22 NYCRR § 202.5-b(f)(2)(ii). While the rules for consensual e-filing generally apply in cases subject to mandatory e-filing, they will not if they are inconsistent with the mandatory e-filing rules. *See* 22 NYCRR § 202.5-bb(a). The rule allowing "other service methods permitted by the CPLR" appears to be in direct conflict with the mandatory e-filing rules, which generally requires that all interlocutory papers in the action be filed and served electronically. *See* 22 NYCRR § 202.5-bb(c).

Furthermore, the court does not state that plaintiff ever e-filed proof of service of the complaint via first class mail, as would seem to be required if the plaintiff was relying on this "CPLR service." Finally, if the complaint plaintiff placed in the mail was labelled a "courtesy copy," it might be reasonable to conclude that the e-filed complaint was the official one for service purposes. For further discussion of the matter, see Siegel, New York Practice § 202 (Connors ed., January 2016 Supplement).

XIII. CPLR 308. Personal service upon a natural person.

Supreme Court Grants Application to Serve Defendant Via Facebook

In *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709 (Sup. Ct., New York County 2015), the court permitted the plaintiff in a matrimonial action to serve the defendant via a private message through Facebook. "This transmittal shall be repeated by plaintiff's attorney to defendant once a week for three consecutive weeks or until acknowledged by the defendant. Additionally, after the initial transmittal, plaintiff and her attorney are to call and text message defendant to inform him that the summons for divorce has been sent to him via Facebook." The court refused to order additional service by any other method, such as publication under CPLR 315, noting that "publication service is … almost guaranteed not to provide a defendant with notice of the action for divorce…."

XIV. Business Corporation Law § 304. Statutory designation of secretary of state as agent for service of process.

When the defendant is a licensed foreign corporation, it will have designated the secretary of state as its agent for service of process on any claim. Bus. Corp. L. § 304. In section 95 of the January 2015 Supplement to Siegel, New York Practice (5th ed.), we explore the issue of whether such designation constitutes the corporation's consent to personal jurisdiction in New York. The issue has become an important one in light of the Supreme Court's decision in *Daimler*.

XV. CPLR 327. Inconvenient forum.

Distinguishing Its Prior Ruling, Court of Appeals Now Permits Forum Non Conveniens Dismissal in Absence of Motion by Party

In *Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Bros.*, 23 N.Y.3d 129 (2014), the Court concluded that even though no party formally moved to dismiss the main action based on forum non conveniens, the Court's prior precedent did not bar such relief where the issue was briefed and argued at supreme court. It should be noted, however, that in *Mashreqbank* a third-party defendant moved to dismiss the third-party action on forum non conveniens grounds, which prompted the court to raise the issue of dismissing the main action on such grounds. The decision is discussed in further detail in Siegel, New York Practice § 28 (Connors ed., January 2015 Supplement).

Court of Appeals Affirms Order Dismissing Action Based on Forum Non Conveniens with Accompanying Conditions That Defendants Stipulate to Waive Affirmative Defenses Before Foreign Tribunal

A forum non conveniens dismissal can be conditioned on the defendant stipulating to waive various defenses in another forum. Siegel, New York Practice § 28. In *Boyle v. Starwood Hotels & Resorts Worldwide. Inc.*, 110 A.D.3d 938, 973 N.Y.S.2d 728 (2d Dep't 2013), *aff'd*, 23 N.Y.3d 1012, 992 N.Y.S.2d 773, 16 N.E.3d 1252 (2014), plaintiffs were residents of the United Kingdom and France who sought damages against the defendant Starwood, which owned a hotel in the United Arab Emirates where they allegedly contracted Legionnaire's disease. The Second Department concluded that supreme court providently exercised its discretion in granting

defendant's motion to dismiss on the ground of forum non conveniens, but saw fit to impose conditions "to assure the availability of a forum for the action." Therefore, it modified the supreme court's order by requiring the defendant to stipulate, as a condition to the dismissal, "to waive jurisdictional and statute of limitations defenses in the United Kingdom, France, and the United Arab Emirates" and any other defenses not available in New York at the time of the commencement of the action. *Id.* at 940, 973 N.Y.S.2d at 730.

In a brief memorandum opinion, the Court of Appeals affirmed the order concluding that the grant of the motion to dismiss based on forum non conveniens and the accompanying conditions did not constitute an abuse of discretion. *Boyle*, 23 N.Y.3d at 1014, 992 N.Y.S.2d at 77.

XVI. CPLR 501. Contractual provisions fixing venue.

First and Second Departments Enforce Forum Selection Clauses in Resorts' Rental Agreements

In *Molino v. Sagamore*, 105 A.D.3d 922, 963 N.Y.S.2d 355 (2d Dep't 2013), the Second Department reversed the trial court and granted the defendant's motion pursuant to CPLR 501 and 511 to change the venue of the action from Queens County to Warren County. Upon her arrival at the defendants' facility, the plaintiff signed a "Rental Agreement" which contained a provision stating that "if there is a claim or dispute that arises out of the use of the facilities that results in legal action, all issues will be settled by the courts of the State of New York, Warren County." The Second Department concluded that supreme court erred in determining that the Rental Agreement was an unenforceable contract of adhesion and that enforcement of the forum selection clause contained therein would be unreasonable and unjust.

"'A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court'."

Similarly, in *Bhonlay v. Raquette Lake Camps, Inc.*, 120 A.D.3d 1015, 991 N.Y.S.2d 765 (1st Dep't 2014), the First Department affirmed supreme court's order granting defendants' motion to change the venue of the action from New York County to Hamilton County, and denied plaintiffs' cross motion to retain venue in New York County. Citing to *Molino*, the court concluded that there was no basis for disregarding the venue agreement because "[p]laintiff has not demonstrated that enforcement of the venue clause would be unjust or would contravene public policy, or that the clause was rendered invalid by fraud or overreaching." The action was actually "transferred to Fulton County, because there are no Supreme Court sessions held in the parties' selected venue of Hamilton County"! *See also Karlsberg v. Hunter Mountain Ski Bowl, Inc.*, _A.D.3d _, 2015 WL 5568788 (2d Dep't 2015) (affirming order granting that branch of the defendant's motion which was pursuant to CPLR 501 and 511 to change the venue of the action from Suffolk County to Greene County).

XVII. CPLR 901. Prerequisites to a class action.

Court of Appeals Holds That CPLR 901(b) Does Not Prohibit a Class Action Seeking Recovery of Actual Damages, Even Though Statute Imposes Penalty

An action to recover a statutory penalty is expressly barred from class form unless the statute imposing the penalty specifically directs otherwise. In *Borden v. 400 East 55th Street Associates, L.P.*, 24 N.Y.3d 382, 998 N.Y.S.2d 729, 23 N.E.3d 997 (2014), the Court of Appeals stressed that under the language of CPLR 901(b), which imposes this restriction, "it is not dispositive that a statute imposes a penalty so long as the [class] action brought pursuant to that statute does not seek to recover the penalty." Therefore, the *Borden* Court holds, a class action is permissible to seek recovery of actual damages sustained as a result of rent overcharges despite the fact that the Rent Stabilization Law imposes treble damages on the finding of a willful violation of its provisions. In other words, "[w]here a statute imposes a nonmandatory penalty, plaintiffs may waive the penalty in order to bring the claim as a class action."

The *Borden* Court also reviewed the standards for class certification in CPLR 901(a) and concluded that the Appellate Division did not abuse its discretion by affirming the supreme court's grant of class certification. *See* Siegel, New York Practice §§ 141-142 (5th ed. 2011).

XVIII. CPLR 1003. Nonjoinder and misjoinder of parties.

Party Added Without Leave of Court Outside CPLR 1003's Time Frames Waives Defect by Failing to Promptly Assert It

The 1996 amendments to CPLR 305(a) and 1003 allow the plaintiff to add additional parties to an action without court leave if the plaintiff acts no later than the 20th day after the defendant's service of the answer. *See* Siegel, New York Practice § 65. If a party is improperly added outside the time frames in CPLR 1003, she had better raise a prompt objection. In *Wyatt v. City of New York*, 46 Misc. 3d 1210(A) (Sup. Ct., New York County 2015), the court ruled that plaintiffs added MTA Bus Company as a defendant without court leave outside the time periods in CPLR 1003. Nonetheless, the court concluded that defendants waived their right to assert the issue because they failed to plead a proper objection in either their original or amended answer to the amended complaint. *Id.* at *5.

Despite the fact that defendants' amended answer contained thirteen affirmative defenses, including lack of personal jurisdiction based on the ground that "plaintiffs have failed to properly serve defendants with the Summons in this matter," it still missed the mark.

The decision is discussed in further detail in section 65 of the July 2015 Supplement to Siegel, New York Practice (5th ed.).

XIX. CPLR 1601. Limited liability of persons jointly liable.

In *Artibee v. Home Place Corp*, _ A.D.3d _, 14 N.Y.S.3d 817 (3d Dep't 2015), plaintiffs sued defendant for injuries sustained while driving on a state highway when a branch from defendant's tree fell and struck plaintiff's car. Plaintiff also sued the State of New York in the Court of Claims.

In the supreme court action, defendant moved in limine to have the jury apportion liability between the defendant and the state. Supreme court ruled that evidence with regard to the state's liability for plaintiffs' alleged damages would be admissible at trial, but denied defendant's request for an apportionment charge.

The Third Department ruled that defendant was entitled to an apportionment charge to permit it to establish that its share of fault was 50% or less. The court noted that under CPLR 1601(1), "where potential tortfeasors are not joined in an action, the culpability of a nonparty tortfeasor may be imposed upon the named defendant if the plaintiff can show that he or she is unable to obtain jurisdiction over the nonparty tortfeasor." The court reasoned that plaintiffs did not face a "jurisdiction[al]" limitation in impleading the state as a codefendant, but instead could not accomplish this task due to the doctrine of sovereign immunity.

Procedurally, the court noted that:

> Plaintiffs' only recourse against the State is to pursue an action in the Court of Claims (see Court of Claims Act §§ 8, 9). Likewise, if defendant is found liable in Supreme Court, it could seek indemnification from the State relative to its share of actual culpability as an additional claimant in the subsequent Court of Claims action.

CPLR 1601(1) does not address whether the state's proportionate share of liability should be considered in calculating a defendant's culpability in a supreme court action. The Third Department observed that in an analogous context, courts have held that where a nonparty tortfeasor has declared bankruptcy and cannot be joined as a defendant, the liability of the bankrupt tortfeasor has been "apportioned with that of the named defendants because the plaintiff has failed to demonstrate that it cannot obtain personal jurisdiction over the nonparty tortfeasor, and equity requires that the named defendants receive the benefit of CPLR article 16." *See, e.g., Kharmah v. Metropolitan Chiropractic Ctr.*, 288 A.D.2d 94, 94–95 (1st Dep't 2001).

A concurrence argued that an apportionment should not have been permitted under the law, observing that it might result in a "skewed result" because of the absence of the State in the Supreme Court action.

XX. CPLR 2101. Form of papers.

New Court Rule Requires Attorneys to Redact Certain Confidential Information from Papers Filed in Court

The Administrative Board of the Courts recently promulgated Uniform Rule 202.5(e), which requires the redaction of certain confidential personal information ("CPI") from court filings. Compliance with the rule—effective January 1, 2015—was voluntary through February 28, 2015, but is now mandatory. The new rule covers actions that are using the New York State Courts Electronic Filing System ("NYSCEF"), *see* § 63, as well as those proceeding with actual hard copy papers.

Under the rule, CPI includes "(i) the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof; (ii) the date of an individual's birth, except the year thereof; (iii) the full name of an individual known to be a minor, except the minor's initials; and (iv) a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof." 22 N.Y.C.R.R. § 202.5(e)(1).

The new rule is discussed in further detail in Siegel, New York Practice § 201 (Connors ed., July 2015 Supplement).

Court of Appeals Holds That Judiciary Law Section 470 Requires Nonresident New York Attorneys to Maintain Physical Office in State

CPLR 2101(d) provides that "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper." In *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015), an attorney residing in Princeton, New Jersey commenced an action in federal district court alleging, among other things, that Judiciary Law section 470 was unconstitutional on its face and as applied to nonresident attorneys. The federal district court declared the statute unconstitutional and, on appeal to the Second Circuit, that court determined that the constitutionality of section 470 was dependent upon the interpretation of its law office requirement. Therefore, it certified a question to the New York Court of Appeals requesting the Court to delineate the minimum requirements necessary to satisfy the statute.

Citing to CPLR 2103(b), the Court of Appeals acknowledged that "the State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here." It noted, however, that the logistical difficulties present during the Civil War, when the statute was first enacted, are diminished today. Rejecting a narrow interpretation of the statute, which may have avoided some constitutional problems, the Court interpreted Judiciary Law section 470 to require nonresident attorneys to maintain a physical law office within the State. The matter is now back before the Second Circuit, which will determine the ultimate issue of the statute's constitutionality in light of the Court of Appeals' answer to the certified question.

The decision is discussed in further detail in Siegel, New York Practice § 202 (Connors ed., January 2016 Supplement).

XXI. CPLR 2103. Service of papers.

If Letter Is Delivered to a Tribunal by Hand, It Should Be Delivered to Opposing Counsel by Hand as Well

In New York City Bar Opinion 1987-6, the ethics committee opined that it was improper to send by hand to a tribunal in a contested matter a letter containing arguments, which shows a "cc" notation to opposing counsel (and no further notation or proof of service), but then to send the document to opposing counsel by mail. The opinion notes that:

> If a letter is delivered to a tribunal by hand, it should be delivered to opposing counsel by hand as well, or by a method of delivery such as simultaneous electronic transmission or express courier that ensures truly prompt receipt by the adversary. In addition, the date sent and method of delivery to opposing counsel should always be disclosed in any communication to a tribunal.

Furthermore, the Committee advised that counsel should consult the applicable rules of a court to ascertain if it is appropriate to engage in communications of this type.

The Code of Judicial Conduct requires a judge to accord all parties a full right to be heard and directs that a "judge shall not initiate, permit, or consider ex parte communications, or consider other communications made

to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding…." 22 NYCRR 100.3(B)(6). As of 2009, the New York Rules of Professional Conduct require that in an adversarial proceeding a lawyer shall not "communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except…in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer." Rule 3.5(a)(2)(ii).

XXII. CPLR 2106. Affirmation of truth of statement by attorney, physician, osteopath or dentist.

CPLR 2106 Amended to Permit Person Outside United States to Submit Affirmation

Effective January 1, 2015, CPLR 2106 was amended to add a new subsection (b) to permit the use of an affirmation by any person who subscribes and affirms the statement while located outside the geographic boundaries of the United States and its territories. The amendment is discussed in further detail in Siegel, New York Practice § 206 (Connors ed., January 2014 Supplement). It is important to note that the requirements of CPLR 2309(c) are still imposed when the oath or affirmation is made outside New York State, but within the United States and its territories, as was the situation in the *Midfirst Bank* decision, discussed under CPLR 2309, below.

Affirmation of Doctor Not Authorized to Practice Medicine in New York Does Not Constitute Competent Evidence

Tomeo v. Beccia, 127 A.D.3d 1071 (2d Dep't 2015) highlights one of the pitfalls of the statute. In *Tomeo*, the plaintiff failed to raise a triable issue of fact in opposition to defendant's prima facie showing on its motion for summary judgment. "The affirmation of the plaintiff's expert, Dr. Richard Quintiliani, did not constitute competent evidence, because Quintiliani was not authorized by law to practice medicine in New York State." Therefore, defendant hospital was granted summary judgment dismissing the action against it.

Court Declares Administrative Order 208-13, Issued by OCA Contemporaneously with New CPLR 3012-b, To Be Invalid

The new CPLR 3012-b requires that a certificate of merit accompany a complaint in a residential foreclosure action commenced on or after August 30, 2013. Administrative Order 208-13, issued by the Office of Court Administration ("OCA") contemporaneously with the new statute's passage, provides that if no affirmation of merit has been filed in a mortgage foreclosure action pending on August 29, 2013, the plaintiff must either comply with the provisions in Administrative Order 431-11 or file with the court at the time of the filing of the request for judicial intervention a certificate of merit containing the contents prescribed in CPLR 3012-b(a). The requirements contained in Administrative Order 208-13 are entirely those of OCA and are subject to the same attacks as the affirmation rule itself.

In *Bank of New York Mellon v. Izmirligil*, 43 Misc.3d 409, 980 N.Y.S.2d 733 (Sup. Ct., Suffolk County 2014) (SPR 266:3), the court declared the requirements in Administrative Order 208-13 invalid and waived compliance with them in a residential foreclosure action pending prior to the effective date of CPLR 3012-b. The court adhered to the rationale in its prior decisions declaring OCA's affirmation requirements invalid. *See, e.g.*, *Deutsche Bank Nat. Trust Co. v. Espinoza*, 2013 WL 2493846 (Sup. Ct., Suffolk County 2013); *LaSalle Bank, NA v. Pace*, 31 Misc. 3d 627, 919 N.Y.S.2d 794 (Sup. Ct., Suffolk County 2011). Furthermore, the court concluded that the "Legislature's entry into the field of merit vouching by plaintiff's counsel in residential foreclosure cases [through the enactment of CPLR 3012-b] . . . struck the death knell to the administratively imposed affirmation requirements."

XXIII. CPLR 2214. Motion papers; service; time.

CPLR 2214(c) Amended to Address Issue That Arose in Second Department's *Biscone* Decision

In *Biscone v. JetBlue Airways Corp.*, 103 A.D.3d 158, 957 N.Y.S.2d 361 (2d Dep't 2012), *appeal dismissed*, 20 N.Y.3d 1084, 965 N.Y.S.2d 72, 987 N.E.2d 632 (2013), addressed in greater detail in Siegel, New York Practice § 246 (Connors ed., July 2014 Supplement), the Second Department concluded that a motion for reargument/renewal was properly denied on the

ground that the moving papers were insufficient because plaintiff failed to include a complete copy of the papers submitted on the main motion, as required by CPLR 2214(c).

The *Biscone* decision has prompted an amendment to the statute, which took effect on July 22, 2014. A new sentence was added to CPLR 2214(c), and states as follows:

> Except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system.

Many supreme court judges require that in all e-filed cases assigned to them, counsel submit hard copies, also known as "working copies," of e-filed documents that are intended for the court's review. *See, e.g.,* § B, 6(a), *Joint Protocols for New York State Courts E-Filing: Cases Filed in Supreme Court New York County*, NYSCEF (August 1, 2014) ("Various Justices require that, in all NYSCEF cases assigned to them, unless otherwise directed, counsel submit working copies of e-filed documents… Generally, in these Parts, documents intended for judicial review must be filed with the NYSCEF system first and the required working copy must be delivered to the court thereafter.").

Courts Deny CPLR 3211 Motions That Fail to Attach Copy of Pleadings

In *1501 Corp. v. Leilenok Realty Corp.*, 2015 WL 2344489 (Sup. Ct, Queens County, 2015), defendant moved to dismiss plaintiff's amended complaint based on documentary evidence pursuant to CPLR 3211(a)(1) and for failure to state a cause of action pursuant to CPLR 3211(a)(7). The court denied the motion noting that:

> Movant failed to annex a copy of the amended complaint it seeks to dismiss herein. As such, the court is unable to determine whether the amended complaint, in fact, is legally sufficient to withstand a motion to dismiss.
>
> There is no authority compelling the Court to consider papers which were not submitted in connection with the motion on which the Court is ruling. Indeed, CPLR §2214 (c), permits the Court to refuse to

consider improperly submitted papers (*Biscone v JetBlue Airways Corporation*, 103 AD3d 158 [2012].

See also Gibbs v. Kings Auto Show Inc., 2015 WL 1442374 (Sup. Ct., Kings County 2015)("In accordance with CPLR 2214(c), [defendant] must at a minimum, annex a copy of the pleading to its motion which it wants the court to dismiss"; defendant moved under CPLR 3211(a)(1) and requested a conversion of the motion to one for summary judgment pursuant to CPLR 3211(c)); *compare* CPLR 3212(b) (specifying that "[a] motion for summary judgment shall be supported by affidavit, *by a copy of the pleadings* and by other available proof, such as depositions and written admissions").

XXIV. CPLR 2309. Oaths and affirmations.

Second Department Clarifies Law Relating to Conformity of Out-of-State Affidavits under CPLR 2309(c)

In *Midfirst Bank v. Agho*, 121A.D.3d 343,, 991 N.Y.S.2d 623, 625 (2d Dep't 2014), the Second Department observed "a significant upswing in the number of appeals where the parties are contesting the admissibility of affidavits executed outside of the state, without CPLR 2309(c) certificates of conformity." *Midfirst Bank* was a residential mortgage foreclosure action in which the defendants did not submit any opposition to the plaintiff's motion for summary judgment. The Second Department, in a very comprehensive opinion, took the "occasion to clarify the law relating to the conformity of out-of-state affidavits as required by CPLR 2309(c)." The court also addressed, albeit in dicta, the consequences that arise when an affidavit is not accompanied by a proper certificate of conformity and whether it can be considered by the court in any event.

The court stressed that the certificate required under CPLR 2309(c), typically referred to as a "'certificate of conformity' is separate and distinct from a 'certificate of authentication'," typically referred to as a "flag." The certificate of conformity addresses the manner in which a foreign oath is taken and must attest that the oath was taken in accordance with the law of either the foreign jurisdiction or New York. *See* Real Property Law § 299-a (1). The certificate of authentication "attests to the oathgiver's authority under the foreign jurisdiction to administer oaths." An affidavit will satisfy CPLR 2309(c) if it is acknowledged by, among others, a notary public in a foreign state. *See* Real Property Law § 299(1)-(5) The *Midfirst Bank* court

also pointed out that, under Real Property Law section 311(5), a certificate of authentication is not required when the conveyance to be recorded in New York State is acknowledged before any officer designated in section 299 of the Real Property Law.

Therefore, the *Midfirst Bank* court ruled that a “[a] combined reading of CPLR 2309(c) and Real Property Law §§ 299 and 311(5) leads to the inescapable conclusion that where, as here, a document is acknowledged by a foreign state notary, a separate ‘certificate of authentication’ is not required to attest to the notary's authority to administer oaths.” *Midfirst Bank*, 991 N.Y.S.2d at 629. The certificate of authentication is only “necessary when an out-of-state acknowledgment is provided by a foreign officer other than one enumerated in Real Property Law § 299, or when the acknowledgment is taken in foreign countries other than Canada, or by foreign mayors or chief civil officers not under seal.” 991 N.Y.S.2d at 628-29.

Even when an oath or affirmation is taken outside the state by a notary, CPLR 2309(c) still requires that it be accompanied by a proper certificate of conformity. “In other words,” held the *Midfirst Bank* court, “a certificate of conformity is required whenever an oath is acknowledged in writing outside of New York by a non-New York notary, and the document is proffered for use in New York litigation.” 991 N.Y.S.2d at 629. The court also referenced Real Property Law § 309-b, entitled “Uniform forms of certificates of acknowledgement or proof without this state,” which provides sample language for a “certificate of an acknowledgement” and a “certificate for a proof of execution.” *See* Sigel, New York Practice § 201 (“Form of Papers”). The statute states that these certificates “may conform substantially” to the language in the statute.

Applying the above principles of law, the Second Department ruled that supreme court erred in concluding that the affidavit of the plaintiff’s foreclosure litigation specialist lacked a certificate of conformity. The court held that the “Uniform, All Purpose Certificate of Acknowledgment” appended to the affidavit “substantially conformed with the template requirement of Real Property Law § 309-b and constituted a certificate of conformity.” *Midfirst Bank*, 991 N.Y.S.2d at 628. Furthermore, since the signature of the plaintiff’s specialist on the affidavit was submitted in support of the summary judgment motion and was acknowledged by a notary licensed in Oklahoma, the court ruled that no separate certificate of authentication, or flag, was required. *See* Real Property Law §§ 299, 311(5).

In that the affidavit of plaintiff's specialist complied with CPLR 2309(c) and established the plaintiff's prima facie entitlement to judgment as a matter of law on the foreclosure complaint, the Second Department reversed supreme court and granted those branches of the plaintiff's motion which were for summary judgment on the complaint and to appoint a referee to compute the sums due and owing under the subject note and mortgage.

The Second Department's decision contains dicta noting that even if the affidavit of plaintiff's specialist was not accompanied by a proper certificate of conformity, this CPLR 2309(c) defect could "be corrected nunc pro tunc . . . or pursuant to CPLR 2001, which permits trial courts to disregard mistakes, omissions, defects, or irregularities at any time during an action where a substantial right of a party is not prejudiced." This troublesome issue is explored in further detail in the 2014 McKinney's Supplementary Practice Commentaries to CPLR 2309, C2309:3 ("Certificates to Accompany Extrastate Oath").

In *Hunter Sports Shooting Grounds, Inc. v. Foley*, 120 A.D.3d 759 (1st Dep't 2014), issued by the Second Department two weeks after *Midfirst Bank*, the trial court denied the defendant town's motion for summary judgment because, among other things, its expert's affidavit that was made and notarized in New Jersey lacked a certificate of conformity. The town then made a second motion for summary judgment, but simply submitted the same documents it had submitted in support of its original motion without rectifying the defects. The Second Department concluded that while the town's failure to submit a proper certificate of conformity "was not a fatal defect that would warrant the outright denial of its motion for summary judgment," the supreme court "properly afforded the [t]own an opportunity to correct the defect." In that the town failed to correct the defect under CPLR 2309(c), the Second Department ruled that supreme court properly denied the town's second motion for summary judgment.

CPLR 2106 Amended to Permit Person Outside United States to Submit Affirmation

Effective January 1, 2015, CPLR 2106 was amended to add a new subsection (b) to permit the use of an affirmation by any person who subscribes and affirms the statement while located outside the geographic boundaries of the United States and its territories. The amendment is discussed in further detail in Siegel, New York Practice § 206 (Connors ed.,

January 2014 Supplement). It is important to note that the requirements of CPLR 2309(c) are still imposed when the oath or affirmation is made outside New York State, but within the United States and its territories, as was the situation in the *Midfirst Bank* decision, discussed immediately above.

XXV. CPLR 3013. Particularity of statements generally.

First Department, in Major Address to Defendant's Pleading Obligations, Concludes That Statute of Limitations Defense Was Improperly Pleaded

In *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 76 (1st Dep't 2015), defendant pleaded sixteen affirmative defenses "within a boilerplate, catchall paragraph" that also asserted "any other matter constituting an avoidance or an affirmative defense which further investigation of this matter may prove applicable herein." Following disclosure, defendant moved for summary judgment dismissing the complaint based on, among other grounds, the statute of limitations. Defendant contended that the claim accrued by 2001, when the alleged negligent work was completed, and that the commencement of the action in 2008 was untimely. *See* Siegel, New York Practice § 40 (Connors ed., July 2015 Supplement)(discussing caselaw holding that contract claim accrues against a contractor on the date of completion of the work).

In response to defendant's motion, plaintiff argued that defendant failed to adequately plead the statute of limitations and, therefore, waived the defense. The supreme court agreed, but nonetheless granted defendant's motion on the merits. The First Department reversed and reinstated the complaint with a set of extensive writings, including a signed majority opinion and a two-judge concurrence, dedicated primarily to the pleading issues raised by the plaintiff.

The entire First Department ruled that this method of pleading "the defense within a laundry list of predominantly inapplicable defenses did not provide plaintiff with the requisite notice" required under CPLR 3013. Furthermore, the court ruled that the defense "was inadequately pleaded because of its failure to separately state and number the defense and that plaintiff was prejudiced by the defective pleading." *See also* CPLR 3014("Separate causes of action or defenses shall be separately stated and numbered.");

CPLR 3026("Defects [in pleadings] shall be ignored if a substantial right of a party is not prejudiced."). Nonetheless, "because the prejudice is curable by permitting discovery on the statute of limitations issue," the court remanded the matter to the motion court to allow defendant to correct its defective pleading and for plaintiff to obtain necessary discovery.

The *Scholastic* decision is discussed in further detail in Siegel, New York Practice §§ 208, 212, 214, 223, 230 (Connors ed., January 2016 Supplement)

XXVI. CPLR 3018. Responsive Pleadings.

Claim That Prior Settlement Among Some Parties Was Not Reasonable Should Be Pleaded as Affirmative Defense

The list of affirmative defenses in CPLR 3018(b) is not exhaustive. *See* Siegel, New York Practice § 223 (5th ed. 2011). To provide a checklist for lawyers drafting answers, we have compiled a list of several items beyond those expressly included in the statute that courts have denominated as affirmative defenses. *See* McKinney's Practice Commentaries, CPLR 3018, C3018:14 ("List in CPLR 3018(b) Not Preemptive"). The claim that a prior settlement among some of the parties to an action was not reasonable should be added to the list. In *Thome v. Benchmark Main Transit Associates, LLC*, 125 A.D.3d 1283, 3 N.Y.S.3d 475 (4th Dep't 2015), the Fourth Department granted third party defendant's motion to amend the answer to include this affirmative defense.

XXVII. CPLR 3020. Verification.

In Denying Motion to Dismiss Claim, Court Concludes There Is No "Discernible Distinction" Between Verification of Claim and Notarized Signature on Claim

In *Bermudez v. State*, 44 Misc.3d 605, 989 N.Y.S.2d 794 (Ct. of Claims 2014), the court referenced CPLR 3020 and CPLR 3021 in reaching its conclusion that there is no "discernible distinction" between a claimant "verifying his claim and swearing to it before a notary." Therefore, the court denied the State's motion to dismiss the claim for failure to comply with section 8-b(4) of the Court of Claims Act, which provides that claims based on unjust conviction and imprisonment "shall be verified by the claimant."

The *Bermudez* decision is discussed in detail in the 2014 Supplementary Practice Commentaries to CPLR 3020, C3020:2 ("Verification Defined").

XXVIII. CPLR 3022. Remedy for defective verification.

Court Addresses "Due Diligence" Requirement When Party Contests Verification

A party entitled to a verified pleading can treat an unverified or defectively verified one "as a nullity," but must assert the objection by providing notice to the adverse party's attorney "with due diligence." CPLR 3022. Many decisions have construed "due diligence" to mean "within twenty-four hours," but the Court of Appeals has never "employed a specific time period to measure due diligence." *Miller v. Bd. of Assessors*, 91 N.Y.2d 82, 87 n.3, 666 N.Y.S.2d 1012, 1015 n.3 (1997).

In *Rodriguez v. Westchester County Bd. of Elections*, 47 Misc.3d 956, 5 N.Y.S.3d 826 (Sup. Ct., Westchester County 2015), petitioner commenced a special proceeding pursuant to the Election Law. Respondents raised the defense of lack of proper verification of the petition in their answers and cross motions. Petitioner, in turn, argued that because the lack of verification of the petition was not raised immediately, i.e., within 24 hours of its service, the defense was waived.

The *Rodriguez* court acknowledged the twenty-four hour rule stated in many reported decisions, but observed that "it is extraordinarily rare that a court actually imposes a 24-hour deadline, and curiously, not one court that has done so cites to the actual origin of the alleged rule." *Id.*, at 958. Finding what it deems to be a lack of foundation for the twenty-four hour rule, the *Rodriguez* court ultimately concludes that "24 hours has never been, nor should it be, a strict deadline for determining due diligence" under CPLR 3022. *Rodriguez*, 47 Misc.3d 962.

The *Rodriguez* court compiled a helpful list of facts and circumstances to be considered when a party treats a pleading as a nullity to ascertain if the notice is made with "due diligence" under CPLR 3022. These include: "the amount of time elapsed between service of the faulty pleading and the return; reasons for, and reasonableness of time elapsed; whether the party rejecting the pleading already had counsel or is an attorney; whether the issue was raised at the first opportunity, whether in writing or in court;

whether a statute of limitations or other deadline has expired during the time elapsed; and the credibility of the party in its pleadings and testimony given, if any." *Id.*, at 962. Applying these factors, the court found that the respondents did exercise due diligence under CPLR 3022 and dismissed the unverified petition.

XXIX. CPLR 3025. Amended and supplemental pleadings.

Court of Appeals, Finding Abuse of Discretion, Reverses Appellate Division and Grants Motion to Amend

It is a rare occasion for the Court of Appeals to reverse an order on a CPLR 3025 motion to amend because decisions on such matters lie within the broad discretion of the lower courts. As the Court pointed out in *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 411, 998 N.Y.S.2d 740, 745, 23 N.E.3d 1008, 1013–14 (2014), "[c]ourts are given 'considerable latitude in exercising their discretion, which may be upset . . . only for abuse as a matter of law.'" On the record before it in *Kimso Apartments*, the Court ruled that there was such an abuse of discretion because the opponents to the proposed amendment to conform the pleadings to the proof under CPLR 3025(c) could not establish any prejudice. Therefore, the Court reversed the order of the appellate division and granted the defendant's motion to amend the answer to assert a counterclaim for monies owed under a settlement agreement that was central to the plaintiffs' declaratory judgment action.

XXX. CPLR 3101. Scope of Disclosure.

Court Orders Production of Relevant Facebook Material, but Denies In Camera Review

In *Melissa "G" v. North Babylon Union Free Sch. Dist.*, 48 Misc.3d 389, 6 N.Y.S.3d 445 (Sup. Ct., Suffolk County 2015), plaintiffs commenced an action to recover damages for personal injuries allegedly sustained by "Melissa" as the result of sexual contact that she had with a teacher employed by the defendant school district from September 2003 through March 2004. Defendants then moved under CPLR 3124 for an order compelling plaintiffs to disclose complete, unedited account data for all Facebook accounts maintained only by plaintiff Melissa, including all

postings, status reports, e-mails, photographs and videos posted on her web page to date.

Applying the standards set forth in CPLR 3101(a), the court noted that "[i]nsofar as plaintiffs claim as part of their damages that Melissa suffers a loss of enjoyment of life, among other things, the scope of relevant information subject to disclosure is broad." In that defendants established that plaintiff's public Facebook pages contain photographs of Melissa engaged in a variety of recreational activities that are probative to her damage claims, the court concluded that "it is reasonable to believe that other portions of her Facebook pages may contain further evidence relevant to the defense."

The court directed plaintiff to print out and to retain all photographs and videos, whether posted by others or by plaintiff herself, as well as status postings and comments posted on plaintiff's Facebook accounts, including all deleted materials. Citing to federal caselaw, the court observed that "[i]n discovery matters, counsel for the producing party is the judge of relevance in the first instance." The court also concluded that "in camera inspection in disclosure matters is the exception rather than the rule, and there is no basis to believe that plaintiff's counsel can not honestly and accurately perform the review function in this case." Therefore, the court ordered plaintiffs' counsel to review plaintiff's Facebook postings and to disclose all postings that are relevant to plaintiff's damage claims within sixty days of its order. *See* Siegel, New York Practice § 344 (Connors ed., July 2015 Supplement) (discussing issues arising when party seeks disclosure of adverse party's social media site).

Court Orders Disclosure of Post-Accident Photographs Posted on Facebook After Plaintiff Deactivated Site

In *Forman v. Henkin*, 2014 WL 1162201 (Sup. Ct., New York County 2014), plaintiff sued for injuries sustained in a fall from defendant's horse. Defendant moved to compel plaintiff to provide authorizations to obtain records of her private Facebook postings, but plaintiff had deactivated the site after she commenced the action. The court concluded that if plaintiff intended to introduce at trial photographs of her privately posted on Facebook before her injury, she was required to provide all such photographs to defendant. As for photographs plaintiff privately posted on Facebook after her injury, the court ruled that since plaintiff failed to provide any information on these items, she was required to provide all such photographs to defendant "that do not show nudity or romantic encounters."

Court of Appeals Holds That Relevance Is Standard for Obtaining Disclosure from a Nonparty Pursuant to CPLR 3101(a)(4)

There has been a long simmering conflict in the Appellate Division over whether something more than mere relevance is required for disclosure from a nonparty. We have tracked this conflict in the Main and Supplementary Practice Commentary to CPLR 3101, C3101:22 ("The 'Circumstances' Rule of 3101(a) (4)"). In *Kapon v. Koch*, 23 N.Y.3d 32 (2014), the Court of Appeals concluded that CPLR 3101(a)(4) "imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty."

The Court held that a party serving a subpoena "must first sufficiently state the 'circumstances or reasons' underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it), and the witness, in moving to quash, must establish either that the discovery sought is 'utterly irrelevant' to the action or that the 'futility of the process to uncover anything legitimate is inevitable or obvious.'" If the witness meets this latter burden, the party serving the subpoena "must then establish that the discovery sought is 'material and necessary' to the prosecution or defense of an action, i.e., that it is relevant."

Courts Continue to Order Disclosure from Nonparty Mediators

In *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007), *aff'd* 10 N.Y.3d 923, 862 N.Y.S.2d 456 (2008), the courts affirmed the denial of a mediator's motion to quash a subpoena. Similarly, in *City of Newburgh v. Hauser*, 126 A.D.3d 926, 3 N.Y.S.3d 616 (2d Dep't 2015), plaintiff sued defendants for breach of contract and professional malpractice. The defendants sought to compel the plaintiff to produce documents submitted in a private mediation proceeding between the plaintiff and a nonparty. The court concluded that "the subject documents are material and relevant to the defense of this action" and affirmed an order compelling their production. The court also rejected plaintiff's contention that CPLR 4547 ("Compromise and offers to compromise") bars disclosure of the subject documents, "as that statute is concerned with the admissibility of evidence, and does not limit the discoverability of evidence." *See* Siegel, New York Practice § 345 (5th ed. 2011).

XXXI. CPLR 3101(d)(1)(i). Scope of Disclosure; Trial preparation; Experts.

Plaintiff's Failure to Promptly Object to Defendant's CPLR 3101(d)(1)(i) Expert Disclosure Forecloses Objection to Lack of Specificity at Trial

In *Rivera v. Montefiore Medical Center*, 123 A.D.3d 424, 998 N.Y.S.2d 321 (1st Dep't 2014), *lv. granted* __ A.D.3d__ (3/3/2015), plaintiff moved to strike all trial testimony from defendant's expert that the decedent's death was caused by a sudden cardiac arrest. Plaintiff contended that defendant's expert testimony should be precluded based on the lack of specificity of defendant's CPLR 3101(d)(1)(i) disclosure, which stated that defendant's expert would "testify as to the possible causes of the decedent's injuries and contributing factors ... [and] on the issue of proximate causation."

The First Department affirmed the trial court's order denying plaintiff's in limine application during trial as untimely. The court emphasized that upon receipt of defendant's expert disclosure, "[p]laintiff neither rejected the document nor made any objection to the lack of specificity regarding the cause of death." Therefore, "[h]aving failed to timely object to the lack of specificity in defendant's expert disclosure statement regarding the cause of the decedent's death, plaintiff was not justified in assuming that the defense expert's testimony would comport with the conclusion reached by the

autopsy report, and plaintiff cannot now be heard to complain that defendant's expert improperly espoused some other theory of causation for which there was support in the evidence.” Furthermore, plaintiff's own experts acknowledged on cross-examination that a sudden cardiac event was a possibility.

The dissent contended that plaintiff could not have been expected to raise the objection at the time of the expert disclosure exchange because “no one had hypothesized that the decedent died of a heart attack” prior to the treating doctor’s testimony on cross examination. The dissent maintained that “disallowing a motion to limit expert testimony by excluding a new theory revealed for the first time at trial would eviscerate the procedural protection that CPLR 3101(d) was drafted to create.”

The appeal will provide the Court of Appeals with its first opportunity to address CPLR 3101(d)(1)(i) in detail.

XXXII. CPLR 3103. Protective orders.

CPLR 3103(a) Amended to Afford Standing to “any person … about whom discovery is sought” to Move for Protective Order

CPLR 3103(a) was amended in 2013 to allow “any person … *about whom* discovery is sought” to move for a protective order. (L.2013, c.205) (emphasis added). This provision has always allowed “any person from whom discovery is sought” to so move, but problems arose where a nonparty’s information was sought from some other third party that possessed the information, such as a bank, accountant, or utility. *See Norkin v. Hoey*, 181 A.D.2d 248, 586 N.Y.S.2d 926 (1st Dep’t 1992) (noting that “the overwhelming weight of authority in this State holds that a bank customer is without standing to challenge a third-party subpoena” of her bank records). According to the legislative history, the purpose of the amendment is not to change existing caselaw as to whether a nonparty has a protectable interest in certain records. Rather, the new language is designed to clarify that a nonparty whose information is contained in the records of another has standing to challenge a subpoena served to obtain those records.

The amendment to CPLR 3103(a) took effect on July 31, 2013 and applies to all actions pending on, or commenced after, that date.

XXXIII. CPLR 3113. Conduct of the Examination.

CPLR 3113(c) Amended to Permit Counsel for Nonparty Deponent to Participate in Deposition to Same Extent as Counsel for Party

The legislation was ultimately signed by the Governor on September 23, 2014 and took effect immediately, governing any action pending on that date or commenced thereafter. The law amends CPLR 3113(c), the subdivision relied upon by the Fourth Department in both *Thompson* and its subsequent *Sciara* decision, to make clear "that a non-party deponent's counsel may participate in [a] deposition and make objections on behalf of his or her client in the same manner as counsel for a party."

The amendment is far more sweeping than the rule announced in *Women in City Govt. United v. City of New York*, 112 F.R.D. 29, 32 (S.D.N.Y. 1986), discussed in the McKinney's Supplementary Practice Commentaries to CPLR 3113. In *Women in City Govt.*, the court noted that counsel for a nonparty may be present during the client's deposition, but may not "keep the deponent from making a statement against his interest in the absence of a testimonial privilege and [may not] . . . object on evidentiary grounds." *Id.* Furthermore, the district court ruled that "[a] non-party witness' counsel is also not present to participate generally in the deposition by cross-examination or otherwise." *Id.*

The rights expressly granted to an attorney for a nonparty by the new CPLR 3113(c) are, however, tempered by the Uniform Rules for the Conduct of Depositions, which only permit a party's attorney to object at a deposition in limited circumstances. *See* 22 N.Y.C.R.R. Part 221. These rules are discussed in the 2006 McKinney's Supplementary Practice Commentaries to CPLR 3115. With the appeal in the *Sciarra* action still before the New York Court of Appeals, we might see that Court's first address to Part 221.

A Lawyer Must Take "Reasonable Remedial Measures" if the Lawyer Comes to Know That a Client Has Offered False Evidence in a Deposition

New York Rule of Professional Conduct 3.3(a)(3) requires that "[i]f a lawyer, a lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure

to the tribunal." Rule 3.3(b) states that a "lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Furthermore, Rule 3.3(c) states that "[t]he duties stated in [3.3] (a) and (b) apply even if compliance requires disclosure of [confidential] information otherwise protected by Rule 1.6."

Comment 1 to Rule 3.3states that the duty to take "reasonable remedial measures":

> also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

Interpreting these provisions in NY City Bar Op. 2013-2, the Ethics Committee concluded that: "When counsel learns that material evidence offered by the lawyer, the lawyer's client or a witness called by a lawyer during a now-concluded civil or criminal proceeding was false, whether intentionally or due to mistake, the lawyer is obligated, under Rule 3.3(a)(3), to take 'reasonable remedial measures,' which includes disclosing the false evidence to the tribunal to which the evidence was presented as long as it is still possible to reopen the proceeding based on this disclosure, or disclosing the false evidence to opposing counsel where another tribunal could amend, modify or vacate the prior judgment." *See* CPLR 5015 (a)(2)(permitting a court to vacate a judgment or order on the basis of "newly-discovered evidence"); CPLR 5015(a)(3) (permitting a court to vacate a judgment based on "fraud, misrepresentation, or other misconduct of an adverse party").

Therefore, even if a lawyer learns after withdrawal from representation that a fraud was committed during the representation, she may very well have an obligation to take "reasonable remedial measures." The opinion notes that "[i]n certain instances, upon discovering that evidence offered in a proceeding was false, fulfilling the lawyer's duty under Rule 3.3 may require the lawyer to locate and review old case files, locate and communicate with a former client, and draft submissions to a tribunal making disclosure that certain evidence was false."

XXXIV. CPLR 3116. Signing deposition; physical preparation; copies

Deposition Transcript of Nonparty Witness Admissible Because of Proof That It Was "Submitted" to Witness for Signature

In *Castano v. Wygand*, 122 A.D.3d 476, 997 N.Y.S.2d 36 (1st Dep't 2014), the court ruled that there was no requirement that a defendant's deposition transcript be signed by him in order to be admissible in support of the co-defendant City's motion for summary judgment because the defendant "accepted its accuracy by submitting it in support of his motion for summary judgment dismissing the complaint." Furthermore, "[t]here was also nothing improper about submitting only excerpts of deposition transcripts in support of the motion, as long as they were not misleading." The unsigned deposition transcript of a nonparty witness was also deemed admissible evidence "because the City defendants presented proof…that the transcript had been submitted to the witness for signature and return and she failed to do so within 60 days." *See* CPLR 3116(a).

Where Deponent Makes Extensive Changes to Deposition Testimony, Court Can Order Deponent to Submit to Further Questioning

In *Lieblich v. Saint Peter's Hosp. of City of Albany*, 112 A.D.3d 1202, 977 N.Y.S.2d 780 (3d Dep't 2013), a nonparty witness "made significant, substantive amendments to her examination before trial testimony," but the court was "satisfied that an appropriate statement of the reasons for such changes was provided." Nonetheless, the Third Department ruled that supreme court appropriately determined that the large number of changes warranted a further deposition of the witness.

XXXV. CPLR 3119. Newly Added Provision Entitled "Uniform Interstate Depositions and Discovery."

Court of Appeals Issues Its First Decision Interpreting CPLR 3119

In *Kapon v. Koch*, 23 N.Y.3d 32 (2014), the Court of Appeals resolved a long simmering conflict in the Appellate Division over whether something more than mere relevance is required for disclosure from a nonparty. In *Kapon*, respondent sought disclosure for a California action by serving a subpoena on petitioners pursuant to CPLR 3119. The Court concluded that CPLR 3101(a)(4) "imposes no requirement that the subpoenaing party

demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty."

The Court also observed that CPLR 3119(e) requires, in relevant part, that "[a]n application to the court for a protective order or to . . . quash . . . a subpoena issued under this section must comply with the rules or statutes of this state and be submitted to the court in the county in which discovery is to be conducted." The Court noted that, under New York law, "[a]n application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is 'utterly irrelevant to any proper inquiry'." *See* CPLR 2304 ("Motion to quash, fix conditions or modify"). Furthermore, "[i]t is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances."

"Although the nonparty bears the initial burden of proof on a motion to quash, [CPLR] 3101(a)(4)'s notice requirement nonetheless obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, 'the circumstances or reasons such disclosure is sought or required'." The Court observed, however, that "the subpoenaing party's notice obligation was never intended by the Legislature to shift the burden of proof on a motion to quash from a nonparty to the subpoenaing party, but, rather, was meant to apprise a stranger to the litigation the 'circumstances or reasons' why the requested disclosure was sought or required."

XXXVI. CPLR 3120. Discovery and Production of Documents and Things for Inspection, Testing, Copying or Photographing.

Uniform Rules Amended to Provide Guidance on "Whether a Case Is Reasonably Likely to Include Electronic Discovery" and to Require Counsel to Confer on Potential Issues

Section 202.12(b) of the Uniform Rules now mandates that an attorney representing a party at a preliminary conference in a case that "is reasonably likely to include electronic discovery" be sufficiently knowledgeable regarding the client's "technological systems to discuss competently all issues relating to electronic discovery." The provision also allows a "client representative or outside expert" to assist the lawyer in fulfilling this requirement.

Effective September 23, 2013, Uniform Rule 202.12(b) was amended to require that in litigation "reasonably likely to include electronic discovery counsel shall, prior to the preliminary conference, confer with regard to any anticipated electronic discovery issues." Furthermore, a new subsection (1) was added to section 202.12(b). It contains "a non-exhaustive list of considerations for determining whether a case is reasonably likely to include electronic discovery," thereby triggering the dual requirements of conferring with opposing counsel prior to the preliminary conference and acquiring sufficient knowledge regarding the client's technological systems. The list includes such considerations as whether "potentially relevant electronically stored information ("ESI") exist[s];" whether "any of the parties intend to seek or rely upon ESI;" whether there are "less costly or less burdensome alternatives to secure the necessary information without recourse to discovery of ESI;" whether "the cost and burden of preserving and producing ESI [is] proportionate to the amount in controversy;" and "the likelihood that discovery of ESI will aid in the resolution of the dispute." 22 NYCRR 202.12(b)(1).

In an attempt to avoid the time and expense of attending a preliminary conference, the parties can stipulate to a timetable governing disclosure using the form stipulation and order prescribed by OCA. *See* 22 N.Y.C.R.R. § 202.12(b) ("If all parties sign the form and return it to the court before the scheduled preliminary conference, such form shall be 'so ordered' by the court, and, unless the court orders otherwise, the scheduled preliminary conference shall be cancelled."); *see also* McKinney's Supplementary Practice Commentaries, CPLR 3120, C3120:2A ("Electronic Disclosure").

Uniform Rule 202.12(c)(3) was also amended to fine tune the list of "non-exhaustive" factors that can be considered in establishing the method and scope of any electronic discovery.

XXXVII. CPLR 3121. Physical or mental examination.

Court of Appeals Interprets Uniform Rule 202.17(b) and Sets Forth Requirements for Exchange of Medical Reports

In *Hamilton v. Miller*, 23 N.Y.3d 592 (2014), plaintiffs in two separate actions sought damages for injuries sustained from exposure to lead-based paint. Both plaintiffs pleaded dozens of injuries caused by the exposure, including claims for physical, neurological, psychological, psychiatric, and developmental problems. The defendants served notices for medical examinations of the plaintiffs under CPLR 3121(a) and requested that plaintiffs produce, in advance of the examination, copies of any reports of any physicians who treated or examined the plaintiffs. *See* 22 NYCRR 202.17(b)(1) (requiring that at least 20 days prior to the CPLR 3121(a) examination, the party to be examined serve "copies of the medical reports of those medical providers who have previously treated or examined the party seeking recovery").

The Court held that Uniform Rule 202.17, entitled "Exchange of medical reports in personal injury and wrongful death actions," does not require a party "to hire a medical provider to examine them and create a report solely for purposes of the litigation[]." Relying on the language in Rule 202.17(b)(1), the Court concluded that parties "need only produce reports from medical providers who have 'previously treated or examined' them."

Furthermore, the Court observed that Uniform Rule 202.17(b)(1) only requires that the medical reports "include a recital of the injuries and the conditions as to which testimony will be offered at the trial, . . . including a description of the injuries, a diagnosis, and a prognosis." The rule does not require "that medical providers causally relate the injury to the defendant's negligence or, in this case, the lead paint exposure."

On the other hand, the Court rejected plaintiffs' argument that a party is only required to turn over existing medical reports. Again quoting from the rule, the Court noted that it requires a party "to provide comprehensive reports

from their treating and examining medical providers [that]…'*shall* include a recital of the injuries and conditions as to which testimony will be offered at the trial'." (quoting 22 NYCRR 202.17[b][1]). Therefore, a party cannot simply respond to a disclosure request by noting that "their treating or examining medical providers have not drafted any reports within the meaning of rule 202.17(b)(1)." If the existing medical reports do not contain the information required by the rule, a party "must have the medical providers draft reports setting forth that information." If that is not attainable, possibly because of the costs associated with such an endeavor, a party "must seek relief from disclosure and explain why they cannot comply with the rule." *See* 22 NYCRR 202.17(j) ("Any party may move to compel compliance or to be relieved from compliance with this rule or any provision thereof, but motions directed to the sufficiency of medical reports must be made within 20 days of receipt of such reports.").

The *Hamilton* decision is discussed in further detail in the 2014 McKinney's Supplementary Practice Commentaries to CPLR 3121, C3121:4 ("Seek Details in Individual Court Rules").

XXXVIII. CPLR 3122-a. Certification of business records.

CPLR 3122-a Amended to Allow Use of Certification Procedure for Business Records Produced by Nonparty without a Subpoena

In the main practice commentary under this section, we note that CPLR 3122-a has several limitations. In an attempt to alleviate some of the statute's constraints, CPLR 3122-a(d) was added to the CPLR, and became effective, on August 11, 2014. The subdivision authorizes the use of CPLR 3122-a's certification procedure for "business records produced by non-parties whether or not pursuant to a subpoena so long as the custodian or other qualified witness attests to the facts set forth in paragraphs one, two and four" of CPLR 3122-a(a). CPLR 3122-a(d).

Using the Uniform Interstate Depositions and Discovery Act to Subpoena a Nonparty's Documents Outside New York State

As we note in the entry above, CPLR 3122-a(d) now authorizes the use of CPLR 3122-a's certification procedure for business records produced voluntarily by nonparties without the compulsion of a subpoena. Yet, in some instances the cooperation of a nonparty is not forthcoming and the

service of a subpoena will be necessary. That can present significant difficulties in certain situations because, as also noted above, a CPLR 3120 subpoena duces tecum cannot be served outside the State. *See* Judiciary Law § 2-b; Siegel, New York Practice § 383 (5th ed. 2011). One option we note for a party faced with these circumstances is to seek to obtain a nonparty's documents via a subpoena served in another state on the authority of a commission issued in New York under CPLR 3108. *See* Practice Commentary CPLR 3120, C3120:12 ("Discovery Against Nonparty Witness.").

If the state in which the nonparty is located has adopted the Uniform Interstate Depositions and Discovery Act, as we have in New York, *see* CPLR 3119, the party to the New York action might seek to issue a New York subpoena duces tecum and present it in the sister state to request that a subpoena of that state then be served on the nonparty. If a subpoena is issued by the sister state and the records are produced by the nonparty with a certification, those documents should ultimately be deemed to be "[b]usiness records produced pursuant to a subpoena duces tecum under rule 3120," CPLR 3122-a(a) and that can enjoy the benefits of the statute.

XXXIX. CPLR 3123. Admissions as to matters of fact, papers, documents and photographs.

Second Department Allows Defendant to Withdraw Its Express Admissions and Reverses Order of Summary Judgment Based on Those Admissions

In *Altman v. Kelly*, 125 A.D.3d 741 (2d Dep't 2015), plaintiff's motorcycle collided with individual defendant's car. The plaintiff commenced this action against defendant and his employer, Islip Pizza. The plaintiff alleged that Islip Pizza was liable for defendant's negligence under the doctrine of respondeat superior.

In a notice to admit pursuant to CPLR 3123, the plaintiff sought Islip Pizza's admission that, at the time of the collision, defendant was "in the course of his employment" with Islip Pizza, was "acting in the scope of his employment" with Islip Pizza, and was "acting in furtherance of the business activities of" Islip Pizza. Islip Pizza timely responded to the plaintiff's notice, and it admitted each of the listed items.

Plaintiff moved for summary judgment on the issue of liability against the defendants. Islip Pizza opposed the motion, and cross-moved for leave to withdraw its admissions, contending that the notice to admit was improper inasmuch as it sought admissions of ultimate conclusions in the action. Islip Pizza also submitted evidence tending to support its contention that defendant was not, at the time of the accident, acting in the course of his employment with Islip Pizza, in the scope of that employment, or in furtherance of Islip Pizza's business.

The supreme court denied Islip Pizza's cross motion to withdraw its admissions and granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability against it. The Second Department reversed.

The court noted that CPLR 3123(a) permits a party to serve upon another party a written request that it admit, among other things, "the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry." In that "Islip Pizza's liability depends entirely on whether it is liable for [defendant]'s acts under the doctrine of respondeat superior," the court concluded that plaintiff's requests to admit thus "were addressed to the core legal and factual issues pertaining to Islip Pizza." Furthermore, the court stressed that "the facts underlying the determination of whether Islip Pizza is liable for [defendant]'s alleged negligence may be obtained through discovery, including depositions of the defendants." Therefore, it concluded that Islip Pizza's cross motion to withdraw its admissions should have been granted and that, in the absence of Islip Pizza's admissions, the plaintiff failed to establish his prima facie entitlement to judgment as a matter of law against Islip Pizza on the issue of liability.

Notice to Admit Deemed Improper Because It Required Defendant to Admit or Deny Essentially All the Elements of Plaintiff's Prima Facie Proof

In *Midland Funding LLC v. Valentin*, 40 Misc.3d 266, 966 N.Y.S.2d 656 (Dist. Ct., Nassau County 2013), plaintiff sued as assignee of Citibank to recover the amount alleged to be due on a Citibank credit card allegedly issued to plaintiff. Defendant denied having information sufficient to form a belief regarding the issuance of the credit card, her use of the credit card, her

default in payment and the assignment of the debt from Citibank to plaintiff. Plaintiff served a notice to admit upon defendant containing 18 specific items including, among other things, that defendant admit she applied for and used the credit card in issue and received the monthly billing statements, which were true and accurate. Defendant did not respond to the notice to admit within 20 days.

The court noted that plaintiff was not required to make a motion to preclude relating to a notice to admit because a proper notice to admit "is self-executing." Under CPLR 3123(a), a party who does not respond to a notice to admit is deemed to have admitted the items therein for the purposes of the action. *See* Siegel, New York Practice § 364 (5th ed. 2011).

Quoting from the Second Department's decision in *DeSilva v. Rosenberg*, 236 A.D.2d 508, 654 N.Y.S.2d 30 (2nd Dept. 1997), the court emphasized that "'[t]he purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial. A notice to admit which goes to the heart of the matters at issue is improper.'"

The court concluded that the notice to admit was "unquestionably improper since it requires defendant to admit or deny what amounts to all of elements of plaintiff's prima facie proof in its cause of action for breach of contract and account stated." For example, item 16 of the notice to admit required defendant to admit ". . . you owe plaintiff, Midland Funding LLC $4,481.64 as demonstrated in the statements." Similarly, item 17 requested defendant to admit that the ". . . billing statements are true and accurate business records that defendant would not object to as being admitted into evidence at trial."

The court recognized a common problem for assignees in these types of cases. "In order to get these records into evidence, Midland must lay the appropriate foundation establishing the documents are business records of the original creditor, in this case Citibank . . . . A witness from an assignee such as Midland almost always lacks the requisite knowledge to lay the proper foundation to establish the documents, the credit card agreement and the credit card statement, are business records of the original creditor."

The court suggested that if plaintiff seeks "to conduct appropriate discovery, such as a deposition or written interrogatories, at which defendant could be

questioned regarding the issuance of the credit card, its use and her payment and/or failure to make payment, it may do so."

XL. CPLR 3126. Penalties for Refusal to Comply with Order or to Disclose.

Rare Moment in Which Court of Appeals Concludes That Courts Below Abused Their Discretion in Imposing Sanctions Under CPLR 3126

It is rare indeed for the New York Court of Appeals to reverse a sanctions award entered by supreme court under CPLR 3126 based on a party's failure to comply with disclosure obligations. The nature and degree of disclosure sanctions imposed under CPLR 3126 are vested in the broad discretion of the trial court, and the appellate courts have frequently cautioned that they will rarely disturb the exercise of that discretion. Yet in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Global Strat Inc.*, 22 N.Y.3d 877, 976 N.Y.S.2d 678, 999 N.E.2d 156 (2013), the Court found a clear abuse of that discretion and vacated a $99 million default judgment because the penalty "was not commensurate with the alleged disobedience, i.e., failure to produce documents that [plaintiffs] claimed were in the [defendant]s' possession." The Court emphasized that plaintiffs originally sought a far lesser penalty, the depositions of the individual defendants, to ascertain whether they complied with the disclosure demands. In addition, the Court found that the report of the referee to whom the matter was referred contained no basis for his conclusion that the individual defendants had willfully failed to comply with plaintiffs' disclosure demands.

The Court remitted the matter to supreme court for "the imposition of an appropriate sanction, should it determine that a sanction is warranted."

Defendants' Answers Are Stricken, and Default Judgment Imposed, Where Clear and Convincing Evidence Demonstrates They Committed Fraud on Court

In *CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d 307 (2014), the Court affirmed an order imposing civil procedure's version of the death penalty: a striking of pleadings and the imposition of a default judgment as prescribed in CPLR 3126(3). This severe sanction was imposed on a finding, "by clear and convincing evidence," that defendants had engaged in conduct that constituted a fraud on the court.

CDR is an extreme case involving egregious conduct by several defendants who were accused of perjury, witness tampering, and falsification of documents. The defendants were convicted of tax evasion in federal court and were sentenced to ten years in prison.

After defendants were sentenced, the plaintiff moved for an order under CPLR 3126(3) to strike defendants' pleadings and for a default judgment based on the fact that the defendants perpetrated a fraud on the court. The Court of Appeals noted that in addition to the sanctions under CPLR 3126, "a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice." These types of actions constitute a "[f]raud on the court" and "involve[] wilful conduct that is deceitful and obstructionistic" and that "injects misrepresentations and false information into the judicial process 'so serious that it undermines . . . the integrity of the proceeding'." Relying on several federal decisions, the Court ruled that a party seeking to strike an adverse party's pleading based on a claim of fraud on the court must demonstrate by clear and convincing evidence "that the offending 'party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action'." The Court affirmed the order striking the answers of those defendants and entering a default judgment against them.

While the *CDR Creances* Court cites to CPLR 3126, and contains a brief discussion of the statute, the relief afforded appears to lie under the distinct inherent power of the courts to impose appropriate sanctions in actions involving a fraud on the court.

Ethics Committee Provides Guidance to Lawyers Advising Clients Regarding Existing and Proposed Postings on Social Networking Sites

Can lawyers representing clients advise them of the dangers of compiling and posting information on social media sites? The dye may have been cast before the client walks in the door, but is it too late to advise the client to remove the picture, film, or post, or to shut down the social networking site entirely?

In New York County Lawyers Association Opinion Ethics Opinion 745 (2013), the ethics committee provided guidance for lawyers advising clients with respect to existing or proposed postings on social media sites. The opinion concludes, among other things, that a lawyer is permitted to advise a

client to use the highest level of privacy settings available on a social media site to prevent others, such as adverse counsel, from having direct access to the contents of the site. Furthermore, an attorney "may properly review a client's social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes."

From an ethics standpoint, an attorney is permitted to advise a client to remove postings from a social media site, but cannot advise the client to destroy such information. *See VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012); 2012 Supplementary Practice Commentaries, CPLR 3126, C3126:8A ("Sanction for Spoliation of Evidence"). In this regard, Rule 3.4 (a) (1) of the New York Rules of Professional Conduct provides that a lawyer "shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce." Furthermore, under Rule 3.4 (a) (3), a lawyer may not "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

The ethics opinion also notes that "a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject." *See* Rule 3.3(a) (3); 22 N.Y.C.R.R. Part 130 ("Costs and Sanctions").

XLI. CPLR 3211(a)(1). Motion to Dismiss Based on Documentary Evidence.

Courts Continue to Deny Relief Under CPLR 3211(a)(1), Demonstrating Subdivision's Limitations

In *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 334, 970 N.Y.S.2d 733, 738, 992 N.E.2d 1076, 1081 (2013), the Court held that "to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the moving party … must establish that the documentary evidence 'conclusively refutes' the plaintiff's allegations." The Court denied defendant's motion because an SEC order did not "conclusively refute" plaintiff insured's argument that a policy exclusion did not defeat coverage.

XLII. CPLR 3211(a)(2). Motion to Dismiss for Lack of Subject Matter Jurisdiction

District Courts Possess Subject Matter Jurisdiction Over Claims for Unjust Enrichment

In *Jeffrey M. Rosenblum, P.C. v. Casano*, 2014 WL 6462490 (Dist. Ct., Nassau County 2014), the district court held that while a claim "for unjust enrichment . . . is equitable in nature, the remedy it seeks, a money judgment, is well within this court's jurisdiction."

In addition to ruling that it had subject matter jurisdiction to entertain the counterclaim for unjust enrichment, the court concluded that it could entertain counterclaims in excess of $15,000 because the court "shall have jurisdiction of counterclaims . . . for money only, without regard to amount." UDCA § 208(b). The counterclaim seeking a declaratory judgment was dismissed, however, because the district court lacks subject matter jurisdiction to entertain such a claim, which "is exclusively equitable in nature." *Jeffrey M. Rosenblum, P.C.*, 2014 WL at *2.

The decision is discussed in further detail in Siegel, New York Practice § 20 (Connors ed., July 2015 Supplement).

XLIII. CPLR 3211(a)(5). Motion to Dismiss Based on Arbitration and Award, Collateral Estoppel, Discharge in Bankruptcy, Infancy or other disability of the moving party, Payment, Release, Res judicata, Statute of limitations, or Statute of frauds.

Res Judicata Does Not Bar Plaintiff From Seeking Relief in Action #2 That Was Not Within Subject Matter Jurisdiction of Court Entertaining Action #1

The limited subject matter jurisdiction of a lower court entertaining a summary proceeding can pose difficulties in applying the doctrines of res judicata and collateral estoppel in a subsequent action. In *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc.*, 24 N.Y.3d 528, 2 N.Y.S.3d 39, 25 N.E.3d 952 (2014), the Court rejected the defendants' argument that the doctrine of res judicata barred plaintiff in a supreme court action from pursuing damages based on an acceleration clause, where those damages had not been recovered in a prior New York City Civil Court action

awarding plaintiff possession of the premises. The *Van Duzer* Court ruled that the Civil Court did not possess subject matter jurisdiction to address a claim for the balance of rent due under the acceleration clause in the holdover proceeding. Therefore, such damages could be sought in the subsequent supreme court action and were not barred by the doctrine of res judicata. *See Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 690 N.Y.S.2d 478, 712 N.E.2d 647 (1999) ("res judicata is inapplicable where the plaintiff 'was unable to ... seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain ... multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action ... to seek that remedy or form of relief'.")(quoting Restatement [Second] of Judgments § 26 (1)(c)).

The decision is discussed in further detail in Siegel, New York Practice §§ 19, 469, 579 (Connors ed., July 2015 Supplement).

Burden of Proof on a Motion to Dismiss Pursuant to CPLR 3211(a)(5) on Statute of Limitations Grounds

The courts have frequently observed that on a CPLR 3211(a)(5) motion to dismiss a claim on statute of limitations grounds, the moving party "must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the [opponent] to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable." *Baptiste v. Harding-Marin*, 88 A.D.3d 752, 930 N.Y.S.2d 670 (2d Dep't 2011). For example, in *Ross v. Jamaica Hospital Medical Center*, 122 A.D.3d 607, 996 N.Y.S.2d 118 (2d Dep't 2014), the defendants established, prima facie, that the two and one half year statute of limitations for medical malpractice in CPLR 214-a had elapsed. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was tolled pursuant to CPLR 205(a) and the action was dismissed. The *Ross* decision is discussed in further detail in section 52 of this supplement.

XLIV. CPLR 3211(a)(7). Pre-Answer Motion to Dismiss for Failure to State a Cause of Action.

In *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N.Y.3d 342, 961 N.Y.S.2d 364, 985 N.E.2d 128 (2013), plaintiff commenced a wrongful death action against defendants Bally's and Bally Total Fitness after his

father died from a heart attack at one of defendant’s facilities, alleging statutory and common law liability. The defendants served a joint answer to the complaint and subsequently moved to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

The Court of Appeals concluded that General Business Law section 627-a does not create a duty running from a health club to its members to use an Automated External Defibrillator (“AED”) required by that section to be maintained on site. As for the common law claim, the Court observed that “New York courts have viewed health clubs as owing a limited duty of care to patrons struck down by a heart attack or cardiac arrest while engaged in athletic activities on premises.” In that defendant moved to dismiss under CPLR 3211(a)(7), the Court noted that it was limited “to an examination of the pleadings to determine whether they state a cause of action. Further, we must accept facts alleged as true and interpret them in the light most favorable to plaintiff; and … plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face.” *See Rovello v Orofino Realty Co*., 40 NY2d 633, 635, 389 N.Y.S.2d 314, 316, 357 N.E.2d 970, 972 (1976); Siegel, New York Practice, §§ 265, 270. While defendant's motion was supported by affidavits that contradicted plaintiff’s claim, the Court concluded that “this matter comes to us on a motion to dismiss, not a motion for summary judgment.” Therefore, the Court concluded that “the case is not currently in a posture to be resolved as a matter of law on the basis of the parties' affidavits, and Miglino has at least pleaded a viable cause of action at common law.”

* * *

The *Miglino* decision has been subject to conflicting interpretation. In *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128 (1st Dep’t 2014), the majority concluded that “the Court of Appeals has made clear that a defendant can submit evidence in support of the [CPLR 3211(a)(7)] motion attacking a well-pleaded cognizable claim.” While the First Department cited to *Rovello* and *Guggenheimer* and numerous Appellate Division decisions to support its holding, it did not even mention *Miglino*. The concurrence in *Basis Yield* observed that while a motion to dismiss under CPLR 3211(a)(1) permits consideration of documentary evidence, under *Miglino* a CPLR 3211(a)(7) motion “‘limits [courts] to an examination of the pleadings to determine whether they state a cause of action’.” In that the motion at issue in *Basis Yield* was a pre-answer motion to dismiss based solely on CPLR 3211(a)(7), the concurrence reasoned that

“there was no basis for the motion court to consider documents outside the complaint at this stage of the proceeding.” *See also Loreley Fin. (Jersey) No. 3 Ltd. v. Citigroup Global Mkts., Inc.*, 119 A.D.3d 136, 139 n. 2 (1st Dep’t 2014); *Marston v. General Elec. Co.*, 121 A.D.3d 1457, 995 N.Y.S.2d 646 (3d Dep't 2014)(citing *Miglino*, court notes that “plaintiff cannot be faulted for not coming forward with any evidence in opposition to the motion to dismiss inasmuch as it was never converted to a motion for summary judgment”).

In *Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 A.D.3d 85 (4th Dep’t 2015), the Fourth Department expressly considered whether the language in *Rovello* permitting consideration of evidentiary submissions on a CPLR 3211(a)(7) pre-answer motion to dismiss “remains viable in light of the Court's recent decision in *Miglino*.” The court unanimously rejected the plaintiff’s argument “that *Miglino* fundamentally changed the parameters of CPLR 3211(a)(7) and effectively barred the consideration of any evidentiary submissions outside the four corners of the complaint.” The Fourth Department agreed with the First Department’s *Basis Yield* “holding, in effect, that *Miglino* had not altered the longstanding practice by which dismissal might be obtained under CPLR 3211(a)(7) with sufficiently ‘conclusive’ evidentiary submissions.”

The problem is explored in further detail in Connors, “Courts Reconsider Rule Permitting Use of Affidavits on CPLR 3211(a)(7) Motion,” 253 (no. 12) New York Law Journal (January 20, 2015)

XLV. CPLR 3211(e). Number, time and waiver of objections; motion to plead over.

The affirmative defense of lack of personal jurisdiction, *see* CPLR 3211(a)(8), lurks in many answers served in New York State court actions. In the aftermath of the Supreme Court's 2014 decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (SPR 265:1), *supra*, we suspect that this defense may get a dusting off by corporate defendants and be made the subject of a CPLR 3212 summary judgment motion. In that an objection based on basis of personal jurisdiction is not subject to the sixty-day rule in CPLR 3211(e), it can be raised on a motion for summary judgment made within the deadlines set in CPLR 3212(a) as long as the affirmative defense is pleaded in the answer. *See* July 2014 Supplement to Siegel, New York Practice (Connors ed.), § 111.

XLVI. CPLR 3212. Motion for Summary Judgment.

In Determining Whether There Is "Good Cause" Under CPLR 3212(a) to Entertain a Late Motion for Summary Judgment, Courts Refuse to Consider Arguments Made for First Time in Reply Papers

In *Goldin v. New York & Presbyterian Hospital*, 112 A.D.3d 578, 975 N.Y.S.2d 892 (2d Dep't 2013), the supreme court granted the defendant's motion for summary judgment, which was made 67 days after the note of issue was filed. But in his original moving papers the defendant failed to demonstrate "good cause" for not making the motion before the expiration of the 60–day deadline set forth in Kings County Supreme Court Uniform Civil Term Rule Part C (6). On appeal, the Second Department denied the motion as untimely and reinstated the medical malpractice action against the defendant ruling that "[i]t was an improvident exercise of the Supreme Court's discretion to entertain the summary judgment motion and to consider the good cause arguments raised for the first time in [defendant's] reply papers." Similarly, in *Bissell v. New York State Department of Transportation*, 122 A.D.3d 1434, 995 N.Y.S.2d 530 (4th Dep't 2014), defendant made its motion more than 10 months after the expiration of CPLR 3212(a)'s 120 day deadline and failed to demonstrate "good cause" for the delay in its moving papers. Relying on *Goldin*, the Fourth Department held that supreme court "improperly considered the 'good cause' proffered by defendant for the first time in its reply papers," and reversed the order dismissing plaintiff's claim.

These decisions are discussed in further detail in Siegel, New York Practice § 279 (Connors ed., July 2015 Supplement).

Local Rules in Sixth Judicial District (and Elsewhere) Require Summary Judgment Motions to be Filed, Rather Than Served, within 60 Days After Filing of the Note of Issue

Courts can prescribe short time frames for making motions for summary judgment in all sorts of places, including preliminary conference orders, scheduling orders, individual court rules, county rules, and rules of a judicial district. In *McDowell & Walker, Inc. v. Micha*, 113 A.D.3d 979, 979 N.Y.S.2d 420 (3d Dep't 2014), the Third Department applied the local rules of the Sixth Judicial District, which require that "[s]ummary judgment motions must be *filed* no later than [60] days after the date when the Trial Note of Issue is filed," unless permission is obtained for good cause shown. (emphasis added). Compliance with this local rule, covering Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga, and Tompkins Counties, can be tricky.

CPLR 3212(a) speaks in terms of when a summary judgment motion may be "made" and provides that the court may set a deadline for making such motions, as long as that date is no earlier than thirty days after the filing of the note of issue. Pursuant to CPLR 2211, a motion is "made" when the motion or order to show cause is "served," not when it is "filed." *See* § 243; McKinney's Practice Commentaries to CPLR 2211, C2211:4 ("When Motion on Notice Deemed 'Made'"). Lawyers making motions for summary judgment in the Sixth Judicial District must take pains to not only make, i.e., serve, their motions for summary judgment within 60 days from the filing of the note of issue, but also to file them within that time frame. We suspect that there are other local or individual rules in the state that require the "filing" of a motion for summary judgment, rather than its mere service, within a specific time frame. Lawyers need to watch for those too. Finally, the filing may also be required under the terms of a stipulation. *See* Siegel, New York Practice (5th ed.), § 279.

Similarly, in *Connolly v 129 E. 69th St. Corp.*, 127 A.D.3d 617, 7 N.Y.S.3d 889 (1st Dept 2015), the supreme court's individual part rules required that motions for summary judgment be "filed" within 60 days of the filing of the note of issue. Since plaintiffs filed the note of issue on July 10, 2013, the motions for summary judgment were required to be filed by September 9,

2013. While defendant made (served) a motion for summary judgment on September 4, 2013, it did not file the motion until September 10, 2013, one day after the 60–day time period expired. Therefore, the First Department found defendants' motions to be untimely and reversed the supreme court's order granting defendants' motions for summary judgment dismissing the complaint.

XLVII. CPLR 3213. Motion for summary judgment in lieu of complaint.

Court of Appeals Rules That Unconditional Guarantee Is an "Instrument for the Payment of Money Only"

In *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, 25 N.Y.3d 485 (2015), the Court held that an unconditional guarantee is "an instrument for the payment of money only" under CPLR 3213. The *Cooperatieve Centrale* Court held that the plaintiff must prove three things in such an action: "the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty." If the plaintiff is successful, "the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense."

In *Cooperatieve Centrale*, plaintiff submitted, among other things, the personal guaranty signed by defendant, the purchase agreement that was the subject of the guaranty, and a default judgment plaintiff entered against a corporation whose obligations defendant agreed to guaranty. Relying on its prior decisions, the Court ruled that the "broad, sweeping and unequivocal language[in] the guaranty foreclose[d] any challenge to the enforceability and validity of the documents which establish defendant's liability for payments arising under the purchase agreement, as well as to any other possible defense to his liability for the obligations of the [corporation]." Therefore, defendant's collusion claim was deemed barred by the express language of the guaranty and summary judgment was awarded to the plaintiff to the tune of approximately $42 million. *See* Siegel, New York Practice § 289 (Connors ed., January 2016 Supplement).

CPLR 2001 Cannot Cure Defective Notice in CPLR 3213 Motion; Vacatur of Default Judgment Required

In *Segway of New York, Inc. v. Udit Group, Inc.*, 120 A.D.3d 789, 992 N.Y.S.2d 524 (2d Dep't 2014), plaintiff commenced an action by motion for summary judgment in lieu of complaint to recover on a promissory note and two personal guarantees on the note. After defendants defaulted, a judgment in the sum of $204,292.96 was entered. The supreme court denied defendants' motion to vacate the default judgment based on lack of personal jurisdiction. *See* CPLR 5015(a)(4). The Second Department reversed and dismissed the action because the CPLR 3213 notice of motion did not provide timely notice of the motion to a defendant who was served by substituted service pursuant to CPLR 308(2). *See* CPLR 320(a); 3213; *see also Beach House Condominium Ass'n of Key West, Inc. v. Beatrice*, 2013 WL 4873934 (Sup. Ct., Kings County 2013)("A failure to give the defendants the statutorily mandated time to appear and answer a motion for summary judgment in lieu of complaint compels not only a denial of the motion but also a dismissal of the action.").. Furthermore, the copies of the notice of motion served upon the defendants contained a misstatement of the address at which the motion could be defended. *See* CPLR 2214(a). "These defects in the notice of motion, under the particular circumstances of this case and in the context of an action commenced pursuant to CPLR 3213, created a greater possibility of frustrating the core principles of notice to the defendants" and, therefore, could not be corrected pursuant to CPLR 2001. *See Ruffin v. Lion Corp.*, 15 N.Y.3d 578 (2010) (CPLR 2001 "may be used to cure only a 'technical infirmity' " in service of process).

XLVIII. CPLR 3215. Default judgment.

New Court Rules Govern Papers Required on Default Judgment Applications

The Uniform Rules applicable to the Supreme and County Courts, the New York City Civil Court, City courts outside of New York City, and the District Courts have been modified to impose specific requirements on plaintiffs seeking default judgments in "consumer credit" matters. *See* Admin. Order 185/2014, September 15, 2014; 22 NYCRR §§ 202.27-a and 202.27-b. When a plaintiff in a consumer credit matter, which is defined in the new Uniform Rules, applies for a default judgment through the clerk's office (*see* CPLR 3215[a]), the plaintiff must submit the proof required of

any default judgment application (see CPLR 3215[f]) and additional proof required by the new Uniform Rules, including an "affirmation of non-expiration of statute of limitations" executed by plaintiff's counsel and an "Additional Notice of Consumer Credit Action."

The new Uniform Rules, which are available at : http://www.nycourts.gov/rules/ccr/, instruct the County Clerk or other applicable clerk of the court to refuse to accept for filing a default judgment application that does not comply with the requirements of the new Rules.

XLIX. CPLR 3216. Want of Prosecution.

CPLR 3216 Amended Effective January 1, 2015 to Address Issues Raised by Court of Appeals *Cadichon* Decision

In *Cadichon v. Facelle*, 18 N.Y.3d 230 (2011), a multi-party medical malpractice action was dismissed by the court on its own initiative pursuant to CPLR 3216. The court, however, failed to notify the parties of this momentous development and they continued to slug it out for over two months by scheduling depositions and engaging in motion practice. In a 4-3 decision, the Court of Appeals reversed and reinstated the complaint, but it was a close call for the plaintiff. In response to the *Cadichon* decision, and the fear that similar instances might be occurring in other parts of the State, the legislature has amended CPLR 3216 in several important respects for the first time in 27 years.

CPLR 3216(a) provides that the court may dismiss a party's pleading for neglect to prosecute on its own initiative or, more typically, upon the motion of a party. The statute was amended to require that, in either instance, the dismissal be "with notice to the parties," so as to avoid a *Cadichon* type administrative dismissal that might not come to the attention of the litigants.

The court's power to dismiss an action for neglect to prosecute is constrained by CPLR 3216(b). Subdivision (2) of that provision has always required that at least one year must have passed since the joinder of issue before a motion to dismiss under CPLR 3216(a) for neglect to prosecute can be made. An amendment to CPLR 3216(b) now includes an additional time frame that must pass before a motion to dismiss can be made, requiring that "six months must have elapsed since the issuance of the preliminary court

conference order where such an order has been issued." *See* Uniform Rule 202.12 (setting out the details for a preliminary conference).

Finally, CPLR 3216(b)(3) was amended to address the situation in which the written demand to serve and file the note of issue is served by the court, rather than an opposing party. When the written demand is served by the court, as was the case in *Cadichon*, the statute now requires that the demand "set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

The amendments to CPLR 3216 take effect on January 1, 2015, and we presume that they apply to all cases pending on that date. The legislation is discussed in further detail in Siegel, New York Practice § 375 (Connors ed., January 2015 Supplement).

Court Distinguishes *Cadichon* and Dismisses Action

In *Rossi v. Scheinbach*, 2015 WL 1034124 (Sup. Ct., Nassau County 2015), plaintiffs sought reargument of an order on a prior motion which sought an order (1) vacating the plaintiffs' default; (2) extending the plaintiffs' time to file the note of issue; (3) deeming the plaintiffs' note of issue filed nunc pro tunc; and (4) granting any further relief the court deemed just and proper upon the ground that the prior order overlooked certain matters of fact and law. The court noted that:

> The Plaintiffs rely on *Cadichon* and argue that in that decision the Court of Appeals held that, "deemed dismissals for alleged want of prosecution under CPLR § 3216 following certification orders, of the type that the Court relied upon in the case at bar, are expressly prohibited under CPLR 205(a) and have been illegal for about the past six years. …
>
> Despite the Plaintiffs' assertion that the facts in *Cadichon* are similar to the facts in the instant case, that is incorrect. In fact, the holding in *Cadichon* is based on the specific language set forth in the stipulation, which is in sharp contrast to the language set forth in the Certification Order herein. In *Cadichon*, the key language was "your default in complying with this demand within the 90–day period will serve as a basis for the court, on its own motion, to dismiss the action for unreasonably neglecting to proceed." In this case, the Certification Order states: "If plaintiff does not file a note of issue within 90 days, this action is deemed dismissed without further order of the Court. (CPLR 3216)" Based on the stark contrast in the language between the stipulation in

> *Cadichon* and the Certification Order in this case, the holding in *Cadichon* is not applicable to the case at bar.
>
> Also, the Plaintiffs fail to acknowledge the line of post-*Cadichon* cases decided by the Appellate Division, Second Department, which all held that a certification order directing a plaintiff to file a note of issue within 90 days, and warning that the complaint would be deemed dismissed without further order of the Supreme Court if the plaintiff failed to comply with that directive, had the same effect as a valid 90–day notice pursuant to CPLR 3216. (*See Byers v. Winthrop University Hosp.*, 100 AD3d 817 [2d Dept.2012]; *King v. Dobriner*, 106 AD3d 1053 [2d Dept.2013]; *Stallone v. Richard*, 95 AD3d 875 [2d Dept.2012]) The Plaintiffs' argument that "the lower court justice and the Nassau County Clerk's Office" have a general policy of illegally dismissing cases, completely ignores the established pertinent appellate case law, which states that such dismissal is proper.

The court, therefore, denied the motion for reargument.

L. CPLR 3217. Voluntary discontinuance.

Service of a CPLR 3211(a) Motion to Dismiss Will Terminate the Plaintiff's Right to Unilaterally Discontinue an Action

CPLR 3217(a)(1) was amended, effective January 1, 2012, to provide that the defendant's service of a responsive pleading cuts off the plaintiff's right to discontinue the action by mere notice. Therefore, the service of a CPLR 3211(a) motion to dismiss will terminate the plaintiff's right to unilaterally discontinue an action under CPLR 3217(a)(1). *BDO USA, LLP v. Phoenix Four, Inc.*, 113 A.D.3d 507, 979 N.Y.S.2d 45 (1st Dep't 2014).

LI. CPLR 4106. Alternate Jurors.

CPLR 4106 Amended to Permit Court to Retain Alternate Jurors after Final Submission of Case to Jury for Deliberations

The 2013 version of CPLR 4106 provides that "after final submission of the case [for deliberations], the court shall discharge the alternate jurors." In the First Department's 2005 decision in *Gallegos v. Elite Model Management*

Corp., 28 A.D.3d 50, 807 N.Y.S.2d 44 (1st Dep't 2005), the court held that without the consent of all the parties, alternate jurors may not be substituted after deliberations have begun. In addition, as also noted in *Gallegos*, the Court of Appeals has held that absent consent to trial by less than six jurors, the parties to a civil case have a constitutional right to a trial by a full six-member jury. *Sharrow v. Dick Corp.*, 86 N.Y.2d 54, 59-60, 629 N.Y.S.2d 980, 982, 653 N.E.2d 1150, 1152 (1995).

Consent was rarely forthcoming from all parties to allow for either of these deviations. Therefore, if a juror took ill during the deliberations, a mistrial was often declared, resulting in a waste of time and money for the litigants, the attorneys, and the court system.

In an attempt to address these problems, CPLR 4106 was amended to permit the court, upon the request of a party, to allow one or more alternate jurors (instead of a maximum of two) to be drawn and then retained after final submission of a case to ensure their availability if needed during jury deliberations. Under the amendment, once deliberations have begun, the court may allow an alternate juror to participate in such deliberations, but "only if a regular juror becomes unable to perform the duties of a juror."

The new law takes effect on January 1, 2014 and applies to all actions commenced on or after that date, and to all actions pending on that date in which a jury has not yet been selected.

The amendment does not prescribe the method for selecting an alternate juror to participate in deliberations. In *Xi Yu v. New York University Medical Center*, 4 Misc.3d 602, 781 N.Y.S.2d 416 (Sup. Ct., Queens County 2004), the court held that alternate jurors must be chosen at random, rather than being chosen sequentially. Subsequently, in *Rivera v. New York City Transit Authority*, 92 A.D.3d 516, 938 N.Y.S.2d 535 (1st Dep't 2012), the First Department ruled that "[t]he trial court's procedure of randomly drawing an alternate juror to substitute for a discharged juror, rather than substituting an alternate juror sequentially according to the designation of alternate jurors, was permissible." This leaves open the question of whether selecting alternate jurors sequentially is "permissible."

Third Department Affirms Trial Court's Ruling Setting Aside Verdict Where Jurors Were Impaneled Pursuant to Local Rule rather Than CPLR 4105 and 4106

In *Piacente v. Bernstein*, 127 A.D.3d 1365 (3d Dep't 2015), prior to the close of proof, plaintiff requested that supreme court, pursuant to CPLR 4105 and 4106, empanel the first six jurors that had been selected and designate the remaining two jurors as alternate jurors. The court concluded that a local rule enacted in the Third Judicial District regarding jury selection procedures required that the six deliberating jurors be chosen randomly by the court clerk and denied plaintiff's request. The jury, which was comprised of juror Nos. 1, 2, 3, 4, 5 and 8, rendered a verdict of no cause of action.

Plaintiff moved under CPLR 4404(a) to set aside the verdict in the interest of justice, claiming that the violation of his statutory right to designate the first six jurors selected during voir dire denied him a fair trial. Supreme Court granted the motion and set aside the verdict.

The Third Department concluded that there was no evidence in the record indicating that plaintiff waived any objection to supreme court's reliance on the Third Judicial District's jury selection rule. Furthermore, in that it held that the local rule "contravened plaintiff's substantial right to empanel the first six jurors that had been selected by the parties, pursuant to the "mandatory procedure" set forth in CPLR 4105, Supreme Court exercised its discretion and granted plaintiff's motion to set aside the verdict and order a new trial in the interest of justice."

LII. CPLR 5015. Relief from judgment or order.

Second Department Concludes That Failure to Comply with Notice Requirements in CPLR 3215(g)(1) Renders Default Judgment Void

In *Paulus v Christopher Vacirca, Inc.*, 128 A.D.3d 116 (2d Dep't 2015), plaintiff failed to provide the required notice to the defendant under CPLR 3215(g)(1) before moving for leave to enter a default judgment. That provision requires that "whenever application [for a default judgment] 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."

Defendant moved to vacate the default judgment under CPLR 5015(a)(1) and(4). The Second Department held that supreme court properly concluded that defendant was not entitled to vacatur of the default judgment pursuant to CPLR 5015(a)(1) because he failed to demonstrate a reasonable excuse for failing to answer the complaint. Nonetheless, the Second Department ruled,

in an issue of "first impression" in that court, that the default judgment should have been vacated pursuant to CPLR 5015(a)(4) because the failure to comply with the notice requirements of CPLR 3215(g)(1) deprived the supreme court of jurisdiction to entertain the plaintiffs' motion for leave to enter a default judgment.

The First, Third, and Fourth Departments have addressed the issue of vacating a default judgment for an appearing party who received no notice of the motion for leave to enter a default judgment, but have reached different results. *See Fleet Fin. v. Nielsen*, 234 A.D.2d 728 (3d Dep't 1996) (concluding that failure to provide notice in accordance with CPLR 3215(g)(1) and (3) does not, standing alone, warrant vacatur of a default judgment); *Walker v. Foreman*, 104 AD3d 460 (1st Dep't 2013) (vacating judgment, court noted that the failure to give proper notice under CPLR 3215(g)(1) requires a new inquest, on proper notice); *Dime Sav. Bank of N.Y. v. Higner*, 281 A.D.2d 895 (4th Dep't 2001)(granting motion to vacate default judgment and foreclosure sale based upon failure to provide notice to defendant homeowner who appeared informally by sending a letter to the bank's attorney denying the validity of the bank's claim). For further discussion of the matter, see Siegel, New York Practice § 295 (Connors ed., January 2016 Supplement).

LIII. CPLR 5222. Restraining notice.

Court of Appeals Holds That "Separate Entity" Rule Prevents Judgment Creditor from Ordering Garnishee Bank with Branch in New York to Restrain Debtor's Assets Held in Bank's Foreign Branches

In *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 996 N.Y.S.2d 594, 21 N.E.3d 223 (2014), the Court held that the "'separate entity' rule prevents a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a judgment debtor's assets held in foreign branches of the bank."

The decision is discussed in further detail in Siegel, New York Practice §§ 487, 491, 510 (Connors ed., July 2015 Supplement).

LIV. CPLR 5223. Disclosure [in aid of enforcement].

United States Supreme Court Rejects Argentina's Claim That Sovereign Immunity Bars Disclosure in Aid of Enforcement

New York State's broad post-judgment disclosure tools were put to the test in *Republic of Argentina v. NML Capital*, __ U.S. __, 134 S. Ct. 2250 (2014), where plaintiff possessed a multi-billion dollar federal court judgment against Argentina and sought disclosure from two nonparty banks regarding the debtor's assets located outside the United States. On a motion to quash the subpoenas, Argentina asserted that the banks' compliance with the subpoenas would infringe on its sovereign immunity and violate the Foreign Sovereign Immunities Act ("FSIA"). The federal district court rejected the argument and compelled the banks to comply with the subpoenas duces tecum at issue. The Second Circuit affirmed the district court, concluding that "because the Discovery Order involves discovery, not attachment of sovereign property, and because it is directed at third-party banks, not at Argentina itself, Argentina's sovereign immunity is not infringed." *EM Ltd. v. Republic of Arg.*, 695 F.3d 201, 205 (2d Cir. 2012).

The United States Supreme Court affirmed, emphasizing that Federal Rule of Civil Procedure 69(a)(2) permits a judgment creditor to obtain discovery permitted under either the broad standard set forth in the Federal Rule of Civil Procedure 26(b)(1) or the rules of practice of the state where the district court sits. The High Court noted that CPLR 5223 permits disclosure of "all matter relevant to the satisfaction of [a] judgment" and quoted from this section in the main text, which observes that New York law permits "'investigation [of] any person shown to have any light to shed on the subject of the judgment debtor's assets or their whereabouts.'" *Republic of Arg.*, 134 S. Ct. at 2254.

The decision is discussed in further detail in Siegel, New York Practice § 509 (Connors ed., July 2015 Supplement).

LV. CPLR 5225. Payment or delivery of property of judgment debtor.

Fourth Department Addresses Right to Jury Trial in Proceedings Under CPLR 5225 and 5227

In *Matter of Colonial Sur. Co. v. Lakeview Advisors, LLC*, 125 A.D.3d 1292, ––– N.Y.S.2d –––– (4th Dep't 2015), the Fourth Department concluded that a special proceeding "under CPLR 5225 and 5227 against a party other than the judgment debtor is an outgrowth of the 'ancient creditor's bill in equity,' which was used after all remedies at law had been exhausted." The judgment creditor in this situation is seeking legal relief to the extent she desires an adjudication of whether the third-party owes a money debt to the judgment debtor and also equitable relief in that she wants any such debt to be paid to her and not the judgment debtor. In that the judgment creditor's use of CPLR 5225 and 5227 in *Colonial Surety* was "in furtherance of both legal and equitable relief," the court ruled that it was not entitled to a jury trial. *See* CPLR 4102(c).

The decision is discussed in further detail in Siegel, New York Practice § 510 (Connors ed., July 2015 Supplement).

LVI. CPLR Article 53. Recognition of Foreign Country Money Judgments.

Court of Appeals Grants Recognition to Default Judgment Entered in England

CPLR 5304 describes in some detail the foreign money judgments that need not be recognized in New York. For example, CPLR 5304(a)(2) generally provides that a foreign judgment will not be enforced in New York "if the foreign court did not have personal jurisdiction over the defendant." An exception to this broad rule is recognized in CPLR 5305(3), which states that a "foreign country judgment shall not be refused recognition for lack of personal jurisdiction if …the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved."

In *Landauer Ltd. v. Joe Monani Fish Co., Inc.,* 22 N.Y.3d 1129 (2014), the Court concluded that recognition of a foreign judgment "is not repugnant to our notion of fairness if defendant was a party to a contract in which the parties agreed that disputes would be resolved in the courts of a foreign

jurisdiction and defendant was aware of the ongoing litigation in that jurisdiction but neglected to appear and defend." The *Landauer* Court reiterated that in these circumstances, "so long as the exercise of jurisdiction by the foreign court does not offend due process, the judgment should be enforced without 'microscopic analysis' of the underlying proceedings."

These recognition standards were easily met in *Landauer*, where the contracts between the parties contained a provision giving the English courts exclusive jurisdiction over any disputes arising from the transactions. Furthermore, the record established that, through its counsel, defendant had ample notice of the lawsuit before the default judgment was entered in England. Therefore, the Court of Appeals granted plaintiff's CPLR 3213 motion for summary judgment in lieu of complaint to afford recognition to the English judgment in New York despite defendant's contention that it had not been properly served in England.

The decision is discussed in further detail in section 472 of the Supplement to Siegel, New York Practice (5th ed.).

LVII. CPLR 5501. Scope of review (on an Appeal from a Final Judgment).

Appeal from Order Denying Motion to Set Aside Verdict Does Not Allow Full Review of All Orders That Affect Final Judgment

An appeal from an order on a CPLR 4404 motion will not bring up for review all issues that affect the final judgement. In *Rivera v. Montefiore Medical Center*, 123 A.D.3d 424, 998 N.Y.S.2d 321 (1st Dep't 2014), *lv. granted* __ A.D.3d __ (3/3/2015), plaintiff appealed from an order denying a motion to set aside the verdict. The court noted that while "an appeal from a judgment, …brings up for review any ruling to which the appellant objected and any non-final order adverse to the appellant (CPLR 5501[a][1], [3]), '[a]n appeal from an order usually results in the review of only the narrow point involved on the motion that resulted in the order'." Although plaintiff objected to the trial court's order precluding plaintiff's economist from including certain testimony in his calculations, that ruling was not brought up for review on the appeal from the order denying the motion to set aside the verdict.

Failure to Appeal from Final Judgment Forecloses Review of Prior Nonfinal Order from which Appeal was Taken

The entry of final judgment precludes the continuance of an appeal from a nonfinal order. *See* Siegel § 530. This can result in calamitous consequences. In *Smith v. Town of Colonie*, 100 A.D.3d 1132, 952 N.Y.S.2d 923 (3d Dep't 2012), plaintiff did not file a notice of appeal from the final judgment, but appealed only from a nonfinal order partially granting defendant's motion for summary judgment and limiting plaintiff's failure to warn claim. The court dismissed the appeal, noting that plaintiff's right to appeal from the nonfinal order terminated upon the entry of the final judgment after trial. While the interlocutory order necessarily affected the final judgment, and would have been reviewable on appeal from the final judgment "inasmuch as it removed legal issues from the case," the failure to appeal from the final judgment prevented the court from reviewing it.

LVIII. CPLR 5515. Taking an appeal; notice of appeal.

New 2015 Legislation Expanding Judiciary's Powers to Adopt E-filing Affects Filing and Service of Notice of Appeal

We address this new legislation in Siegel New York Practice §§ 11, 63, 531, 533 (Connors ed., January 2016 Supplement)(available in December 2015). We note it under CPLR 304, above, and again here because if mandatory e-filing in a particular category of action has been adopted in the county where the action was commenced, the filing and service of a notice of appeal under CPLR 5515(1) is subject to the e-filing rules. CPLR 2111(c). That means that any notice of appeal in those actions must be electronically filed and served. The new legislation will also have an impact on the time to serve and file the notice of appeal under CPLR 5513(a).

LIX. CPLR 5601. Appeals to the court of appeals as of right.

Two-Justice Dissent in Defendant's Favor Does Not Provide Basis for Plaintiff to Appeal as of Right

CPLR 5601(a) allows an appeal as of right to the Court of Appeals from an order containing "a dissent by at least two justices on a question of law in favor of the party taking such appeal." In *Reis v. Volvo Cars of North*

America, 24 N.Y.3d 35, 993 N.Y.S.2d 672, 18 N.E.3d 383 (2014), the defendant appealed from an order as of right on this ground. The plaintiff, who was also aggrieved by the order because the majority dismissed his failure to warn claims, similarly sought to appeal as of right. The Court dismissed the plaintiff's appeal because the two-justice dissent in the appellate division was not in plaintiff's favor. Unfortunately, plaintiff did not move for permission to appeal from that portion of the order under CPLR 5602(a), which is always advisable in these circumstances. *See* Siegel, New York Practice § 528 (5th ed. 2011). Therefore, the Court ruled that "the part of the order unfavorable to plaintiff is now beyond our review."

Turning to the matters that could be reviewed on the appeal, *see* CPLR 5501, Siegel, New York Practice § 530, the *Reis* Court observed that "an appeal properly taken under CPLR 5601(a) brings up for review all issues that the Appellate Division decided adversely to the appellant, even those on which no Appellate Division justice dissented." This was a critical point of appellate practice in this matter because while the Court did not agree with the two-judge dissent's conclusion that the trial court improperly charged the jury on customary business practices, it did rule that the majority erred in concluding that it was proper to charge the jury on special knowledge. Therefore, the Court reversed the judgment and remitted the case for a new trial.

The *Reis* decision highlights several important aspects of appellate practice in the New York Court of Appeals and is discussed in further detail in Siegel, New York Practice §§ 527, 529 (Connors ed., July 2015 Supplement).

LX. CPLR 7803. Questions raised.

Court of Appeals Holds That Writ of Prohibition Is Appropriate To Prevent Judge from Compelling Criminal Prosecution

In *Soares v. Carter*, _N.Y.3d _, 2015 WL 2092498 (2015), the Court of Appeals affirmed the granting of a writ of prohibition enjoining the City Court Judge from enforcing his orders compelling the People to call witnesses and prosecute a criminal matter after the District Attorney had decided to discontinue the prosecution. "Under the doctrine of separation of powers, courts lack the authority to compel the prosecution of criminal actions…. Such a right is solely within the broad authority and discretion of

the district attorney's executive power to conduct all phases of criminal prosecution." Therefore, any attempt by the Judge to compel prosecution through the use of his contempt power exceeded his jurisdictional authority and warranted the granting of the writ of prohibition.

LXI. CPLR 7804. Procedure.

Court of Appeals Remits Proceeding to Supreme Court to Allow Respondent to Serve Answer in Article 78 Proceeding

CPLR 7804(f) provides that if a motion to dismiss in an Article 78 proceeding "is denied, the court *shall* permit the respondent to answer." (emphasis added). Despite the mandatory tone of this subdivision, in *Kickertz v. New York University*, 25 N.Y.3d 942, 944, 6 N.Y.S.3d 546, 547, 29 N.E.3d 893, 894 (2015), the Court of Appeals observed that a court need not permit a respondent to serve an answer after denying a motion to dismiss "if the 'facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer.'"

In *Kickertz*, the First Department reversed supreme court and denied respondent's motion to dismiss the petition. Rather than allowing respondent to now answer the petition, the court granted the petitioner judgment on the merits. The Court of Appeals concluded that there were several triable issues of fact with regard to whether the respondent, a private educational institution, substantially complied with its established disciplinary procedures before expelling the petitioner. Therefore, the Court vacated that portion of the order granting the petition and remitted the proceeding to supreme court to permit the respondent to serve an answer to the petition.

LXII. CPLR 8001. Attendance Fees for a Subpoena.

Payment Voluntarily Made to a Fact Witness, Far in Excess of That Required Under CPLR 8001, May Warrant a Specific Jury Instruction Regarding Potential Bias

In *Caldwell v. Cablevision Systems Corp.*, 20 N.Y.3d 365, 960 N.Y.S.2d 711, 984 N.E.2d 909 (2013), an orthopedic surgeon was subpoenaed to testify as a fact witness at trial. He testified in regard to the notes he

recorded when he evaluated plaintiff in an emergency room, which indicated that plaintiff informed him that she tripped over a dog rather than defendant's trench. The surgeon's testimony consisted merely of his verification that he made the entry into the emergency room record, and he provided no professional opinion.

During cross-examination, the doctor admitted that he was compensated by defendant for his lost time in the sum of $10,000. The Court of Appeals noted that, like the Second Department, it was "troubled by what appears to be a substantial payment to a fact witness in exchange for minimal testimony." Nonetheless, it affirmed the order of the appellate division, which held that the substantial payment made by the defendant to the doctor did not require exclusion of the witness's testimony. The large payment did, however, mandate that the jury be charged regarding the suspect credibility of factual testimony from a witness who is paid so handsomely.

Judicial decisions and Rule 3.4(b)(1) of the New York Rules of Professional Conduct mandate that any compensation made to a fact witness be "reasonable" in relation to "the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel." Furthermore, a lawyer cannot "pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter." Rule 3.4(b). The Court held that this latter prohibition was not at issue in *Caldwell* because "[t]he doctor's testimony was limited to what he had written on his consultation note less than 12 hours after the accident and well before plaintiff commenced litigation."

Nonetheless, the Court agreed with the trial court's conclusion that "the fee payment was fertile ground for cross-examination and comment during summation." In addition, the Court held that because defendant did not even attempt to justify such a large payment for one hour of testimony, the jury should have been also charged to assess whether the compensation was disproportionately more than what was reasonable for the loss of the doctor's time from work and, if so, whether it had the effect of influencing the witness's testimony. *See* PJI 1:90.4 ("Compensation of Fact Witnesses"). The failure to give a more specific jury charge in this case constituted harmless error because there was no arguable claim that the doctor fabricated the contents of his records.

The *Caldwell* decision is discussed in further detail in Siegel, New York Practice, § 382 ("Subpoenas; Issuance") (July 2013 Supp.).

* * *

Court Applies Principles in *Caldwell* to Memorandum of Understanding Between Plaintiff and One of Several Defendants Resolving Claims in the Action Between Those Parties

In *Tricham Housing Associates, L.P., v. Panitz*, 2013 WL 3775617 (Sup. Ct., New York County 2013), defendants moved to dismiss plaintiff's complaint and for Part 130 sanctions against plaintiff and its attorneys alleging that plaintiff's attorneys violated Rule 3.4 (b) of the New York Rules of Professional Conduct, which prohibits a lawyer to "pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter." The basis for the motion was a "Memorandum of Understanding" (MOU) between the plaintiff and a settling defendant ("S"), which resolved the claims asserted in the action as between those parties. The MOU provided, among other things, that in the event that the nonsettling defendants recovered no sums on their counterclaims against plaintiff, plaintiff would reimburse S for legal costs, fees, and expenses incurred in connection with the action, "not to exceed $10,000.00."

S nonetheless remained a party to the action with cross-claims against the other defendants. As part of the MOU, S assigned to plaintiff his cross-claims against these defendants.

The nonsettling defendants argued that the MOU, which was signed S, plaintiff and plaintiff's counsel, violated Rule 3.4 (b) because it allegedly compensated S, "a likely witness in this action who was deposed a week after the execution of the MOU, based upon the outcome of the litigation of the movants' counterclaims against plaintiff."

The court noted that:

> the terms of the MOU as well as the deposition testimony of [S] demonstrate that in settlement of the claims between them plaintiff and [S] agreed to a payment to [S] contingent upon the outcome of the counterclaims. Were [S] merely an uninterested witness the MOU would violate public policy as the payment of his legal fees is contingent upon the outcome of the litigation between plaintiffs and movant.

In this instance, however, where S was a party to the action, the court concluded that the MOU did not violate either Rule 3.4 (b) or public policy. The *Tricham Housing* court concluded that the Court of Appeals' decision in *Caldwell*:

> recognized the inapplicability of the rule to a party who testifies as parties by definition have an interest in the litigation and stand to benefit from a successful conclusion in their favor. When a party to the litigation testifies the factfinder presumptively understands and views the testimony through the prism of the party's apparent self-interest. If the law were to bar party testimony because a party stands to benefit only from a successful outcome to the litigation in its favor then parties would never be permitted to testify in support of their own case.

The court also discussed the Court of Appeals' decision in *In re Eighth Judicial District Asbestos Litigation*, 8 N.Y.3d 717, 840 N.Y.S.2d 546, 872 N.E.2d 232 (2007), which held that "whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action which requires the agreeing defendant to remain a party to the litigation, the parties must disclose the existence of that agreement and its terms to the court and the nonagreeing defendant(s)."

The *Eighth Judicial District* Court also recognized that "it is not uncommon for a plaintiff to have a financial incentive to maximize the liability of one particular defendant in a multi-defendant action." The *Tricham Housing* court noted that "that fact alone did not overcome the strong public policy favoring settlement." Based on its reading of *Eighth Judicial District*, the *Tricham Housing* concluded that:

> The MOU constitutes a settlement agreement and therefore is favored. As the signatories to that agreement are parties to this action there is no ethical bar to the contingency clause at issue here. Nor have the movants demonstrated how [S]'s testimony would be influenced in a manner contrary to his current adversarial position by the terms of the agreement.

Furthermore, the agreement "was properly disclosed and whether and what effect its possible introduction at trial may have is not decided herein as that issue is not yet ripe for determination."

Based on the above, the court denied the motion in its entirety. The First Department subsequently vacated the MOU between plaintiff and S, finding it "void and unenforceable as against public policy." *Tricham Housing Associates, L.P. v. Klein*, 113 A.D.3d 432, 978 N.Y.S.2d 162 (1st Dep't 2014). The court unanimously concluded that if the MOU were to stand, "with the payment of [S]'s legal fees conditioned on the failure of his former co-defendants' claims, [it would] create[] an incentive for [S] to falsify his testimony, an incentive that has long been disfavored."

NYSBA Ethics Committee Opines That Lawyer May Ethically Purchase Evidence from a Third Party

In New York State Bar Association ("NYSBA") Opinion 997 (2014), the evidence at issue was a surveillance tape recorded by a storeowner, which apparently showed that the defendant's actions caused the accident at issue. Under the CPLR, the plaintiff's lawyer could, of course, serve a subpoena requesting production of the tape. *See* CPLR 3101(i), CPLR 3120(1)(i). Yet, as was apparently the case in *Caldwell*, there are times when a lawyer would rather secure the willing cooperation of the nonparty in lieu of seeking to compel the attendance of a witness or the production of materials with the force of a subpoena.

The NYSBA Ethics Committee observed that New York's Rules of Professional Conduct are silent as to whether a lawyer may make a payment for evidence on behalf of a client. However, the Committee opined that "[s]uch payment may, depending on the circumstances, be an appropriate means of advancing a client's interests" pursuant to Rule 1.1(c)(1). ("A lawyer shall not intentionally . . . fail to seek the objectives of the client through reasonably available means permitted by law and these Rules"). The opinion notes several potential ethical limitations on the practice, but concludes that when these are not present, "a lawyer may purchase surveillance video . . . for use as evidence in contemplated or pending litigation."