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CIVIL PRACTICE UPDATE

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2019-2020 CIVIL PRACTICE UPDATE

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SPEAKER BIOGRAPHY

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Part One

PERSONAL JURISDICTION

I. CPLR 301

A. Presence

1. Corporations

Daimler AG v. Bauman
571 U.S. 117 (2014)

Court declared in essence that NY's well established "doing business" standard under which an unauthorized foreign corporation is subject to G/J (jurisdiction over claims arising outside the forum) in NY is unconstitutional. Court held that such "exorbitant" and "unacceptably grasping" jurisdiction violates due process. Instead, G/J is constitutionally permissible only when a corporation is "at home." There are three such instances: (1) corporation is incorporated in the state; (2) corporation has its principal place of business in the state; and (3) "in an exceptional case" where the corporation's activities in the state are "so substantial and of such a nature as to render the corporation at home in that state." The "at home" rule for corporations was created by analogy to domicile jurisdiction over individuals.

BNSF R. Co. v. Tyrrell
137 S. Ct. 1549 (2017)

At issue was whether D railroad company could be subject to P/J in Montana with respect to a FELA claim that occurred in another state. Court (8-1) held it could not, citing *Daimler*.
COMMENT: Court reaffirmed where, as here, general jurisdiction is involved, D corporation must be "at home" in forum state. "Paradigm" of "at home" is the corporation's state of incorporation and principal place of business. As to the third basis, the "exceptional" case, Court found D's railroad's activities in Montana did not bring it within this basis. In so concluding, Court noted that a corporation doing business in many states cannot be "at home" in all of them, and the analysis must consider its forum state's contacts in light of its overall activities in other states; and Court pointed to *Perkins v. Benguet* (342 U.S. 437 [1952]) as an example, and perhaps the only example, of an exceptional case.

Robins v. Procure Treatment Centers
179 A.D.3d 412 (1st Dep't 2020)

P claimed general jurisdiction over PPM based upon certain documents in which PPM listed a NY place of business. However, PPM submitted an affidavit of its Present who identified PPM's principal place of business as NJ and denied having a NY principal office. Court noted that while the affidavit was cursory, P's evidence did not establish that PPM's principal place of business or "nerve center" was in NY, and Court held no P/J under CPLR 301. **COMMENT:**

Court applies "nerve center" test set forth in *Hertz v. Friend* (571 U.S. 117) for determining principal place of business, which was adopted for determining a corporation's citizenship for purposes of diversity jurisdiction, and cited in *Daimler*.

2. Persons

Burnham v. Superior Court
495 U.S. 604 (1990)

Service of process of person upon person while in NY, even if transient, is sufficient to confer G/J. **COMMENT:** Justice Sotomayor in her concurrence in *Daimler* noted the "incongruous" result created by *Daimler* when compared to *Burnham*. No Appellate Court has ruled *Daimler* overruled *Burnham*.

B. Consent

1. Corporation-Registration

BCL §304(a)

Under this statute, a foreign corporation that is registered to do business in NY consents to G/J. *See*, *Augsburgy Corp. v. PetroKey Corp*., 97 A.D.2d 173 (3d Dep't 1983). The Court reached this conclusion notwithstanding the fact that the statute expressly provides that registration effects a consent to jurisdiction. **COMMENT:** Does *Daimler* preclude mere registration as basis for G/J? *See*, Knapp, *Daimler* Doomsday Is Doubtful, NYLJ, May 28, 2015; and Alexander, Practice Commentaries to CPLR 301, C301:8 (2016). *Compare*, Saperstein, "New York State Legislature Seeks to Overturn Daimler," NYLJ, 5/20/15, p. 3, col. 3.

Aybar v. Aybar
169 A.D.3d 137 (2d Dep't 2019), *lv. granted,* 34 N.Y.3d 905 (2020)

In this products liability action arising out of an accident that occurred in VA commenced by NY Ps including Anna Aybar, against For Motor and Goodyear Tire, Court held that their registration to do business in NY and the designation of the Secretary of State to accept service of process in NY did not, and could not constitutionally, amount to a permissible consent to P/J in NY. It stated: "We hold that in view of the evolution of *in personam* jurisdiction jurisprudence, and, particularly the way in which *Daimler* has altered that jurisprudential landscape, it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of NY courts, to be sued upon causes of action that have no relation to NY." **COMMENT:** (1) The First Department in *Fekah v. Boler-Hughes Inc.* (176 A.D.3d 527, 110 N.Y.S.3d 1 (2019) and the Fourth Department in *Best v. Guthrie Medical Group* (175 A.D.3d 1048, 107 N.Y.S.3d 258 (2019), citing *Aybar*, have likewise held consent jurisdiction cannot be constitutionally based upon corporate registration. (2) In a footnote, the Second Department seemingly suggest that despite its citation to *Daimler* and due process, its decision might be merely based on statutory construction. The footnote stated: "The parties observe that post *Daimler*, some NY lawmakers have proposed amending BCL §1301 to expressly provide that a corporation's application to do business in New York

constitutes consent to P/J in lawsuits in NY for all actions against the corporation (see 2015 NY Senate-Assembly Bill S4846, A6714). No such changes in the law have been effected to date, and we decline the appellants' invitation to opine on the constitutionality of any such possible amendment." (3) While this appeal involved an appeal of the denial of both Ford's and Goodyear's separate motions to dismiss which were decided in separate orders, one for Ford and the other for Goodyear, the Second Department also reversed the denial of Goodyear's motion in *Aybar v. Goodyear* (175 A.D.3d 1373, 106 N.Y.S.3d 361 [2d Dep't 2019]), an action brought by Jose Aybar.

Chen v. Dunkin' Brands, Inc.
954 F.3d 492 (2d Cir. 2020)

In this false advertising action, alleging violations of federal and state law against D, a Delaware corporation with its PPB in MA, Court affirmed dismissal of the action for lack of P/J in NY over D. It held: (1) no general jurisdiction over D under CPLR 301 merely because of its authorization to do business in NY as *Daimler* precludes P/J on that basis alone, a conclusion reached under *Erie* by reason of the First, Second and Fourth Department decisions; and (2) no general jurisdiction under CPLR 301 based on D's activities in NY as when looking at those activities in light of its activities in other states they do not bring it within *Daimler's* "at home" "exceptional" basis.

2. Individual

ABKCO Music, Inc. v. McMahon
175 A.D.3d 1201 (1st Dep't 2019)

Court dismissed the action, holding there was no basis to find P/J in NY over D. Court noted that the fact the contract chose NY law to apply to disputes arising under the contract "did not constitute a voluntary submission to P/J in NY." **COMMENT:** In dismissing the action, Court noted that P could have added a NY forum selection clause when it prepared the agreement.

Highland Crusader Offshore Partners v. Targeted Delivery
__ A.D.3d __ (1st Dep't 5/21/20)

In this commercial action the issue was whether jurisdiction may be exercised over Ds by virtue of their close relationship with signatories to the contracts that contain forum selection clauses, notwithstanding that Ds lacked minimum contacts with the forum. Court found that Ps have sufficiently pleaded allegations of a close relationship between the signatory and non-signatory parties so as to warrant jurisdictional discovery. Court noted that under the "closely related" analysis there must be a showing that the relation of the parties is such as to make application of the forum selection clause foreseeable, rendering a separate minimum-contacts analysis unnecessary. The Court then in an opinion by Justice Manzanet-Daniels engaged in a thorough and thoughtful analysis of the pertinent case law and the pertinent facts, finding that jurisdictional discovery was warranted.

II. CPLR §302(a)

A. Due Process and Specific Jurisdiction

Walden v. Fiore
571 U.S. 277 (2014)

When specific jurisdiction is involved, *e.g*., long-arm basis where cause of action arises out of enumerated contacts, Court held that the due process "minimum contacts" analysis requires the contacts to be based on a D's individual contacts with a forum state, and not based solely on the relationship the D may have with the Ps or third-parties who reside in the state. In essence, the inquiry is whether D's activities connect D with the forum state in a meaningful way. That the tortious act had effects in the forum state cannot alone satisfy due process. **COMMENT:** *Walden* raises concerns about the application CPLR 302(a)(3)(a)(ii) where the only connection D may have with NY is ability to foresee consequences of the act in NY.

Bristol-Myers Squibb Co. v. Superior Court
137 S. Ct. 1773 (2017)

In this products liability action, Court held P/J in California over a corporation incorporated in Delaware with its principal place of business could not be exercised in action brought by non-California resident who did not allege that they purchased the corporation's drug through California physicians or from any California source, and did not claim that they were injured in California or were treated for their injuries there. **COMMENT:** As there was no basis for general jurisdiction in California, Court looked to specific jurisdiction. It noted that in order for a state court to exercise specific jurisdiction, the action must "arise out of or relate to the D's contacts with the forum. In other words, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum state and is therefore subject to the state's regulations." For this reason, "specific jurisdiction is confined to adjudication or issues deriving from or connected with, the very controversy that establishes jurisdiction." Here, there was no link between any California contacts and Ps' cause of action. Standard is still not clear for specific jurisdiction. *See also*, Khawaja, "Supreme Court's 'BMS' Decision Presents New Hurdles to Forum Shoppers," NYLJ, Dec. 15, 2017, p. 3, col. 3.

Ford Motor Co. v. Montana Eighth Jud. Dist.
443 P.3d 407 (Mt. 2019), *cert. granted*, __ U.S. __ (1/17/20)

Bandemer v. Ford Motor Co.
913 N.W.2d 744 (Minn. 2019), *cert. granted*, __ U.S. __ (1/17/20)

Court granted cert in these two cases to determine when under the due process standard for specific jurisdiction the "arise out of or relate to" element is met, and specifically whether it can be met when none of D's forum contacts caused the claim. **COMMENT:** See *Aybar* at p. 7.

D&R Global Selections v. Pineiro
29 N.Y.3d 292 (2017)

In this commercial action involving two unauthorized foreign corporations, Court held D was subject to P/J as P's claim arose from D's transaction of business in NY. Court's discussion emphasized that D's activities showed D "purposefully availed itself of privilege" of conducting activities in NY by its described activities and P's claim arose from that transaction. Court also held the exercise of P/J did not offend due process. It noted that under the first due process element, D has established minimum contacts with NY by visiting the state on multiple occasions to promote its wine with the purpose of finding a United States distributor and thereafter selling wine to a New York distributor. Thus, D availed itself of the privilege of doing business in NY by taking a purposeful action, motivated by the entirely understandable wish to sell its products here. Having done so, D could reasonably foresee having to defend a lawsuit in NY. As to the second element, Court held D had not presented any compelling reason why the exercise of jurisdiction is unreasonable. Rather, D availed itself of the privilege of conducting business in NY by promoting its wine here, soliciting a distributor here, and selling wine to that NY based distributor. Therefore, the exercise of long-arm jurisdiction over D comports with federal due process.

Williams v. Beemiller, Inc.
33 N.Y.3d 523 (2019)

Ps commenced this action against D OH firearm merchant, among others, alleging that Ds negligently sold and distributed the gun used in the shooting. D sold the gun in OH to an OH resident, who then resold it on the black market and which was then used by a gang member to shoot P in Buffalo. The Court of Appeals affirmed the order of the Fourth Department dismissing the action against the OH merchant "under well-established due process precedent because he lacked minimum contacts with this state," without addressing whether P.J was proper under CPLR 302(a). The four-judge majority opinion addressed the issue of the requisite "minimum contacts," and concluded that there was no evidence that D "took purposeful action" to serve the NY market and avail himself of the privilege of conducting activities in NY. It noted D "did not maintain a website, had no retail store or business telephone listing, and did no advertising of any kind, except by posting a sign at his booth when participating in a gun show" in OH. The fact that one of D's customers indicated that there was a chance that he might transport his purchased firearms to NY was deemed insufficient to establish constitutionally sufficient ties with NY. In so ruling, the Court distinguished *LaMarca v. Pak-Mor Mfg. Co*. (95 N.Y.2d 210 [2000]) because there the D advertised nationally and initiated a business relationship with a NY based distributor in order to sell products in NY. **COMMENT:** For further discussion see Siegel & Connors, NY Practice (6th ed) §86.

B. Bases

1. CPLR 302(a)(1)

Aston v. Algoma Hardwoods
173 A.D.3d 408 (1st Dep't 2019)

Court affirmed dismissal of action for lack of P/J. P, a NJ resident alleged that she was injured in NJ by product allegedly sold at D's establishment in NJ. She has identified no activity of D in NY, either before or after its headquarters moved to NJ, that has a sufficient nexus to the injury to confer P/J.

Hansen Realty Dev. v. Sapphire Realty Group
173 A.D.3d 487 (1st Dep't 2019)

In this unjust enrichment action, D commenced a third-party action against Jia based on allegations that Jia had directed D to pay certain expenses that had no legitimate business purpose and had attended business meetings with it. Court held P/J could be exercised as Jia's attendance at and participation in multiple business meetings in NY, one of which was held during the alleged unauthorized vacation, concerning an underlying real estate development project, is sufficient to establish that he was transacting business in NY. Moreover, there was a sufficient connection between Jia's business transactions in NY and the causes of action alleged in the complaint to confer jurisdiction over him pursuant to CPLR 302 (a) (1).

Robins v. Procure Treatment Centers
179 A.D.3d 412 (1st Dep't 2020)

Court held P failed to establish that D physicians who treated her in NJ were subject to long-arm jurisdiction under CPL 302(a)(1). It noted P submitted evidence that Ds participated in radio interviews intended to solicit NY residents, but those interviews occurred after the alleged malpractice and therefore do not relate to P's claims. Nor did the billing records establish that Procure physicians actually managed P's care with Dr. Shrivastava, P's treating physician who referred her to Procure, and any co-management of care was insufficient to serve as a basis for jurisdiction because it did not occur in NY, but only in NJ. Whether Ds were employees or members of Procure, the evidence does not demonstrate that they engaged in activities in NY sufficient to exert P/J over them as individuals.

Silver v. Alon Zakaim Fine Art Ltd.
180 AD.3d 467 (1st Dep't 2020)

In this action, P sought a declaration that he is the owner of a painting that he purchased in 2015, that he was deceived into sending the painting to a now defunct art gallery in NY to be sold on his behalf, and that the painting was transferred to Ds, three art galleries based in London, England, who have refused to return the painting to him. Court held there is P/J of Ds based on the allegations that Ds transacted business in NY by purporting to purchase a majority interest in a painting from a NY art gallery, which retained a minority interest in the painting, and marketing the painting for sale in NY under a consignment agreement with Christie's NY, using

a NY address.

Trimarco v. Edwards
183 A.D.3d 402 (1st Dep't 2020)

Court affirmed dismissal of action for lack of P/J under CPLR 302(a)(1). It noted the alleged NY contacts were not substantially related to the loan agreement and dispute over payment at issue here to support the exercise of P/J.

Piccoli v. Cerra, Inc.
174 A.D.3d 754 (2d Dep't 2019)

In this breach of contract action, D, a NJ company purchased certain equipment from P, a NY Corp. It was disputed where the contract was executed. Court held Ps made a *prima facie* showing that the Ds transacted business in NY and that the Ps' cause of action for breach of contract arises from that transaction so as to establish that jurisdiction is proper under CPLR 302(a)(1). Accepting the Ps' allegations as true and construing the allegations in the light most favorable to the Ps, they demonstrated that the Ds conducted sufficient purposeful activities in NY, including contract negotiations, several trips to inspect the equipment and make repairs, and made payments for the equipment, all of which bore a substantial relationship to the subject matter of this action, so as to avail themselves of the benefits and protections of NY laws.

Skutnik v. Messina
178 A.D.3d 744 (2d Dep't 2019)

D alleged in this breach of contract action that D failed to repay a loan made in 2002. P had funded the loan through multiple wire transfers into D's bank account in NY. D moved to dismiss for lack of P/J, contending he had resided in FL since 2001. Court denied the motion, finding P made a *prima facie* showing of P/J. It noted the emails submitted regarding the subject loan included an email from the D dated May 8, 2002, wherein the D requested that P send him multiple loan disbursements by wire transfers into a bank account in Smithtown, NY, for which the D provided an account number and a routing number. P's submissions demonstrated that the D maintained a bank account in NY for the purpose of availing himself of the privilege of conducting business activities in NY, and that he purposefully used that account to conduct the very transactions that are the subject of this action.

Zeidan v. Scott's Dev. Corp.
173 A.D.3d 1639 (4th Dep't 2019)

P was injured while sliding down a water park in PA. Court held P failed to make a *prima facie* showing of P/J pursuant to CPLR 302(a)(1), inasmuch as they failed to demonstrate "an 'articulable nexus' or 'substantial relationship'" between at least one element of their negligence cause of action and Ds' alleged contacts with NY.

Schneider v. Licciardi
65 Misc.3d 254 (Sup. Ct. Greene Co. 2019) (Fisher, J.)

In this unjust enrichment action pertaining to a payment D physician received from the provider of his malpractice insurance in exchange for his ownership interest in the insurer when it demutualized, D, a NY licensed physician who had sold his NY based medical practice to P, resided in FL and then worked remotely from that state as an independent contractor conducting regular contact in support of care for multiple NY patients. Court denied the motion. It noted he purposefully and regularly reached into the NY marketplace and acted with a NY license under the protection of NY insurance. P's claim for unjust enrichment arose in equity based on its payment of D's malpractice insurance premiums due to his contacts. Therefore, a sufficient nexus existed because the claim arose from D's relationship with P and NY patients. Moreover, exercising P/J did not violate federal due process rights since D had minimum contacts with NY and should have reasonably suspected that he could be required to defend his actions in NY, and maintenance of the suit did not offend traditional notions of fair play and substantial justice.

Aybar v. US Tires & Wheels of Queens
65 Misc.3d 932 (Sup Ct. Queens Co. 2019) (Butler, J.)

P sued D, a Queens-based company, that sold and installed new tires, manufactured by Goodyear Tire, for a vehicle purchased by P in NY, and manufactured by Ford Motor; and D commenced third-party actions against Goodyear and Ford. Goodyear and Ford moved to dismiss for lack of P/J. Court denied motion finding their contacts with NY were sufficient to confer long-arm jurisdiction under CPLR 302(a)(1). Both companies had considerable financial and business contacts and deals in NY and had those contacts for a lengthy period of time. Those contacts satisfied the first prong of the long-arm statute, in that both companies transacted business within NY. With regard to the second prong, although the products at issue herein were manufactured out of state by third-party Ds, the nature of their businesses within NY State include, but are not limited to, marketing, promoting, advertising, sales, and servicing (either through corporate owned entities or independent contractors or dealers under contract) of their products. These business activities are directly targeted at the NY market, consisting of millions of resident drivers. Lastly, Court noted no due process concerns were present. **COMMENT:** (1) A liberal construction of "arising from." For further discussion of this issue, *see* Hutter, "What Happens in Vegas, Stays in Vegas.", 82 Alb. L. Rev. 1139 (2019). (2) Court cited in support the Ford Motor cases which the Supreme Court has now granted cert to hear.

Knox v. Oguno
2019 N.Y. Slip Op. 32754(U) (Sup. Ct. Chemung Co.) (Faughan, J.)

In this medical malpractice action, P's primary care physician in Chemung County determined that P needed to be examined by a neurologist. She referred P to D, who practiced across the border in PA. Court rejected P/J over D, concluding that in the absence of any agreements with NY facilities for referrals, D did not transact business in NY. The fact that he wrote a prescription which he knew or should have known would be filled by a NY pharmacy was not a significant contract with NY.

2. CPLR 302(a)(3)

Greenbacker Residential Solar v. OneRoof Energy
174 A.D.3d 437 (1st Dep't 2019)

In this commercial tort action, Court held D failed to make a sufficient showing of P/J to entitle it jurisdictional discovery. In support, it noted that because the conduct complained of involved the diversion of funds from outside NY to recipients outside NY, the "critical events," and thus the situs of injury, were not in NY. P did not allege that D received substantial revenue from interstate or international commerce; and D could not be said to have "reasonably expected" his actions to have consequences in NY.

U.S. Immigration Fund v. Litowitz
182 A.D.3d 505 (1st Dep't 2020)

In this action, insofar as Ps alleged commercial torts, Court held long-arm jurisdiction over Ds pursuant to CPLR 302(a)(3) was not available. It noted that provision, in the context of commercial torts, where the damages are purely economic, "the situs of the injury is the location where the event giving rise to the injury occurred, and not where the resultant damages occurred." The motion court correctly found that the critical events associated with the return of the investments occurred in Florida, where the Ps' corporate offices are located, and not in NY, where the construction projects took place and where one of the Ps was domiciled.

Grandelli v. Hope St. Holdings, LLC
176 A.D.3d 922 (2d Dep't 2019)

P's decedent died as a result of an elevator malfunction when he was attempting to exit the elevator. D1 is a French company which manufactured the brakes that were incorporated as component parts into the subject elevator's A.C. drive, a device that controls the speed of the electrical motor in the elevator. It moved to dismiss the action and all cross-claims against it for lack of P/J. Court granted motion. The basis for the dismissal was that D1 had established that it did not expect or reasonably should have expected its product of brakes to have consequences in NY. In this connection, Court noted that D1 established that it does not sell the elevator brakes it manufactures in France to any customers in NY or contract with any other company to distribute its elevator brakes to customers in NY. Instead, it sells its elevator brakes as component parts to other manufacturers which incorporate them into A.C. drives, which are then sold to other manufacturers that incorporate the A.C. drives containing the elevator brakes into elevator systems. D1 also established that it has no knowledge of the end users of the elevator brakes, and that it does not sell replacement elevator brakes or component parts to the end-user customers who purchased the elevators into which they were incorporated. Lastly, D1 established that its products were neither sold nor advertised online.

Sacco v. Reel-O-Matic, Inc.
183 A.D.3d 567 (2d Dep't 2020)

In this products liability action, the fourth and fifth elements were in issue. Court noted this element is met when "the non-resident tortfeasor expects, or has reason to expect, that his or her

tortious activity in another State will have direct consequences in NY." This element was met here by evidence from D's website that supports the conclusion that it was foreseeable that persons in NY would be purchasing its products through its distribution network and using D's products nationwide, including in NY. As to the fifth element which requires a comparison between a D's gross sales revenue from interstate or international business with total gross sales revenue, in this case, the evidence of revenue offered by D was limited to a conclusory assertion that D "does not derive substantial revenue from the sales of any products within NY" and "merely derived only approximately 1.5% [of its total revenue] from international exports." Court then held D as movant failed to establish that its gross sales revenue from interstate or international business was not sufficient to support long-arm jurisdiction. As to due process constraints, Court observed that D's website presented D as a manufacturer of premium products that could be bought from national retailers, both online and through at least one store located in NY, which evidence was sufficient to satisfy due process requirements.

Nowelle B. v. Hamilton Med.
175 A.D.3d 1008 (4th Dep't 2019)

P commenced this action against several Ds, including Hamilton Medical, A.G. (HMAG) and Hamilton Medical, Inc. (HMI), seeking damages for injuries sustained by her infant son after he suffered a severe brain injury from bilateral pneumothoraxes. P alleged that the child was on a ventilator, which was defectively designed or improperly manufactured by HMAG, and that the defective ventilator caused the child to suffer the bilateral pneumothoraxes. There is no dispute that HMAG is a Swiss corporation organized and existing under the laws of Switzerland with its principal place of business in Switzerland. HMAG designed and manufactured ventilators, which were sold in the USA by HMI, a wholly-owned subsidiary of HMAG that is organized and based in NV. Court affirmed denial of HMAG's motion to dismiss. Initially, it found that P/J was established under CPLR 302(a)(3)(ii). It then found upon a thorough review of HMAG's contacts with NY that it had the requisite minimum contacts with NY and that as HMAG targeted NY consumers through a USA distributor that it owned and with which it shared executive leadership that rendered it likely that its products would be sold in NY it was not unreasonable to subject it to suit in NY if its allegedly defective merchandise has been the source of injury to a NY resident. Lastly, the Court concluded that "when a company of HMAG's size and scope profits from sales to New Yorkers, it is not at all unfair to render it judicially answerable for its actions in NY."

3. CPLR 302(a)(4)

Zeidan v. Scott's Dev. Co.
173 A.D.3d 1639, 103 N.Y.S.3d 707 (4th Dep't 2019)

P was injured while sliding down a water slide in a water park in PA owned by D. Court noted that although P alleged that D owns property in NY, there is no indication in the record that such ownership gave rise to Ps' allegations of negligence at the water park in PA.

4. CPLR 302(b)

Crosby v. Crosby
177 A.D.3d 1143 (3d Dep't 2019)

P wife commenced this divorce action, alleging that her 27-year marriage to D husband had irretrievably broken down. D who resided in KY moved to dismiss for lack of P/J. Court granted the motion. Initially, Court noted that a NY court may exercise long-arm jurisdiction over a nondomiciliary D in a matrimonial action brought by a NY domiciliary involving a demand for financial relief provided that, as relevant here, NY was the matrimonial domicile of the parties before their separation or the claim for relief accrued under the laws of NY. "In addition to establishing one of these predicates for jurisdiction, it must also be shown that the D has certain minimum contacts with NY." Assuming, without deciding, that the wife established one of the predicates for jurisdiction under CPLR 302 (b), we find that the quality and nature of the husband's activities in NY were such that it would be unreasonable and unfair to require him to defend an action in this state. Although the parties married in NY in 1991 and resided here until 1995, they have not resided together in this state in over 23 years. From 2003 until 2015, the parties resided together in KY, where, at the time of commencement of this action, the husband was employed as a university professor and the parties owned real property. With the husband's consent, the wife moved to NY with the parties' son in August 2015 and, as vaguely asserted by the wife, the husband has visited them in NY. The parties have not rented or purchased a home in NY. Rather, the wife and the son have lived rent-free with the wife's parents, with the husband providing additional financial support. In our view, the husband's contacts with NY are insufficient to warrant the exercise of P/J over him.

III. RELATED ISSUES

A. Pleading

Gibson v. Air & Liquid Sys. Corp.
173 A.D.3d 519 (1st Dep't 2019)

Court affirmed denial of D's motion to dismiss for lack of P/J, finding the defense was forfeited by not denying general jurisdiction with specificity. It noted that where a P has not alleged facts specifically addressing the issue of P/J in its complaint, D must assert lack of P/J as an affirmative defense in order to give P notice that it is contesting it. (*See* CPLR 3018). Where P elects to allege facts specifically addressing the issue of P/J in its complaint, D's denial of those allegations may be sufficient to preserve D's jurisdictional defense. Here, the specific allegations of P's complaint paragraph three track, almost verbatim, the language of personal jurisdiction in CPLR 302, which provides the bases for specific jurisdiction. D's denial of these allegations is was thus sufficient to provide notice to P that it is contesting specific jurisdiction. The allegations of P's complaint paragraphs 83 and 84 purport to establish a basis for general jurisdiction. They were not denied by D, rather D admitted them to the extent that it "is a duly organized foreign corporation doing business in NY." This answer, interposed in 2004, before the Supreme Court's ruling in *Daimler*, would have provided a basis for general jurisdiction. It, therefore, does not qualify as a specific denial that would have put P on notice that the D is contesting general jurisdiction. D's failure to clearly provide an objection to general jurisdiction

in its answer waived the defense and conferred jurisdiction upon the court.

B. Motions

Jiang v. Ping An Ins.
179 A.D.3d 517 (1st Dep't 2020)

Court held D Huatai Group waived any objection to jurisdiction by appearing by notice of pro hac vice admission in this dispute, failing twice to file timely pre-answer motions to dismiss, and defending on the merits. Court noted pro hac vice admission is akin to an appearance. Even if granting pro hac vice admission is a ministerial act, Huatai Group waived any objection to jurisdiction by failing to timely challenge it in an answer or a pre-answer motion to dismiss in accordance with the CPLR, as well as by defending on the merits.

Skutnik v. Messina
178 A.D.3d 744, 113 N.Y.S.3d 195 (2d Dep't 2019)

With respect to motions to dismiss for lack of P/J, Court opined as follows: "Although a P is not required to plead and prove P/J in the complaint, where jurisdiction is contested, the ultimate burden of proof rests upon the P. In opposing a motion to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of jurisdiction, a P need only make a *prima facie* showing that such jurisdiction exists."

C. Waiver of Defense of Lack of Personal Jurisdiction

USI Systems AG v. Gliklad
176 A.D.3d 555 (1st Dep't 2020)

P commenced this action to enforce a Swiss judgment in NY. Court rejected D's argument that he was not subject to P/J in NY as he asserted counterclaims that were unrelated to P's claim and his own affirmative defenses which affected a waiver of his argument.

JP Morgan Chase Bank v. Jacobowitz
176 A.D.3d 1191 (2d Dep't 2019)

In this mortgage foreclosure action, Ds' counsel filed a notice of appearance dated February 25, 2015, and they did not move to d dismiss the complaint on ground of lack of P/J at that time or assert lack of P/J in a responsive pleading. Where Ds did not move to dismiss for lack of P/J until ten months later, Court held Ds waived their claim of lack of P.J. Court noted that it is immaterial that the notice of appearance, in addition to requesting that all papers in the action be served on Ds' counsel, stated that Ds do not waive any jurisdictional defenses by reason of the within appearance.

HSBC Bank v. Assouline
177 A.D.3d 603 (2d Dep't 2019)

In this mortgage foreclosure action commenced on April 2, 2009, Court held D did not make an

informal appearance in this action so as to waive her objection to P/J. It noted correspondence from the D to P's then attorney, dated June 9, 2009, which did not reference this action but merely discussed the D's desire for a loan modification, did not constitute an informal appearance. Similarly, correspondence on behalf of D from a law office to the P's servicer, dated March 31, 2014, which did not reference this action and requested an opportunity to discuss settlement "prior to litigation," did not constitute an informal appearance. The fact that the letter requested to discuss settlement "prior to litigation" would imply that D's attorney was not aware of this action.

Crosby v. Crosby
177 A.D.3d 1143 (3d Dep't 2019)

In this action for a divorce, D filed an answer with one affirmative defense. (Schuyler County was an inconvenient forum). Two months later he moved to dismiss for lack of P/J in NY and without seeking leave to amend the answer included in the motion an amended answer in which he asserted lack of P/J. P rejected the amended answer as untimely, and D moved for leave to file an amended answer. Supreme Court denied D's motion to dismiss, finding there was P/J in NY over him and denied the motion to amend as moot. Initially, Court held that Supreme Court erred in denying, as moot, the husband's motion for leave to amend his answer to include, as relevant here, the affirmative defense of lack of P/J. Inasmuch as that defense was not raised in the husband's original answer, it could not be properly raised in the motion to dismiss unless and until the husband was granted leave to amend his answer. (*See* CPLR 3211[e]). Instead of remanding to Supreme Court to decide that motion, Court then granted leave noting the absence of any prejudice to P.

State of New York v. Konikov
182 A.D.3d 750 (3d Dep't 2020)

In this action to recover a fine owed to a state agency, Court noted D did not waive his challenge to P/J by filing an answer and appearing in the action, as he raised this claim in both his answer and his motion to dismiss.

Masigla v. Windhaven Ins. Co.
2019 N.Y. Slip Op. 51169(U) (App. T. 2d Dep't 2019)

Court held D waived its defense that it lacked sufficient contact with NY to warrant the exercise of P/J. Court noted that to raise an issue of P/J an objection to P/J must be raised in the answer or in a pre-answer motion to dismiss the complaint, whichever comes first. Absent the pursuit of either course, D's voluntary participation in litigation in which the point can be raised in and of itself, constitutes a submission to the jurisdiction of the courts. Here, D first appeared by interposing its answer, in which it raised the affirmative defense that the summons was not properly served, but was silent on the issue of P/J due to lack of a jurisdictional basis for the service. Thus, it waived all P/J defenses other than the actual service of process.

D. Jurisdictional Discovery

Qudsi v. Larios
173 A.D.3d 920 (2d Dep't 2019)

In this MV accident case arising out of a collision on the NJ Turnpike in which Ps were all residents of NY, D lessee of truck and its driver, NJ residents moved to dismiss of lack of P/J, and P cross-moved for jurisdictional discovery. As to the driver, Court held jurisdictional discovery was not warranted as he established by his proof that he conducted no business in NY in connection with the subject load, and P failed to put forth any basis to warrant discovery as to him. However, as to the trucking company, which was transporting a load for USPS, it admitted that it had terminals at four NY locations at which it parked its vehicles. Based upon these facts, and given the driver's failure to submit trip logs, manifests, or other documentary evidence to support its assertion that the load he was transporting was being shipped within the State of NJ and had no relationship to its NY business, further discovery was warranted.

E. Bond

Jiang v. Ping An. Ins.
179 A.D.3d 517 (1st Dep't 2020)

Upon finding P/J was present over Huatai Group, Court noted that Insurance Law §1213(c) requires an "unauthorized foreign or alien insurer" to post a bond before filing any pleading in a proceeding against it. Court held that on this record the court appropriately imposed a bond requirement upon Huatai Group and held in abeyance Ds' cross-motion as to the insurance policy's choice of law and dispute resolution clauses pending Huatai Group's compliance with Insurance Law §1213(c).

Part Two

PROPER COURT

I. SUBJECT MATTER JURISDICTION

Cayuga Nation v. Campbell
34 N.Y.3d 282 (2019)

P, members of Indian tribe brought action, purportedly on behalf of tribe, against their rivals in leadership dispute, asserting tort claims premised on rivals' alleged lack of authority to act on behalf of tribe and possession and control of tribal property. Court held 5-2 that as the action involved internal tribal governance dispute, NY courts lacked subject matter jurisdiction. In so ruling, Court noted that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States. **COMMENT:** Court observed: "The question of subject matter jurisdiction occasioned by this appeal is a "question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it."

Trepel v. Hodgins
183 A.D.3d 429 (1st Dep't 2020)

Court held NY courts lacked subject matter jurisdiction over Ds, an agency of the State of Arizona, and Hodgins, an employee of the agency, citing *Franchise Tax Bd. of California v Hyatt*, (139 S Ct 1485 [2019]). Contrary to P's apparent contention, Ariz Rev Stat Ann § 12-820.05(A), which governs tort actions against public entities or employees, is not relevant to the breach of contract claim. As to the tort claims, plaintiff failed to show that Arizona's rules of tort immunity as developed at common law and as established under its statutes and constitution are different from the rules enunciated in *Hyatt*.

Clark Tower v. Wells Fargo
178 A.D.3d 547 (1st Dep't 2019)

In this foreclosure action, P moved for a preliminary injunction enjoining D from foreclosing on P's office building in Tennessee. In commencing action in NY, P relied on parties' forum selection clause. Court denied motion, holding a NY court may not decided issues "directly affecting" title to real property in another state.

Repwest Ins. Co. v. Hanif
178 A.D.3d 973 (2d Dep't 2019)

P commenced this action for a judgment declaring it had no duty to provide coverage for any claims arising out of a collision between a vehicle insured by Hereford Insurance and a vehicle it injured; and Hereford counterclaimed for a loss transfer under the Insurance Law §5105(a). Court held that since the counterclaim is subject to mandatory arbitration, Supreme Court had no subject matter jurisdiction over the counterclaim.

II. FORUM SELECTION CLAUSE

Deutsche Bank Nat. Trust Co. v. Barclays Bank
34 N.Y.3d 327 (2019)

The Court's initial paragraph observed: "New York State is a national and international leader in commerce. As a result, large numbers of contracting parties in the U.S. include a NY choice-of-law and forum selection clause in their contracts."

***Eshaghpour v. Zepsa Indus*.**
174 A.D.3d 440 (1st Dep't 2019)

D and P entered into a contract for certain services. P signed the front page of the agreement, indicating that the "prices, specifications and conditions above and on the back of this proposal [were] satisfactory." D moved to have the complaint dismissed, relying on the "Terms and Conditions" printed on the back of the proposal page, which included a forum selection clause requiring all disputes to be litigated in North Carolina. However, the Terms and Conditions section never appeared in the proposed agreement that P ultimately reviewed and signed, and it is undisputed that P never saw the Terms and Conditions page. Indeed, the final 29-page agreement, which did not include the "Terms and Conditions," was paginated consecutively and signed on each page by both parties. Upon D's motion to dismiss, Court, applying contract law rules, held the "Terms and Conditions" section was not part of the parties' contract.

ABKCo Music, Inc. v. McMahon
175 A.D.3d 1201 (1st Dep't 2019)

In dismissing an action for lack of P/J upon its finding that the relevant contact did not constitute the transaction of business in NY, Court noted that the inclusion of a NY forum selection clause would have achieved a different result.

Alvogen Group Holdings v. Bayer Pharma AG
176 A.D.3d 551 (1st Dep't 2019)

In this action for breach of contract and rescission of asset sale, Court held the forum selection clause designating Berlin in the parties in manufacturing and supply agreement (MSA) was enforceable against P requesting NY jurisdiction, based on argument that the MSA was incorporated into the asset sale and purchase agreement (APA), which chose NY as a forum. Court noted the MSA stated exclusive place of jurisdiction as Berlin, and allowing one P to litigate breach of MSA claim in NY would have led to two contradictory forum selection clauses, and P was not a party to the APA, which was executed by other Ps and D, nor was it a third-party beneficiary of that contract's forum selection clause.

***Dietz v. Linde Gas, Inc*.**
178 A.D.3d 469 (1st Dep't 2019)

In this fraud action, Court held the NY forum selection clause in the parties' contract was

permissive, and not mandatory, and thus did not preclude litigation in NJ. **COMMENT:** The trial court stayed the NY action between the parties in light of pending action in NJ involving the same claim.

U.S. Immigration Fund v. Litowitz
182 A.D.3d 505 (1st Dep't 2020)

Ps sued Ds Litowitz and Mas, asserting as a basis for jurisdiction the "Confidentiality Agreement." The Agreement signed by Litowitz provided that he consents to P/J in NY to any "suit, action, or proceeding arising out of" it. Because the third cause of action alleges that he breached the Agreement, his motion to dismiss that cause of action for lack of P/J was denied. The Confidentiality Agreement, however, did not otherwise confer P/J over Litowitz on the remaining claims. The crux of the complaint — which alleges fraud and defamation against Ds — fails to plead a sufficient nexus with the alleged breach of the Agreement. Moreover, the Agreement cannot provide a basis for asserting jurisdiction over D Ma because she did not sign it, and was not named as a party to it.

Highland Crusader Offshore Partners v. Targeted Delivery Technologies
183 A.D.3d __ (1st Dep't 5/21/20)

At issue on this appeal is whether P/J may be exercised over Ds by virtue of their close relationship with signatories to the contracts that contain forum selection clauses, notwithstanding that Ds lack minimum contacts with the forum. The Court held in a thoughtful opinion by Justice Manzanet-Daniels that Ps have sufficiently pleaded allegations of a close relationship between the signatory and non-signatory parties so as to warrant jurisdictional discovery. The Court noted a non-signatory may also be bound by a forum selection clause where the non-signatory and a party to the agreement have such a "close relationship" that it is foreseeable that the forum selection clause will be enforced against the non-signatory and the rationale for binding non-signatories is based on the notion that forum selection clauses "promote stable and dependable trade relations," and thus, that it would be contrary to public policy to allow non-signatory entities through which a party acts to evade the forum selection clause."

III. *FORUM NON CONVENIENS*

Primus Pac Partners v. Goldman Sachs Group
175 A.D.3d 401 (1st Dep't 2020)

In this action where P is a Cayman Islands partnership involving allegations of fraud with respect to Malaysian banks, Supreme Court properly dismissed action on *forum non conveniens* grounds without first addressing P/J as P/J inquiry would have involved a burdensome inquiry.

Estate of Kaiser v. UBS A6
175 A.D.3d 403 (1st Dep't 2019)

In this art theft action involving allegations that the Nazis illegally confiscated a painting from decedent, Court affirmed dismissal on *forum non conveniens* grounds. In so ruling, Court held the trial court properly invoked the doctrine without first determining whether it had P/J over the

Ds. **COMMENT:** In *Flame S.A. v. Worldlink Intl*., 107 A.D.3d 436 (1st Dep't 2013), the panel held the trial court must pass on P/J issue before addressing *forum non conveniens* issue.

Fekah v. Baker Hughes Corp.
176 A.D.3d 527 (1st Dep't 2019)

Court affirmed dismissal of action arising from car accident in Africa as all medical care arising from the accident was rendered outside of NY, the injured parties did not live in NY, and D was a corporation not incorporated in NY. Court rejected P's argument that the situs of the accident is irrelevant for FNC purposes. **COMMENT:** P/J was based upon D's negotiation to do business, which Court rejected. FNC claim did not have to be addressed.

USI Systems v. Glikland
176 A.D.3d 555 (1st Dep't 2019)

In this action to enforce a Swiss judgment, Court dismissed counterclaims concerning circumstances, transactions and corporate relationships that occurred or arose in Switzerland or Russia, and D alleged no facts to indicate any relationship between the counterclaims and NY on FNC grounds.

Fernie v. Wincrest Capital, Ltd.
177 A.D.3d 531 (1st Dep't 2019)

Court affirmed dismissal of the action on FNC grounds. It noted the action involved a dispute among residents of the Bahamas, including P, in which P alleged fraud and improper ouster from her position in a Bahamian company; all the tortious acts alleged took place in the Bahamas, P's injury occurred in the Bahamas, and the company at issue has its principal office in the Bahamas. Bahamian law will govern at least some of the claims. Thus, "although there are some witnesses and evidence in NY, and one D is a NY resident, the court properly determined that NY is an inconvenient forum for this action."

JTS Trading Ltd. v. Asesores
178 A.D.3d 507 (1st Dep't 2019)

Court affirmed dismissal of action on FNC grounds, noting the parties are from Hong Kong and Mexico; and the agreement allegedly breached was executed in Mexico, is governed by Mexican law, and was allegedly breached in Mexico; and only a single, peripheral witness is present in NY. Accordingly, despite some initial contacts with one D's NY representative, the action was properly dismissed. **COMMENT:** Court prefaced its decision by stating that: "In determining whether an action should be dismissed for forum non conveniens, P's choice of forum is entitled to strong deference."

Al Rushaid Parker Drilling, Ltd. v. Byrne Modular Bldg.
180 A.D.3d 577 (1st Dep't 2020)

Ps, a Saudi Arabia Company, alleged that D, a United Arab Emirates Company, bribed certain of P's employees to act against its interests with respect to obtaining a contract for a construction

project in Saudi Arabia. Court affirmed Supreme Court's dismissal of the action on FNC grounds on the condition that the D or Ds stipulate to accept service of process and waive any statute of limitations defense if sued in the alternative forum (Switzerland in the *Pictet* action, the UAE in the *Byrne* action). In this regard, the Court held Supreme Court properly considered the following matters, among others: (1) none of the parties to either action is a NY citizen or resident or (if an entity) is formed under NY law or has its principal place of business in NY; and (2) the alleged conduct at issue primarily occurred in the UAE, Saudi Arabia and Switzerland, with the sole NY connection being the passage of wired funds through a corresponding bank in the state.

Trimarco v. Edwards
183 A.D.3d 402 (1st Dep't 2020)

Court affirmed grant of Ds' FNC motion. It noted that while the action was a relatively simple one that would not unduly burden the courts of this State, there is minimal connection between the action and this State, both the D and the sole non-party witness reside in Switzerland, and there is no indication of any relevant events having taken place in NY.

D&R Global Selections v. Bodega Olegario
183 A.D.3d 493 (1st Dep't 2020)

In *D&R Global Selections v. Bodega Olegario* (29 N.Y.3d 292 [2017]), the Court of Appeals held that under CPLR 302(a)(1) there was P.J over a Spanish company sued by a Spanish company for breach of a contract to promote P's wines, which contract was executed in Spain. Court here denied D's FNC motion.

Albright v. Combe Inc.
180 A.D.3d 628 (2d Dep't 2020)

Ps, 21 individuals, only 2 of whom are NY residents, with the remaining 19 residing in other states, commenced this products liability action in Westchester County against D1, a DE corporation with its PPB in White Plains and D2, a DE corporation with its PPB in Puerto Rico. Court denied D's motion to dismiss on FNC grounds the complaint insofar as asserted by the nonresident Ds. Ds asserted no facts other than that the nonresident Ps were out-of-state residents. Thus, Ds did not meet their burden of proof on the issue of convenience of the witnesses, since, among other things, there was no statement as to whom the witnesses are and where they reside. Moreover, the Ds' product's design, manufacturing, labeling, advertising, and executive decision-making all allegedly occurred in White Plains, where D1 has a PPB. Further, there is no per se rule stating that out-of-state Ps cannot, on the ground of FNC, sue in NY based upon products liability, despite the fact that evidence of damages would most often be found where P resides. **COMMENT:** Note the last factor mentioned by the Court.

Sikinyiu v. Port Authority of NY
__ A.D.3d __ (2d Dep't 7/1/20)

Action was commenced in Kings County. The accident occurred in NJ, the decedent was a resident of NJ and, as a result of the accident, received medical treatment in NJ before her death;

P is a resident of GA, and none of the potential witnesses are believed to be residents of NY. The D Port Authority of NY and NJ is a statutory resident of NY and D Champlain Enterprises, Inc., is a NY corporation. Court granted Ds FNC motion to dismiss, but with conditions. It found Ds established that NY is an inconvenient forum in which to prosecute the action. However, in order to ensure the availability of a forum for the action, the motion was granted on condition that Ds stipulate (1) to accept service of process in a new action in NJ upon the same causes of action as those asserted in the instant complaint, and (2) waive any defense of the SOL not available in NY at the time of the commencement of this action, all provided that the new action is commenced within 30 days after service of the stipulation upon P.

Ecovative Design LLC v. Bolt Threads, Inc.
2019 NY Slip Op. 55145(U) (Sup. Ct. Alb. Co.) (Platkin, J.)

In this breach of contract action Court after a thorough and thoughtful analysis of the FNC factors, denied motion by D, a CA based corporation. It noted dismissal would be appropriate only when it plainly appears that NY is an inconvenient forum and that the action has no nexus to this State. Here, this action, which arises out of the contractual obligations and performance of a NY-based company, clearly has extensive ties to this State, and requiring D to litigate here would not cause it a substantial hardship. D therefore has failed to meet its "heavy burden" of demonstrating that NY is an inconvenient forum. **COMMENT:** Court, sitting in the Commercial Division of Supreme Court, Albany County, noted that the Commercial Division was intended to provide a forum for commercial disputes such as the present one, and it routinely applies the law of other states.

IV. VENUE

A. Venue Contract Selection Clause

New York State Workers' Compensation Board v. Episcopal Church Home
64 Misc.3d 176 (Sup. Ct. Alb. Co. 2019) (Platkin, J.)

State Workers' Compensation Board in its capacities as successor to group self-insured trust and as the governmental agency charged with the administration of the Workers' Compensation Law and attendant regulations, brought collection action against purported former members of the trust. Purported members moved to change place of trial based on forum selection clause, actually a venue provision, in trust's participation agreements from Albany County to Erie County. In granting the motion, the Court noted 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. Here, the Court, after holding the clause encompassed the claims sued on, held that some but not all of the Ds were bound by the clause due to the nature of their contract status.

Nossov v. Hunter Mountain
2019 WL 1059515 (Sup. Ct. Kings Co.) (Bailly-Schiffner, J.)

D moved to change venue to Greene County pursuant to venue selection clause in lift-ticket D gave to P. Court granted motion, noting that the clause applied to "lawsuits arising from use of the facilities" and this covered P's action claiming he was injured when he attempted to board a ski lift.

B. Bases

1. Residence

Lividini v. Goldstein
175 A.D.3d 420 (1st Dep't 2019)

P sued a medical group PC, a surgical center LLC, and Dr. Goldstein individually in Bronx County. All Ds moved to transfer the action to Westchester County where they had an office and where Dr. Goldstein worked as their employee. Dr. Goldstein also practiced in Bronx County. Court denied (3-2) the motion, noting Dr. Goldstein, viewed as an individually owned business may be deemed a resident of any county where he has its principal office and any county in which he resides; and he established Bronx County as his principal place of business and his registration with the State listed only a Bronx County address.

Persaud v. Transdev Serv.
175 A.D.3d 1223 (1st Dep't 2019)

Ds moved to transfer venue from Bronx County to Nassau County pursuant to CPLR 504(1). Court affirmed denial of motion, noting Nassau County is not a named D, and Ds are not officers of Nassau County and were not named in a representative capacity. Court observed that CPLR 504(1) exists for the benefit of a county or other government entity named as a D, not for the benefit of individual litigants such as the instant Ds. The fact that one D had contracted to operate Nassau County buses and thus was deemed an employee for purposes of GML §50.b(1) does not require a different result.

Green v. Steinitz
182 A.D.3d 486 (1st Dep't 2020)

Court affirmed denial of Ds' motion to change venue from Bronx County to Putnam County. It noted that a lease agreement signed by Ps for property located in Dutchess County showed only that Ps resided in Dutchess County sometime after the actions were commenced, and does not challenge plaintiffs' prior showing that they were residents of Bronx County when they commenced their respective actions. Ps' subsequent move to Dutchess County "did not invalidate the original designation based upon Ps' residence at the time of the commencement of the action."

Bostick v. Safa
173 A.D.3d 823 (2d Dep't 2019)

In this medical malpractice action sued in Kings County, D MD claimed venue was improper. Court rejected argument noting that a partnership or individually owned business shall be deemed a resident of any county in which it has its principal office, and D MD's principal office was in Kings County.

O.K. v. Y.M. & Y.W.H.A.
175 A.D.3d 540 (2d Dep't 2019)

Court denied Ds' motion to change venue from Kings County to Nassau County. Ds had so moved based on claim that they maintained their principal place of business in Nassau County. The basis for the denial was that Ds failed to submit their certificates of incorporation. Court rejected as incompetent evidence the computer printout from the Department of State's website as it was not certified or authenticated and no factual foundation was submitted to support its admission as a business record. **COMMENT:** Under case law, Court could have taken judicial notice of the information from the website. No reason given as to whether judicial notice was improper. Was judicial notice argued by D?

Williams v. Staten Island Univ. Hosp.
179 A.D.3d 869 (2d Dep't 2020)

In this medical malpractice and wrongful death action Court denied motion of D physician to change venue from Kings County to Richmond County. It noted D failed to demonstrate that venue was improperly placed in Kings County based on the location of the office of D Tarantini and that none of the individual Ds lived in Kings County.

Drayer-Arnow v. Ambrosio & Co.
181 A.D.3d 651 (2d Dep't 2020)

P, as resident of Suffolk County, was injured on premises owned by Plainview School District in Nassau County. She commenced this action in Queens County based upon the residence of D Inshallah Corp., which allegedly performed certain construction work at the premises. When their demands for a change of venue from Queens County to Suffolk County pursuant to CPLR 511(b) were not met, Inshallah and D Northridge Corp. separately moved pursuant to CPLR 503(a), 510, and 511 to change the venue of the action from Queens County to Suffolk County, alleging, *inter alia*, that Inshallah's principal office was located in Suffolk County and all of the remaining parties resided in Suffolk County. The Supreme Court granted the separate motions of Inshallah and Northridge. Court denied the motions. It noted that while Inshallah claimed its PPB was in Suffolk County, its certificate of incorporation stated it was in Queens County. Thus, venue of the action was proper in Queens County. **COMMENT:** Where corporations have changed their PPB since the date of incorporation, the certificate should be amended to reflect that change.

Zelazny Family Enter. v. Town of Shelby
180 A.D.3d 45 (4th Dep't 2019)

In this hybrid vehicle article 78 proceeding and declaratory judgment action commenced in Niagara County to annul a determination made by the Town, which is located in Orleans County, Town and its sued officials moved to change venue from Niagara County to Orleans County. In affirming grant of motion, Court concluded venue was improper in Niagara County under Town Law §66(1). In so holding Court rejected the argument that neither CPLR 504(a) nor CPLR 506(b) were intended to supersede Town Law §66(1).

Bray v. Town of Yorkshire
2019 NY Slip Op. 51899(U) (Sup. Ct. Erie Co.) (Sedita, J.)

In this MV accident case arising out of a single car accident that occurred in Cattaraugus County, the D Town and D Cattaraugus County moved to change venue pursuant to CPLR 510(1) on ground that proper venue was in Cattaraugus County under CPLR 504(1). Court granted motion. In doing so, it noted that it had discretion to nonetheless deny the motion to change venue to Cattaraugus County, should P demonstrate the existence of special or compelling countervailing circumstances which favor keeping the action in Erie County. No such circumstances, however, were shown.

Ayers v. Mohan
64 Misc.3d 470 (Sup. Ct. Bronx Co. 2019) (Capella, J.)

In this medical malpractice action, D MDs moved to change venue from Bronx County to Westchester County pursuant to CPLR 510(1) on the ground that venue as designated was no longer proper given that none of the remaining parties were residents of the originally designated county, as P, who had subsequently moved to a different county, and D hospital, against which action has been discontinued by stipulation. Court noted that they were both residents of the originally designated county at the time the action was commenced, and that county was determined to be proper based on P's residence by the trial court in a previous decision. Court then denied the motion as a change in the residence of a party upon whom venue was originally and properly predicated does not support a change of venue under the statute.

2. Claim Arose

L. 2017, ch. 366, eff. Oct. 23, 2017

Bill amends CPLR §503(a) to add an additional ground for the placing of venue – "the county in which a substantial part of the events or omissions giving rise to the claim occurred." Language comes from 28 USC §1391(b)(2). **COMMENT:** (1) While CPLR §503 is captioned "Venue based on residence," venue can also now be based on the cause of action allegation. Legislature was of the opinion that residence alone was too restrictive; (2) Where no party resides in NY but the acts or omissions occurred in a county in NY, P may still select any county it wishes; (3) If a P has designed an improper venue, D may when invoking CPLR 511(b) specify the county in which it claims the acts or omissions occurred; and (4) *See generally*, Kelner, "Choosing A Venue" New Options," NYLJ, 7/23/18, p. 3, col. 3.

Espinal v. Lightbody
65 Misc.3d 728 (Sup. Ct. Bronx Co. 2019) (Higgitt, J.)

In this MV accident case, Court held Bronx County was a proper venue for the action arising from an accident that occurred in NY County between a vehicle driven by P, a PA resident, and a vehicle allegedly owned by D NJ corporation not authorized to do business in NY and operated by D individual, a NJ resident employed by the corporation. Court noted that under CPLR 503(a), "the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial party of the events or omissions giving rise to he claim occurred; or, if none of the parties then resided in the State, in any county designed by P." The word "or" connecting the propositions that venue may be laid in the county in which a party resides or the county where a substantial part of the events occurred with the proposition that P may choose any county when none of the parties resided in NY makes clear that the propositions are alternatives. Court also noted that CPLR 503(c), which addresses residence of corporations for venue purposes, did not apply here as D corporation was not authorized to do business in NY and was not a railroad or common carrier.

C. Transfer

1. Improper Venue - CPLR 510(1)

Richardson v. City of New York
184 A.D.3d 453 (1st Dep't 2020)

Court granted D's motion for a change of venue from Bronx County to NY County. After Ps commenced this action in Bronx County, Ds timely served a demand for a change of venue as of right to NY County, where one of them has its principal office. Ps did not respond to the demand, and Ds timely moved to change venue. In opposition to the motion, Ps did not dispute that their choice of venue was improper, but requested that venue be placed in Kings County, where the accident occurred. Court held that by failing to respond to Ds' demand to change venue to a proper forum, Ps forfeited their right to select venue. Further, no party moved to transfer venue to an alternate county. Thus, once Ds had followed the procedure set forth in CPLR 511 and established that the county chosen by Ps was improper, their motion to change venue to NY County as of right should have been granted.

HSBC Bank v. Mariatopoulos
175 A.D.3d 575, 108 N.Y.S.3d 17 (2d Dep't 2019)

In holding that a D's motion to dismiss for improper service was untimely, made 65 days after she served her answer, Court discussed *Simon v. Usher* (17 N.Y.3d 625 [2011]) wherein the Court of Appeals whether the five-day extension under CPLR 2103(b)(2) applies to the 15-day time period prescribed by CPLR 511(b) to move for change of venue when a D its demand for change of venue by mail. In doing so, Second Department stated: "If the P does not consent to change venue within five days after service of the D's demand, the D may then move for a change of venue within 15 days after serving the demand. Thus, a D must wait five days after serving the demand for a change of venue before it is permitted to make a motion for a change of

venue." **COMMENT:** Dictum is contrary to *Aaron v. Steele* (166 A.D.3d 1141 [3d Dep't 2018]) where the Court held 4-1 that D does not have to wait five days to make motion.

American Tax Funding v. Druckman Law Group
175 A.D.3d 1055 (4th Dep't 2019)

Court affirmed grant of D's motion to change venue from Monroe County to Nassau County. It noted the trial court properly determined that D's motion was timely and in compliance with the procedure set forth in CPLR 511, as we agree with D that the court's prior order granting it leave to serve a late answer effectively extended the time for it to serve its written demand for a change of venue, and D timely served its written demand on May 9, 2017, "before the answer [was] served" on May 15, 2017. In its subsequent motion for a change of venue, D established that Nassau County is, and Monroe County is not, a proper venue for trial of the action, and the court therefore properly granted the motion as a matter of right.

Zelazny Family Enter. v. Town of Shelby
180 A.D.3d 45 (4th Dep't 2019)

In this hybrid vehicle article 78 proceeding and declaratory judgment action, court held that Town and its sued officials did not waive their right to challenge venue in Niagara County as improper by reason of their participation in a consolidation motion by another party seeking to consolidate their action and proceeding with the other action and proceeding made in Niagara County.

Espinal v. Lightbody
65 Misc.3d 728 (Sup. Ct. Bronx Co. 2019) (Higgitt, J.)

In this MV case arising out of an accident in NY county involving a PA resident (P) and NJ corporation and individual (D), D moved to transfer venue from Bronx County to NY County. The motion was made 15 days after service of demand to change venue, which was made 11 months after being served but before answer was served. Court noted that a D's time to serve the demand is tied to when it interposes its answer, and the timing of the motion tied to when it serves the demand. Nothing in CPLR article 5 requires a D to act sooner. Here, Ds served their demand prior to serving their answer and moved to change venue within 15 days after service of the demand. Court held that Ds may have interposed a late answer and which P apparently did not reject, did not modify the timing requirements for the demand and motion.

2. Interest of Justice

State of New York v. Konikov
182 A.D.3d 750 (3d Dep't 2020)

In this action to recover a fine owed to a state agency, commenced in Albany County, sought to change venue to Nassau County pursuant to CPLR 510(2). The sole basis was that due to his due to his health problems and need for daily religious observance, he "cannot guarantee that [he] will be able to arrive on time" to court. Court rejected argument, noting D was required to demonstrate a strong possibility that an impartial trial could not be obtained" in Albany County.

D's unsupported and "conclusory allegations" are insufficient to demonstrate a strong possibility that the partiality of any trial in the county where venue was properly placed would be in question and, thus, Supreme Court providently denied the motion on this ground.

3. Convenience - CPLR 510(3)

Country-Wide Ins. Co. v. Melia
169 A.D.3d 452, 91 N.Y.S.3d 882 (1st Dep't 2019)

In affirming change of venue from NY County to Queens County, Court wrote: "While P insurance company has its principal place of business in New York County, this action arose in Queens County, two related actions based upon the same accident were venued in Queens County, the subject insurance policy was issued in Queens, and the elderly D lives in a nursing home there. Under these circumstances, changing venue to Queens County will better promote the ends of justice."

Lividini v. Goldstein
175 A.D.3d 420, 107 N.Y.S.3d 18 (1st Dep't 2019)

Court rejected a transfer based on inconvenience from Bronx to Westchester, noting that the distance from Westchester to Bronx County was not shown to inconvenience any witness.

Marcus v. Jason & Bill's Pool Serv.
178 A.D.3d 546 (1st Dep't 2019)

Trial court granted Ds' motion to change venue of this breach of contract action from NY County to Suffolk County, and Court affirmed. It noted the record shows that the pool that Ds were hired to perform work on is located in Suffolk County, and Ds submitted an affirmation of their counsel identifying a nonparty material witness who was allegedly present during some of the events in question and has indicated that although he was willing to testify about what he observed, he would be inconvenienced if required to travel from Suffolk County, where he lives and works, to NY County.

Reardon v. Macy's
170 A.D.3d 1060 (2d Dep't 2019)

D moved to change venue from Kings County to NY county. Court held trial court did not err in denying motion. It noted Ds failed to identify even a single prospective witness who would be inconvenienced by the venue remaining in Kings County. Ds argued that the convenience of the parties warranted changing the venue to NY County, since there were purportedly "no known Kings County witnesses or connections to this case." This assertion, however, is not supported by record.

State of New York v. Konikov
182 A.D.3d 750 (3d Dep't 2020)

In this action to recover a fine imposed by a state agency commenced in Albany County, D moved to change venue to Nassau County pursuant to CPLR 510(3). Court affirmed denial of the motion noting that D failed to provide the names and addresses of the non-party witnesses who had expressed their willingness to testify, the substance and relevance of their proposed testimony, and how they would be unduly inconvenienced by appearing for trial in Albany County. D's personal inconvenience "carries little if any weight," and his reliance upon his medical condition is unpersuasive in the absence of any medical evidence. In any event, P offered to conduct depositions in Nassau County and to allow D to appear by telephone.

3. Other

The RAL Supply Group v. DeSantis
65 Misc.3d 437 (Sup. Ct. Suffolk Co. 2019) (St. George, J.)

In this action in which P electronically field its S&C in a county other than the one designed in the caption, Court held that the NYS Constitution, article VI, §19(a) authorized Supreme Court to grant P's application to transfer the action to the designated county without having to re-serve D with or re-file the S&C. Court noted that although P had no apparent statutory basis for the relief requested, the constitutional provision authorized Supreme Court to transfer an action "to any other court having jurisdiction of the subject matter within the judicial department provided that such other court has jurisdiction over the classes of persons named as parties." Here, there was no question that the designated court was one of concurrent jurisdiction with the court in which the matter was filed, and that it also had subject matter jurisdiction over the action, as well as jurisdiction over the classes of persons named as parties in the action.

D. Consolidation

Jimenez v. Benson
__ A.D.3d __ (2d Dep't 7/1/20)

In this bus accident action P, a passenger, commenced this action in Nassau County after another passenger commenced an action in Queens County. Ds moved pursuant to CPLR 602 to consolidate both actions in Nassau County. Court held Supreme Court properly granted consolidation and placed venue in Queens County. It noted that where consolidation or a joint trial is ordered, venue should be placed in the county where the first action was commenced, unless special circumstances warrant otherwise.

Part Three

COMMENCEMENT OF ACTION: FILING AND SERVICE OF PROCESS AND NOTICE OF CLAIM

I. E-FILING OF PROCESS

E-Filing – C. 2015, ch. 238

Chapter 237 amends the CPLR by adding a new Article 21-A and Judiciary Law §212(2) which address the electronic commencement of an action or special proceeding and the filing of papers electronically. Specifically, Chapter 237 makes permanent the authorization for the use of mandatory e-filing Supreme Court civil parts. It also gives the Chief Administrative Judge authority to implement mandatory e-filing in a county and in most types of cases. However, no expansion of mandatory e-filing may be undertaken without the approval of the local County Clerk. This authority lends flexibility to the process of rolling out E-filing in counties that are ready and allowing other counties the time to make appropriate arrangements. Lawyers will continue to be able to opt out of mandatory e-filing. In addition, self-represented litigants will be exempt from mandatory e-filing, but they will be able to elect e-filing as an option. By various Administrative Orders issued since August 31, 2015, the statute's effective date, most counties in whole or in part require e-filing. The counties as of January 31, 2020, are listed on NYSCEF's website - apps.courts.state.ny.us/nyscef/AuthorizeCaseType. **COMMENT:** Counsel should always confirm prior to commencing an action whether e-filing is required.

II. SERVICE

A. Summons

Cusumano v. Riley Land Surveyors
179 A.D.3d 593 (1st Dep't 2020)

P commenced action by service of summons with notice, stating the action sought "to recover damages for contract damages and fraud" in the amount of $750,000.00. Default judgment was entered and D sought to vacate it. Court rejected D's argument that summons was defective because summons was allegedly unclear as to whether claims were asserted by one or both Ps as D failed to give an "explanation of the obstacle this presents to it preparing a defense."

Rivera v. New York City Dep't of Sanitation
183 A.D.3d 545 (1st Dep't 2020)

Court granted motion to amend the summons to substitute City of New York for D. Court noted the S&C were served on Corporation Counsel for the City of New York, which answered on behalf of the City of New York. D's motion to dismiss the complaint should have been denied

and P's cross motion to amend the S&C to correct the misnomer granted. The City was not prejudiced by the mis-description.

Fadilla v. Yankee Trails World Tours, Inc.
173 A.D.3d 1538 (3d Dep't 2019)

In this P/I action, the intended D was named Yankee Trails, Inc. However, the D named on the summons was Yankee Trails World Tours, Inc. This D was a separate entity with a different address and different offices than Yankee Trails, Inc. and was not involved in the underlying accident. The summons was filed a few days before the SOL expired and then served on the Secretary of State. Five months later P contacted the insurance carrier for Yankee Trails World Tours, Inc. and informed it that it was in default, which then notified the intended D Yankee Trails, Inc. The carrier insured both corporations. Yankee Trails, Inc. then moved to dismiss for lack of P/J and the expiration of the SOL, and P cross-moved to amend the summons to name Yankee Trails, Inc. as the correct D pursuant to CPLR 305(c). The Court granted the motion and denied the cross-motion. The basis for its holding was that since Yankee Trails, Inc. had never been served, no P/J over it was ever obtained. In so holding, Court noted that CPLR 305(c) is not available when a P seeks to substitute a D who has not been properly served.

B. Proof of Service

Ocwen Loan Servicing v. Ali
180 A.D.3d 591 (1st Dep't 2020)

In this foreclosure action, Court affirmed denial of motion to dismiss the complaint for lack of personal service. In so holding, Court noted that D failed to rebut presumption of proper service established by P's process server's affidavit. It noted D denied that she was personally served because she had temporarily moved to a family member's home. D's claim that she was never in her "dwelling place or usual place of abode" (CPLR 308[2]) at the time service was allegedly effected upon her was not supported with documentary evidence. D's further argument that she is shorter than the person described in the AOS is insufficient to rebut the presumption of proper service. Court noted in this connection that D did not dispute that the other descriptions set forth in the AOS, such as her age, weight, hair color, and skin color, match her description. Furthermore, D concedes that both her husband and a female tenant resided at the address where service was effectuated, and she does not dispute that they were of suitable age and discretion to have accepted service.

HSBC Bank USA v. Sprei
180 A.D.3d 763 (2d Dep't 2020)

In this foreclosure action, Supreme Court granted D's motion to dismiss the complaint for lack of P/J. Initially, Court noted P's process server's AOS averred that the process server attempted personal service upon Ds at their dwelling place on August 8 and 12, 2009. The affidavits further established that on August 13, 2009, the process server affixed copies of the S&C to the door of their dwelling place. Ds, however, presented evidence that the subject AOSs were filed with the clerk of the Supreme Court on August 7, 2009, prior to any of the alleged attempted service; and submitted a sworn joint affidavit containing a detailed and specific contradiction of the

statements in the process server's affidavits. This evidence rebutted the affidavits of service, necessitating a hearing. However, when at the scheduled hearing P failed to provide any explanation as to why it was unable to produce the process server and proceed with the hearing. Thus, Supreme Court providently exercised its discretion in denying P's request for an adjournment because P did not demonstrate due diligence in preparing for the hearing and granting the motion.

C. Bases for Service and Compliance

1. CPLR 308

(a) Personal Service (1)

Deutsche Bank v. Yurowitz
181 A.D.3d 646 (2d Dep't 2020)

In this mortgage foreclosure action, D claimed he was not served. Here, the process server's affidavit established, *prima facie*, that service was validly made pursuant to CPLR 308(1). D points to the discrepancy between his alleged actual height and weight at the time of service, 6 feet 4 inches and 200 pounds, respectively, and the approximate height and weight the process server estimated the person he served to be, 5 feet 10 inches and 175 pounds, respectively. Court noted minor discrepancies between the appearance of the person allegedly served and the description of the person served in the AOS are generally insufficient to raise an issue of fact warranting a hearing. That rule applied here.

(b) Suitable Age and Discretion (2)

J.P. Morgan Chase v. Castro
182 A.D.3d 425 (1st Dep't 2020)

Court affirmed vacatur of default judgment of foreclosure, finding proper service was not made. It noted any presumption of proper service raised by the process server's affidavit was overcome by D's testimony and documentary evidence and that of her former spouse, who was purportedly served as a substitute for D. This evidence shows that D's former spouse did not reside at the subject property and was not there at the purported time of service, that the description of the person served did not match that of the former spouse, that the property identified by the process server as the subject property was not in fact the subject property, and that, contrary to the process server's affidavit, the second floor was not vacant.

Estate of Perlman v. Kelley
175 A.D.3d 1249 (2d Dep't 2019)

In this action to recover legal fees, commencement occurred on December 31, 2015, and an AOS was filed on January 21, 2016 which stated that service had been effected under (2) by delivery of the summons at D's office on January 14, 2016, but no reference was made to any mailing. Two months later P moved for a default judgment which attached an AOS stating that P had mailed a second copy to D on February 13, 2016, but submitted no proof that an affidavit of such

service was filed. Court affirmed dismissal of the action for lack of P/J. The Court noted that P failed to comply with (2)'s strict requirements. P did not mail the pleadings to D within 20 days after delivery and never filed an AOS with the clerk indicating that the mailing had been done. The Court concluded that the delay in mailing was not a "technical infirmity" under CPLR 2001, but rather a jurisdictional defect. **COMMENT:** Note compliance with one prong was not enough to excuse under CPLR 2001 the failure regarding the second prong. Justifiable where D received the summons?

Hulse v. Wirth
175 A.D.3d 1276 (2d Dep't 2019)

In this P/I action, Court observed the P/J is not acquired unless both the delivery and mailing requirements have been strictly complied with. Here, there was no proof that the envelope used to mail the process had the required legend. Motion to dismiss was thus denied.

Edwards-Blackburn v. City of New York
181 A.D.3d 791 (2d Dep't 2020)

In this P/I action, Court held the evidence submitted by D Freeman in support of her motion to dismiss the complaint for lack of P/J sufficiently rebutted the presumption of proper service to warrant a hearing. Freeman's submissions included specific and detailed averments, as well as the affidavit of a security guard who worked in Freeman's apartment building. The security guard averred that the summons and complaint were delivered to him at his desk on March 21, 2017, but that he was not authorized to receive packages or deliveries, that he did not deny the process server access to Freeman's apartment, and that he did not inform Freeman of the delivery. Under these circumstances, the court should have conducted a hearing to determine whether the security guard was a person of suitable age and discretion within the meaning of CPLR 308(2), and whether the outer bounds of Freeman's dwelling place extended to the security guard's desk in her apartment building.

State of New York v. Konikov
182 A.D.3d 750 (3d Dep't 2020)

In this action to recover a fine owed to a state agency, Court held P made a *prima facie* showing of proper service by the affidavit of process server who averred that he at 9:07 p.m. on 11/21/17 left a copy of the S&C at a specified address — D's residence — with "Jane Doe" who refused to provide her name and who was described as a female with white-colored skin and covered hair, 50 to 55 years of age and between 5 feet 4 inches tall and 5 feet 8 inches tall and between 131 and 160 pounds; the affidavit further stated that copies of the S&C were mailed to D at that home address on 12/1/17. In opposition, D, while admitting receipt of process by mail, averred that several weeks before receipt a copy of the process was left on the front steps of his house, and that no one who fits the description in the AOS "lives" with him, giving descriptions of his wife and 20-year-old daughter. Agreeing with Supreme Court's finding that there were only "minor differences" between the appearance of the unidentified woman served as described in the AOS and D's minimal description of his wife. As D's denials were unsubstantiated and insufficiently detailed, he failed to rebut the presumption of service or to demonstrate that a traverse hearing was warranted.

Preferred Mut. Ins. Co. v. DiLorenzo
183 A.D.3d 1091 (3d Dep't 2020)

In this D/J action, D sought to vacate D/J, which motion was denied. Court noted the AOS reflects that the Orange County Sheriff left the S&C with D's grandmother at 16 Strack Road in the Town of Goshen, Orange County, followed by mailing, that same day, a copy of the summons to the same address. D does not deny that his grandmother was served nor does he claim that the address was not proper or that he did in fact receive the pleadings.
Instead, in a conclusory fashion, D states that he "currently resides in Middletown, NY" without specifying an address or providing any proof of his residence. Court held D "failed to adequately rebut the presumption of proper service created by the AOS, as this "bare claim . . . is not a detailed and specific contradiction of the allegations in the process server's affidavit."

Chi v. Miller
63 Misc.3d 354 (Sup. Ct. Queens Co. 2019) (Modica, J.)

At issue was whether a 13-year old (D's daughter) is a person of suitable age and discretion. Court noted that there was no specific age rule. It then ordered a hearing at which P would have burden to establish the daughter was objectively of sufficient maturity and understanding so as to be reasonably likely to convey summons to D.

(c) Agent (3)

Troy-McKoy v. Mt. Sinai
182 A.D.3d 524 (1st Dep't 2020)

Court held P's motion for a D/J was denied because he failed to establish that the service upon a law firm that represented D in connection with a notice of claim was authorized to receive process on behalf of D in this action.

Redbridge Bedford v. 159 North 3d St.
175 A.D.3d 1569 (2d Dep't 2019)

D was served by delivery of the S&C to the Secretary of State. D argued that such service was improper because proper service could only be accomplished by service upon its attorney who had appeared in the action in P's application for a TRO. Court rejected the argument, noting that absent proof to the contrary an attorney lacks authority to accept service and an attorney is not automatically considered an agent for purposes of service.

Roc-Lafayette Assoc. v. Reuter
183 A.D.3d 465 (1st Dep't 2020)

Court affirmed dismissal of action for lack of P/J. It noted the record shows that the process server only attempted to effectuate service of process twice at an address which was not D's "actual place of business, dwelling place or usual place of abode within the state." Under the circumstances presented, including that defendant had moved to Mexico almost a year before service was attempted, and that defendant had no contractual obligation to notify P that his

address changed, P failed to satisfy the due diligence requirement.

(d) Nail and Mail (4)

Deb v. Hayut
171 A.D.3d 862 (2d Dep't 2019)

In this P/I action, Court held that although the failure to file an AOS with the court pursuant to COLR 308(4) is generally a procedural irregularity which may be cured, in this case, P did not cure the defect. Court then granted motion to dismiss for failure to comply with (4). **COMMENT:** File the affidavit or make the motion!!

Mid-Island Mortgage Corp. v. Drapel
175 A.D.3d 1289 (2d Dep't 2019)

In this mortgage foreclosure action, Court held "due diligence" was not established. Four attempts to serve D at the address of the mortgaged premises were made over a week. As the process served was aware that D was in active military service at the time the process server attempted service at the address, the process server's four attempts at service prior to resorting to affix-and-mail service were not made when the D "could reasonably be expected to be found at such location."

Zheleznyak v. Gordon & Gordon, PC
175 A.D.3d 1360 (2d Dep't 2019)

In this legal malpractice action, D moved to dismiss based upon P's failure to serve it within 120 days after the filing of the S&C. Although P submitted a copy of an AOS in opposition to D's motion, the trial court granted the motion to dismiss the complaint because the AOS was not filed. Court affirmed, noting that "while the failure to timely file and AOS with the clerk of the court as required by (4) may, in the absence of prejudice, be corrected by court order pursuant to CPLR 2004," P failed to seek this relief and trial court declined to extend the time to file proof of service *sua sponte*. **COMMENT:** Ouch!

(e) Alternative Service (5)

Fontanez v. P.V. Holdings Corp.
182 A.D.3d 423 (1st Dep't 2020)

Court affirmed order directing service pursuant to CPLR 308(5) upon P's showing that service pursuant to CPLR 308(1)(2), or (4) was impracticable. It noted in support that P served process on the Secretary of State of NY and mailed notice of this service with a copy of the pleadings to D by registered mail to his last known address. She also hired a process server, who attempted to obtain D's address through the DMV and through people search databases, including "Premium People Search" and "IRB Search." Further, P's attempts to serve through the Chinese Central Authority in accordance with the Hague convention would have been futile because she did not have D's correct address. Court also held that it was proper to direct that alternate service be made on D as real party in interest, even if neither the attorney nor the insurer had knowledge of

D's whereabouts. **COMMENT:** Court also noted that P did not have to show due diligence to meet the impracticability threshold standard.

Bayview Loan Servicing v. Cave
172 A.D.3d 985 (2d Dep't 2019)

In this mortgage action, Supreme Court authorized service upon D by publication pursuant to (5). D moved to vacate default. Court noted that D submitted proof that she and her daughter lived on the mortgaged property for several years prior to the commencement of the action and when the action was commenced; and records which showed she was receiving electricity and cable during that time. The process served had averred that the house was vacant and the electric meter was ripped out. Court held this proof in support of her motion raised a question of fact as to whether it was impracticable for P to serve her with the S&C pursuant to CPLR 308(1), (2), or (4), such that P was entitled to an alternative method of court-authorized service pursuant to CPLR 308(5). Under these circumstances, the Supreme Court should not have determined D's motion without first conducting a hearing.

Northwood School v. Fletcher
Index No. CV19-0148 (Cty. Ct. Essex Co. 2019) (Meyer, J.)

In this real property litigation, P argued for service under (5) as its process server was reluctant to enter upon the D's properties for fear of being prosecuted for trespass. Court denied the request. It noted there are other means for service despite "no trespassing" signs and the threat of prosecution for trespass. For instance, the sheriff shall serve all civil process regardless of whether it has been issued by the court. (County Law §650[2]). Thus, a sheriff or deputy sheriff who enters upon property to perform that statutory duty cannot enter or remain unlawfully in or upon premises."

2. CPLR 311

Emaar Rak F.Z.E. v. Rak Tourism
177 A.D.3d 538 (1st Dep't 2019)

Court rejected P's argument that it properly served D by personally delivering a package addressed to D's general manager to a Fed Exp cashier. It noted CPLR 311 required process to be tendered directly to an authorized corporate representative.

3. BCL §306

Country-Wide Ins. Co. v. Power Supply, Inc.
179 A.D.3d 405 (1st Dep't 2020)

Court held D failed to show that its default should be vacated under either CPLR 317 or CPLR 5015(a)(1). D's conclusory denial of receipt of the S&C from the Secretary of State, although the address used was D's correct business address, is insufficient to rebut the presumption of service created by the Secretary of State's AOS. Moreover, D's attorney was aware of the action since he received a courtesy copy of the S&C.

Fisher v. Lewis Construction
179 A.D.3d 407 (1st Dep't 2020)

Court affirmed D's motion to vacate default judgment. It noted P properly served D via Secretary of State as SOS's record showed it was a viable corporation at the time; service was complete under BCL§306(b)(1) when P served SOS "irrespective" of whether the process was actually received; and D's conclusory denial of receipt was insufficient to rebut prescription of service.

Miller v. 21st Century Fox America
180 A.D.3d 608 (1st Dep't 2020)

Supreme Court denied P's motion for a default judgment and dismissed the complaint for lack of P/J due to improper service; and Court affirmed. It noted that D's service by certified mail to the corporate D's address, alone, is not a proper means of service under CPLR 311(a)(1), CPLR 312-a, and BCL §306.

Frazier v. 811 E. 178th St. Realty
183 A.D.3d 413 (1st Dep't 2020)

On this appeal from a denial of D's motion to vacate a D/J, Court held Supreme Court providently exercised its discretion in determining that under the circumstances, D's failure to maintain an accurate address with the Secretary of State for six years did not constitute a reasonable excuse for its default.

4. Agreement

New Brunswick Theological Seminary v. VanDyke
__ A.D.3d __ (2d Dep't 6/3/20)

P commenced this proceeding to confirm an arbitration award that it obtained against D who did not appear for the arbitration and D moved to vacate the award and to dismiss the petition on the ground that the procedure used for service of the notice of arbitration deprived her of her right of due process. In a thoughtful and comprehensive opinion authored by Justice Miller, the Court set forth the parameters for allowing service by agreed-upon methods and constitutional rights to due process. The parties FIWRD agreement allowed for service of the notice of arbitration by certified mail. D claimed she never received the notice and that P knew or should have known what she spent long periods of time away from her NY residence. Court noted that the parties may agree to some other form of service, other than those specified in the CPLR, and where they do so that method controls; and that in the arbitration context it is for the arbitrator to determine whether that method was followed. The Court further found that public policy did not preclude the enforcement of the service provision as agreed to.

Rockefeller Technology Inv. v. Changzhou Ltd.
460 P.3d 764 (Cal. Sup. Ct. 2020)

The parties, P US partnership and D a Chinese corporation, entered into an arbitration agreement wherein they agreed to submit to the jurisdiction of the CA courts. They also agreed to provide notice and "service of process" to each other through Federal Express or similar courier. When P moved to confirm arbitration award in CA, it served the petition upon D by Federal Express. At issue the Hague Convention permitted such service. Court held the service was proper as the convention only requires formal service of process to be sent abroad when the law of the forum state requires such; and that her the parties' agreement constituted a waiver of formal service of process. Thus, service here was proper.

5. Limited Liability Company

Cedar Run Homeowners' Assoc. v. Adirondack Dev. Group
173 A.D.3d 1330 (3d Dep't 2019)

Court held Ps failed to establish they acquired P/J over D by, among other things, complying with Limited Liability Company Law §303 (a). Although Ps proffered an unsigned receipt of service purportedly generated by the Office of the Secretary of State, that receipt did not set forth the papers served, whether duplicate copies of those papers were delivered to the Secretary of State, the time of service or facts showing that service was made by an authorized person.

6. State

Matter of Randolph v. Office of NYS Comptroller
168 A.D.3d 1195, 92 N.Y.S.3d 423 (3d Dep't 2019)

P used the certified mail method to effectuate service upon the Comptroller. (*See* CPLR 307 [2]; 403 [c]). This method requires that the pleadings be sent by certified mail, return receipt requested, to the Comptroller and that they also be served upon the State of New York by personally delivering them to an Assistant Attorney General or to the Attorney General (*see* CPLR 307 [1], [2]; 403 [c]; 7804 [c]). The record here discloses that P did not personally deliver the notice of petition, verified petition, and other documents to an Assistant Attorney General or to the Attorney General. Given this jurisdictional defect, Supreme Court properly dismissed the petition.

D. Order To Show Cause

Esteves-Rodriguez v. Sanford
179 A.D.3d 1370 (3d Dep't 2020)

In this article 78 proceeding, petitioner was required pursuant to OTSC to serve a copy of the signed OTSC upon respondent (Parole Board Chair) and the AG. While P served all of the required papers on respondent, the papers served on the AG did not include a copy of the OTSC. Court held failure to serve AG with all papers as required by the OTSC required dismissal for lack of P/J.

E. Prohibited Service

Hudson City Savings Bank v. Schoenfeld
172 A.D.3d 692, 99 N.Y.S.3d 389 (2d Dep't 2019)

Jewish D was served on Sukkot, which did not fall that year on a Saturday or Sunday. Court held service was not made in violation of GBL §13 as service did not occur on a Saturday. **COMMENT:** For further discussion of GBL §13, see Justice Dillon's analysis at Practice Commentaries to CPLR 3211 (2019), C 3211 "Prohibited Service on the Religious Sabbath."

F. 120 Days to Serve and Extensions of Time – CPLR 306-b

Zegelstein v. Faust
179 A.D.3d 541 (1st Dep't 2020)

Court affirmed Supreme Court's denial of P's motion for an extension of time to serve process in response to D's motion to dismiss. It held P failed to establish: (1) "good cause" as excuse - law office failure - was insufficient, especially in light of P's awareness of a service issue months earlier; and (2) "interest of justice" in view of "extreme lack of diligence" and expiration of SOL.

Fernandez v. McCarthy
183 A.D.3d 539 (1st Dep't 2020)

Court affirmed grant of P's motion to extend the time to serve in the interests of justice. It noted that under the circumstances, we find that, although P delayed in seeking an extension of his time to re-serve the complaint, the motion court appropriately exercised its discretion when it extended P's time in the interest of justice, as P established the existence of several relevant factors weighing in favor of an extension. Ps legal malpractice claim, which would otherwise be lost due to the running of the SOL, seems to be potentially meritorious, and Ds have not established that they would suffer substantial prejudice from the extension, where they had actual notice of this action and the allegations against them from early on.

Wilmington Savings Fund Society v. James
174 A.D.3d 835, 106 N.Y.S.3d 106 (2d Dep't 2019)

In this mortgage foreclosure action, Court held P established "good cause" through its submittal of a detailed affidavit of due diligence, affidavits of attempted service, and evidence of the many inquiries and record searches that it made in an effort to serve D.

Butters v. Payne
176 A.D.3d 1028, 112 N.Y.S.3d 245 (2d Dep't 2019)

In this MV accident case, Court affirmed denial of P's motion for an extension to serve. It noted P's "extreme lack of diligence" in commencing the action: the S&C was not filed until the day of expiration of the SOL; P made no effort to serve the S&C within or after the expiration of the

120-day period set forth, failed to seek an extension of time for service until nearly one year after the filing of the S&C, and failed to offer a reasonable excuse for the delay, and failed to demonstrate a potentially meritorious cause of action inasmuch as she failed to submit competent medical evidence demonstrating that she sustained a serious injury. Furthermore, Ds clearly suffered prejudice from P's extreme lack of diligence and long delays. **COMMENT:** Court did not state the nature of the prejudice. Presumption because of the long delay?

Mighty v. Deshommes
178 A.D.3d 912 (2d Dep't 2019)

Court held Supreme Court providently exercised its discretion under the interest of justice prong in denying Ewing's first motion to dismiss the complaint and granting the P's cross motion for an extension of time to serve Ewing. The complaint demonstrated a potentially meritorious cause of action, the action was timely commenced, and the P exercised diligence in attempting to effect proper service on Ewing within the 120–day period. Additionally, the statute of limitations had expired by the time the P made the cross motion, the P promptly cross-moved for an extension of time to serve Ewing, and there was no prejudice to Ewing attributable to the delay in service. Court also held Supreme Court providently exercised its discretion in denying Ewing's second motion to dismiss the complaint and granting the P's cross motion for a second extension of the time to serve Ewing. Ewing maintains that he should have been served at an address which differed from the Strauss Street address listed on the police report, as well as the Atlantic Avenue address and the Georgia address. However, a search of the DMV records conducted on June 23, 2017, more than six weeks after the traverse hearing, reflected that the Atlantic Avenue address, where the P had attempted to effectuate service, was the current documented address for Ewing. Since the record demonstrates that Ewing failed to notify the DMV of his change of residence, as required by V&T §505(5), he was estopped from raising a claim of defective service.

Chandler v. Osadln, Inc.
181 A.D.3d 897 (2d Dep't 2020)

In this P/I action, D Bent moved to dismiss the complaint pursuant to CPLR 306-b, and P cross-moved pursuant to CPLR 306-b to extend the time to serve Bent. Initially, Court found that P failed to show "good cause" for an extension as he failed to show reasonably diligent efforts to effect proper service. However, Court found an extension was warranted under in the "interest of justice." It noted the record establishes that P attempted service in a timely manner, although that service was defective; Bent gained actual notice of this action within 120 days after its commencement, Bent did not show that his ability to defend the action was prejudiced in any demonstrable way by the delay in service, and the statute of limitations had expired. Although P did not seek an extension until after Ds moved to dismiss the complaint against Bent, the defendants' answer asserted that service was improper only in a conclusory manner and P was not informed of the specific reasons for invalidating service until Ds made their motion. On the other hand, P failed to submit sufficient evidence to demonstrate that he had a potentially meritorious cause of action. Bearing in mind all of the factors relevant to the determination of a CPLR 306-b motion, Court held Supreme Court properly exercised its discretion in granting the extension under this prong of CPLR 306-b.

State of New York Mortgage Agency v. Braun
182 A.D.3d 63 (2d Dep't 2020)

In this mortgage foreclosure action, the Court in a 3-2 decision granted P's motion for an extension of time to serve D even though the motion was made after the action was dismissed for lack of P/J. In a thoughtful opinion authored by Justice Leventhal, the majority rejected D's argument that the motion should have been denied because the action was no longer pending. An action is seemed pending until there is a final judgment. While there was an order granting D's motion to dismiss the complaint insofar as asserted against him, no final judgment had been entered and, thus, the action was still pending when P moved, among other things, to extend the time to serve D. Moreover, CPLR 306-b does not provide that a motion pursuant thereto to extend the time for service must be denied as untimely if it is made subsequent to the issuance of an order granting a motion to dismiss and prior to the entry of judgment, or that a motion pursuant to CPLR 306-b to extend the time for service must be made in any particular time frame.

Amica Ins. Co. v. William Baird Trust
180 A.D.3d 1284 (3d Dep't 2020)

In this subrogation action, Court held Supreme Court properly granted P's application. It noted that the record disclosed that P, on more than one occasion, attempted to personally serve D with process, albeit unsuccessfully, within the requisite 120-day period and that P made searches and inquiries to ascertain D's address. P's motion was timely as the record reflects that P's motion was noticed in February 2018, the motion was originally made in October 2017 - approximately when the 120-day period to effectuate service was expiring - and P was directed by Supreme Court to resubmit it; and D does not allege that he suffered any prejudice by the extension and P's claim had merit.

Fadilla v. Yankee Trails World Tours
173 A.D.3d 1538 (3d Dep't 2019)

After holding P could not amend its summons to amend the summons to name the correct D, who had not been served, Court held CPLR 306-b could not be invoked as that statute requires the commencement of a valid action, and here because of the incorrect D named, no such action was validly commenced.

Matter of Janiga v. Town of West Seneca Zoning Board
174 A.D.3d 1401 (4th Dep't 2019)

In this Article 78 proceeding, Court affirmed dismissal of proceeding. It initially held an extension was not warranted under the good cause prong as Ps failed to show that any attempt was made to serve respondents during the applicable SOL period. As to the separate interest of justice prong, a "broader and more flexible provision," an extension was not warranted under it as Ps here did not seek an extension until more than four months after the expiration of the service period and nearly three months after respondents moved to dismiss the petition. In addition, the SOL had expired, and petitioners failed to demonstrate the meritorious nature of their claim. "Those factors, considered as a whole, weigh against extending petitioners' time for

service in the interest of justice."

G. Motions

US Bank Nat. Assoc. v. Roque
172 A.D.3d 948 (2d Dep't 2019)

Court held that CPLR 3211(e)'s requirement applied as well to motions made pursuant to CPLR 3212.

HSBC Bank v. Mariatopoulos
175 A.D.3d 574 (2d Dep't 2019)

In this mortgage foreclosure action, D served her answer by mail, and 65 days later she moved to dismiss pursuant to CPLR 3211(a)(8) on the ground of improper service. Trial court denied motion on ground it was untimely, made five days beyond 60-day time limit for moving. Court affirmed, concluding that CPLR 2103(b)(2) did not give D the option to extend the time period by five days as legislative intent was to give an additional five days to a responding party.

III. NOTICE OF CLAIM

A. Generally

1. General Municipal Law

Colon v. Martin
__ N.Y.3d __ (5/7/20)

In this action against D municipality, Court held that GML §50-h(5), governing examination of claims against a municipality did not operate to permit claimant to have a co-complaint present during an oral examination; and the provision permitted municipality to conduct separate examinations of co-claimants.

***Ryabchenko v. New York City Trans*.**
174 A.D.3d 549 (2d Dep't 2019)

Two years after filing her complaint alleging a slip and fall accident, P moved for leave to amend her notice of claim to remove any mention of the stairs being "uneven, misleveled, smooth" with a "slick surface," and to add new allegations that the stairs were "defectively installed … and/or designed … with a hole/gap upon which P's foot was caused to trip and fall." Supreme Court granted the motion, and the Court reversed. It held the amendments were not technical in nature, but rather were of a substantive nature beyond the purview of GML §50-e(6).

Rubenstein v. City of New York
176 A.D.3d 1132 (2d Dep't 2019)

In this slip and fall action, Supreme Court granted S/J dismissing the complaint which alleged a different theory of liability then the notice of claim and thus did not comply with GML §50-e. Court affirmed. The notice of claim alleged that P slipped and fell on ice on a pedestrian ramp caused as a result of an ice condition and that the ice was covered by a freshly fallen thick layer of snow. The complaint alleged that the icy condition on which P fell was caused by "a backup of water from the closest sewer which flooded the pedestrian ramp," that the "sewer backup … was known to occur with regularity," and that the City was negligent in failing to repair the allegedly defective condition. Court's affirmance noted that the notice of claim contained no allegation about sewage backup and failure to maintain the sewer.

DiMattia v. City of New York
183 A.D.3d 823 (2d Dep't 2020)

Court affirmed denial of P's motion to amend notice of claim to substitute 165 Father Capodanno Blvd. to 165 Seagate Court as location of accident. While it noted a petition for leave to amend a notice of claim may be granted provided that the error in the original notice of claim was made in good faith and the municipality has not been prejudiced the petitioner failed to demonstrate that the error in the original notice of claim regarding the address of the property adjacent to the allegedly defective sidewalk where the accident occurred was made in good faith; and failed to meet her initial burden of demonstrating that the City will not be prejudiced as a result of the petitioner's lengthy delay in seeking leave to correct the description of the accident location.

2. Court of Claims Act

Constable v. State of New York
172 A.D.3d 681, 99 N.Y.S.3d 438 (2d Dep't 2019)

In this slip and fall action, Court noted that claimant's notice of intention to file a claim and the claim failed to provide the State with a sufficient description of the place of the accident. As a result, Court affirmed dismissal of the claim on the basis of the claimant's failure to comply with the requirements of Court of Claims Act §11. **COMMENT:** Court noted the claim was filed in November 2013 and State waited until March 2015, six months after the last deposition was conducted to make motion. Noting that there was no time limitation for the State to make its motion based on insufficient description, Court recommended that legislative action to do so would be appropriate.

Rodriguez v. City University
179 A.D.3d 506 (1st Dep't 2020)

Court affirmed dismissal of claim for lack of proper service. Court rejected claimant's argument that by producing a receipt for a request for certified mail, return receipt requested, coupled with D's admission of receipt of a copy of the claim, she has proved service upon D in compliance with Court of Claims Act § 11, is unavailing. It is not enough for claimant simply to point to her

receipt for mailing by certified mail, return receipt requested. Instead, claimant must prove not only that she attempted service by certified mail, return receipt requested, but that such service was actually completed.

Katan v. State
174 A.D.3d 1212 (3d Dep't 2019)

Court agreed with the Court of Claims that claimant's description of her injury location was not detailed enough to satisfy the pleading requirement. Claimant alleged that she fell "on the exterior stairs/landing located proximate to Moffit Hall and Clinton Dining Hall." The record establishes, however, that there are three staircases proximate to Moffit Hall and Clinton Dining Hall. Claimant's contention that the location stated in her claim necessarily referred to the sole staircase/landing between the two buildings is without merit because the claim did not allege that the situs of the accident occurred between the two buildings. In opposition to the motion to dismiss, claimant submitted an aerial map of where she allegedly fell. However, the aerial map does not cure the pleading defect in her claim because the aerial map was not included in her claim, and D is not required to go beyond the claim to ascertain the situs of the injury. Because the claim failed to sufficiently allege where the injury occurred, we find that it did not comply with the requirements of Court of Claims Act 11(b).

Donahue v. State
174 A.D.3d 1549 (4th Dep't 2019)

Claimant received a money judgment, awarding him money damages for past and future lost wages. State argued that the Court of Claims lacked subject matter jurisdiction to make those awards as claimant failed to sufficiently set forth the claim with respect to that category of damages. Court rejected argument (4-1). It noted a natural reading of the statute requires a claimant to specify the items of damage to property or injuries to a person for which the claimant seeks compensation. Here, claimant sufficiently specified the nature of the claim, the time when and the place where the claim arose, and the injuries claimed to have been sustained, *i.e.*, "injuries to his shoulder, bicep, and elbow." Inasmuch as this is an action for damages for P/I, claimant was not required to specify, in total or itemized by category, his claimed items of damage. Damages sought for claimed medical expenses or lost wages are matters for the BOP.

Gang v. State
177 A.D.3d 1300 (4th Dep't 2019)

Claimant commenced this action alleging medical malpractice while he was an inmate. In his notice of intention to file a claim, he alleged that he sustained an injury to his left hip as a result of the malpractice. Court concluded the statement in the notice of intent and the claim were made with sufficient definiteness to enable D to be able to investigate the claim promptly and to ascertain its liability under the circumstances. Although there is a different date of the alleged injury and a slightly different alleged injury in the claim as opposed to the notice of intent, Court nevertheless concluded that the allegations in each were sufficient to allow the state to conduct a prompt investigation of a possible claim in order to ascertain the existence and extent of the State's liability. As to alleged inconsistencies regarding his injury, P's medical records stated injury was to claimant's right hip, P's mistake did not cause any prejudice to D and can be

ignored.

B. Late Notice of Claim

1. General Municipal Law

J.H. v. New York City Health & Hosp. Corp.
179 A.D.3d 452 (1st Dep't 2020)

Court affirmed denial of P's application to file a late notice of claim. Among other matters, Court noted the medical records were insufficient to impute actual knowledge to respondent, as they did not "*evince* that the medical staff, by its acts or omissions, inflicted any injury on P." Even if P's untimely and unauthorized June 2014 notice of claim was sufficient to provide such actual knowledge to respondent, the 11-month delay between the expiration of the 90-day notice of claim period in July 2013 and the service of this notice in June 2014 was not reasonable.

Sproule v. New York City Convention Center
180 A.D.3d 496 (1st Dep't 2020)

Court granted Ps' application to serve a late notice of claim. It noted that while Ps failed to offer any reasonable excuse for their failure to timely serve a notice of claim, this failure is not, standing alone fatal. Ps sufficiently demonstrated that respondents acquired actual notice of the event within a reasonable time thereafter, and that respondents would not be substantially prejudiced in their defense by the delay. Specifically, there is a surveillance video of the accident, which the claims administrator for the Javits Center acknowledged having in its possession approximately six months after the accident. Moreover, the operator of the lift that injured petitioner was employed by respondents.

Atkinson v. New York City Health & Hosp. Corp.
184 A.D.3d 528 (1st Dep't 2020)

Court denied P's late notice application. It held, among other deficiencies that P failed to show that D had actual notice of her claim within 90 days of accrual of the claim, or a reasonable time thereafter, noting D's mere possession or creation of medical records does not ipso facto establish that it had actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on P. D's records of P's treatment did not on their face show any negligence, malpractice or injury to P, and P did not submit a physician's affirmation to make such a showing.

Matter of Perez v. City of New York
175 A.D.3d 1534 (2d Dep't 2019)

Court denied P's petition. After noting that the City had not been shown to have actual notice of her slip and fall, Court then rejected P's excuse. It noted a lack of due diligence in determining the identity of the owner of the property upon which the subject accident occurred is not a reasonable excuse for the failure to serve a timely notice of claim. Here, P failed to demonstrate that either she or her counsel made any effort to investigate or research what entity owned the

subject premises. In addition, P failed to satisfy her initial burden of showing that the City would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay.

Matter of Nunez v. Village of Rockville Ctr.
176 A.D.3d 1211 (2d Dep't 2019)

Supreme Court granted leave to P to serve a late notice of claim alleging discrimination, false arrest, malicious prosecution, abuse of process and a §1983 claim. Court reversed with respect to the claims other than malicious prosecution and §1983. Initially, Court noted that P did not have to file a notice of claim with respect to his §1983 claim and that the malicious prosecution claim was timely. As to the dismissed claims, Court held not reasonable excuse was posited, rejected P's claim that his attorney in the underlying criminal matter told him of the notice of claim requirement. The Village did not have actual knowledge as the underlying records prepared by the Nassau County PD and DA's office could not be imputed to the Village. While P showed a lack of prejudice to the Village, Court held that factor was not dispositive. The most important factor is the acquisition of actual knowledge and the Village had none.
COMMENT: Justice Barron wrote a concurring/dissenting opinion which contains an excellent discussion of the factors that courts are to consider in determining whether to grant a late notice petition.

Lockwood v. City of Yonkers
179 A.D.3d 688 (2d Dep't 2020)

P was allegedly injured on 4/24/14 and by petition filed 9/12/14 commenced this proceeding for leave to serve a late notice of claim, which was denied on 12/11/14. P then moved on 5/2/17 for leave to renew his prior motion, which was granted as well as the leave application. Court reversed. It noted: "Here, the accident allegedly occurred on 4/24/14. Therefore, the one-year-and-90-day sol expired on 7/23/15. P's motion for leave to renew his petition was not made until 5/2/1717, nearly two years after the SOL expired, and thus was untimely. While the SOL was tolled from the time the petition was filed until the entry of the order dated 12/11/14, denying the petition, that tolling period was insufficient to render the motion for leave to renew timely (see CPLR 204(a)" **COMMENT:** Court noted that "A motion to renew a prior timely petition for leave to serve a late notice of claim, which renewal motion is made after the SOL has expired, is untimely and does not relate back to the original petition."

Sanchez v. Jericho School Dist.
180 A.D.3d 828 (2d Dep't 2020)

In this P/I action, P failed to serve a timely notice of claim or commence a timely proceeding to serve a late notice of claim. Court rejected P's argument that D school district was estopped from asserting the failure. While noting that the school district in a proper case could be estopped in a proper case, no such case was present. It held further that there is no evidence in the record demonstrating that Ds engaged in any misleading conduct which would support a finding of equitable estoppel; Ds' participation in pretrial discovery did not preclude them from raising the untimeliness of the notice of claim; and Ds had no obligation or duty to inform P that his notice of claim was untimely served.

Kimball Brooksland v. State
180 A.D.3d 1031 (2d Dep't 2020)

In this property damage action arising from alleged damage due to Hurricane Irene, Court held the claimant's allegations of negligence in both the notice of intention to file a claim and the notice of claim were not sufficiently specific to satisfy pleading requirements of Court of Claims Act §11(b). Here claimant failed to allege in either the notice of intention to file a claim or the notice of claim the particular manner in which the State was negligent, including, as the claimant subsequently sought to establish in support of its motion for summary judgment, that the claimant's property was damaged as a result of the State's failure to repair and maintain the flood protection wall identified in the claimant's motion papers. Court further noted that claimant's omission is not remedied by the State's access to information or knowledge of the claim from its own records as the State is not required to go beyond a claim or notice of intention in order to investigate an occurrence or ascertain information which should be provided pursuant to Court of Claims Act §11.

Sanchez v. Jericho School Dist.
180 A.D.3d 828 (2d Dep't 2020)

Court noted that even if D's cross-motion to serve an amended complaint could be viewed as an application to serve a late notice of claim, Supreme Court would have lacked authority to grant it as the application would have been made after the expiration of the SOL.

E.R. v. Windham
181 A.D.3d 736 (2d Dep't 2020)

Court held that Supreme Court properly denied P's motion which was for leave to serve a late notice of claim upon the City on behalf of the motion in her individual capacity, as the SOL for her derivative cause of action had expired at the time the motion was made. The infancy toll is personal to the infant and does not extend to a parent's derivative cause of action.

E.R. v. Windham
181 A.D.3d 736 (2d Dep't 2020)

Court affirmed Supreme Court's denial of infant P's application to file a late notice of claim, noting, among other things, Ps failed to offer any evidence to show that the City acquired actual knowledge of the essential facts constituting the claim with the 90-day statutory period or a reasonable time thereafter. Ps' mere allegations of the existence of records prepared by criminal investigators, without evidence of their content, were insufficient to impute actual knowledge to the City.

Brown v. New York City Housing Auth.
182 A.D.3d 594 (2d Dep't 2020)

Court affirmed grant of the late notice application. It noted, *inter alia*, P met her burden of showing that D will not substantially prejudiced by the late notice of claim, since the photographs taken by P depict the defect as it existed at the time of the accident, and D failed to

rebut P's initial showing as to lack of prejudice with a particularized evidentiary showing that P's delay in service a notice of claim will prejudice it in its defense on the merits.

Diaz v. Rochester-Genesee Regional
175 A.D.3d 1821 (4th Dep't 2019)

Claimant was operating a garbage truck when the truck was involved in a collision with a bus allegedly owned and operated by respondents. Shortly thereafter, an employee of respondent Regional Transit Service, Inc. went to the scene of the collision and spoke to claimant as part of an investigation. Claimant stated that she was unhurt. Supreme Court denied late application and Court affirmed. Here, it is undisputed that respondents lacked actual knowledge of claimant's alleged injuries within the 90–day statutory period. Moreover, the record established that claimant's attorneys did not promptly notify respondents of the essential facts of the claim upon discovering their failure to serve a notice of claim in a timely manner. Instead, for reasons that are not explained in the record, claimant's attorneys waited until 180 days had passed since the accident to serve the application. Although respondents failed to establish substantial prejudice resulting from the delay, claimant failed to provide a reasonable excuse. Therefore, we cannot conclude that the court clearly abused its broad discretion in denying claimant's application.

Vitko v. Simon
179 A.D.3d 1515 (4th Dep't 2020)

Court denied P's application for leave to serve a late notice of claim. It noted P failed to meet her burden of demonstrating that the Town had actual knowledge of the incident within 90 days of its occurrence. P did not dispute that the Town lacked actual knowledge of any injury at the subject property until the Town was served with P's application. P likewise failed to establish a reasonable excuse for her failure to timely serve the notice of claim, and to establish that a late notice of claim would not substantially prejudice the Town's interests.

Dusch v. Erie County Med. Ctr.
184 A.D.3d 1168 (4th Dep't 2020)

Court granted P's application disregarding P's failure to offer a reasonable excuse for the failure, it focused on the actual knowledge element. It found such knowledge from the pertinent medical records. Those records indicated that, following the surgical skin graft procedure, P developed swelling beneath the dressings that became constrictive of blood flow to the leg and ultimately caused necrosis, and that Ds' medical staff, for various reasons, had failed to recognize the ischemic nature of the leg and claimant's development of compartment syndrome, thereby eventually necessitating partial amputation of the leg. Thus, D had actual knowledge of the essential facts constituting the claim.

2. Court of Claims Act

Hyatt v. State
180 A.D.3d 764 (2d Dep't 2020)

Court held Court of Claims properly exercised its discretion in denying claimant's motion for

leave to serve a late claim. Among the matters it noted the claimant failed to demonstrate a reasonable excuse for the approximately 1½-year delay in seeking leave to file a late claim. His attorney's failure to timely and properly investigate the claim in order to determine the location of the accident, especially in light of the fact that the claimant's father had been an emergency responder at the scene of the accident, in effect, constitutes law office failure, which is not a reasonable excuse.

Phillips v. State of New York
179 A.D.3d 1497 (4th Dep't 2020)

Court granted claimant's application to file a late claim with respect to his Labor Law §240(1) cause of action. Upon its consideration of the six factors outlined in Court of Claims Act §10(6), it wrote: "Several factors militate against granting claimant's application. For instance, his excuse for failing to file a timely notice of intent was law office failure, which, as the court determined, is not an acceptable excuse. Also, as the court noted, claimant has at least a partial alternate remedy through workers' compensation. With respect to three of the remaining four statutory factors, we agree with the court's determination that defendant had notice of the essential facts constituting the claim, had an opportunity to investigate the claim and was not prejudiced by the delay." The most significant factor, however, is "whether the claim appears to be meritorious" (Court of Claims Act § 10[6]) inasmuch as "it would be futile to permit the filing of a legally deficient claim which would be subject to immediate dismissal, even if the other factors tend to favor the granting of the request." As to claimant's §240(1) cause of action, Court found it had merit. Court then concluded: ""Even if the excuse for failing to file a timely claim is not compelling,' " we conclude that the denial of the application with respect to the proposed section 240(1) cause of action was an abuse of discretion because defendant was able to investigate the claims and thus suffered no prejudice and, as noted, the proposed section 240(1) cause of action appears to have merit."

Part Four

STATUTES OF LIMITATIONS

I. EXTENDING/SHORTENING AND RAISING LIMITATION PERIOD

Sotheby's Inc. v. Mao
173 A.D.3d 72 (1st Dep't 2019)

P's causes of action for breach of contract and enforcement of a guarantee stemming from its revolving credit agreement for financing D's purchase of fine art for resale were governed by CPLR 213(2). Under the terms of the agreement, P became entitled to demand immediate payment of the total outstanding balance of the loan, and the limitations period began to run, two business days after an event of default occurred when D failed to remit the proceeds of a painting's sale. Court held P's amended complaint, commenced over seven years after the event of default, was time-barred. It noted P's alleged waiver of D's obligation to remit the proceeds of the sale in a timely fashion and make immediate repayment of the outstanding loan after the event of default did not delay the accrual of its causes of action because the parties did not enter into a written agreement to waive or extend the statute of limitations in compliance with General Obligations Law § 17-103.

Digesare Mechanical, Inc. v. U.W. Marx, Inc.
176 A.D.3d 1449 (3d Dep't 2019)

In this breach of a construction contract action, P moved for S/J on its first, second and fourth causes of action, and Ds cross-moved for S/J dismissing the complaint against Marx. Supreme Court denied P's motion, finding that a triable issue of fact existed as to whether Marx had breached the contract, and granted Ds' cross motion for S/J dismissing the complaint against Marx on the ground that P's claims against Marx were time-barred by a six-month limitation period set forth in the subcontractor agreement. Court held the contractual period here was unreasonable. Although there is nothing inherently unreasonable about the contractual six-month limitation period, "an otherwise reasonable limitation period may be rendered unreasonable by an inappropriate accrual date." The enforceability of a contractual accrual date depends upon "whether the P had a reasonable opportunity to commence its action within the period of limitation." Here, P had no such opportunity, because the timing of its payment was subject to a condition – Marx's receipt of payment from DASNY – that P could not control and that did not occur before the limitation period expired. The Court forcefully concluded that "a 'limitation period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim."

II. INTERPOSITION

Benitez-Rivera v. New York Botanical Garden
181 A.D.3d 501 (1st Dep't 2020)

Court granted motion to dismiss, finding D had established that no action had been commenced against it before the applicable 3-year SOL had expired on 3/6/16. It noted that P named D in October 2015 as a D in an amended S&C, but he did not file the amended S&C until July 2016. P's failure to file the amended S&C by 3/6/16 meant that the action was a nullity as to D.

III. STATUTORY PERIODS

A. Contract – CPLR 213

- No Cases -

B. Fraud – CPLR 213(8)

- No Cases -

C. Tort – CPLR 214(4) and (5)

Bandler v. DeYonker
174 A.D.3d 461 (1st Dep't 2019)

Court held the SOL for this tortious interference with contract and with prospective business relations is three years from the date of injury pursuant to CPLR 214(4), which is triggered when P first sustains damages. Here, the November 2015 complaint alleges that P was terminated from his engagement with nonparty BPCM in February 2012, which is when he was injured and his causes of action accrued. Thus, it was time-barred. P's argument that his claim for unjust enrichment is subject to a six-year limitation period was also rejected by the Court as such claims against Ds flow from alleged tortious conduct, and thus were barred by a three-year limitations period.

Troy-McKoy v. Mt. Sinai
183 A.D.3d 524 (1st Dep't 2020)

P's action to recover damages for destruction of his medical records in a fire was properly dismissed as barred by the three-year SOL. It noted the claim accrued upon the destruction of the records and not on the date of his discovery of the damage.

Naccarato v. Sinnott
176 A.D.3d 1467 (3d Dep't 2019)

P commenced this action in September 2013, claiming Ds' faulty drain system caused surface water to gather and collect on his property, causing damage. Court held action was subject to

CPLR 214(5), and the cause of action accrued when the damages are apparent, and not when the damages are discovered. However, later accrual date may be applied where injuries to property are caused by a continuing nuisance involving a continuous wrong and provided that the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed. Court held P's claims accrued in the spring of 2009 when Ps' property collapsed after Ps had been observing increased surface water on the property for over a year, and thus action was time-barred. Court also rejected Ps' efforts that a continuing wrong, and thus successive causes of action were involved. It noted that Ps' claims stem from the allegedly negligent construction of the French drain in 2007. During her deposition, P Patricia Naccarato acknowledged that Ps first suspected that the French drain was the cause of the water problem six months after it was installed. This "discrete act" was the alleged source of the damage to Ps' property). Any subsequent consequential damages stemming from this act did not give rise to successive causes of action.

***Durstenberg v. Electrolux Home Prods*.**
181 A.D.3d 444 (1st Dep't 2020)

P was allegedly injured as a result of a refrigerator catching fire on 12/12/12. He commenced an action against Electrolux, the manufacturer, in 10/15, and Electrolux had action removed to federal court. On 12/8/15 P moved for leave to amend the complaint to add P.C. Richard, the retailer, as a D and remand the action to state court. On 2/23/16, P's application was granted, and on 2/29/16 P filed an amended complaint, and on 3/18/16 P filed a supplemental summons. In addressing the SOL issues, Court held P's claims sounding in strict liability, negligence and negligent infliction of emotional distress were interposed against P.C. Richard on March 18, 2016, at the earliest, and thus, the claims are time-barred under CPLR 214. P's arguments that the federal court order granting him leave to amend the complaint to add P.C. Richard and to remand the case to state court overrode the SOL, that the CPLR does not provide a deadline for the filing of a supplemental summons, and that his failure to timely file a supplemental summons was caused by the fact that the state court docket was marked inactive, were found "unavailing."

D. Professional Malpractice

Etzion v. Blank Rome
174 A.D.3d 421 (1st Dep't 2019)

In this legal malpractice action, P sought to be relieved of his obligation to pay D's fees for the services rendered by them in defending him in a post-divorce fraud action commenced by his wife. He commenced the action after he had prevailed in the fraud action. Court held Supreme Court did not err in finding that this action, which was commenced 12 years after the divorce action ended, is barred by the applicable three-year SOL pursuant to CPLR 214(6). Court rejected P's contentions, that continuous representation doctrine is applicable, because Ds were retained under two separately executed retainer agreements in the divorce action and the fraud action. The first retainer agreement expressly stated that it did not cover any services following the entry of a final judgment of divorce. Thus, there was no mutual understanding that further representation was necessary on the specific subject matter of the malpractice claim. Moreover, the divorce action and the fraud action, although related, were two distinct and separate actions.

Mutual Redevelopment Houses v. Skyline Engineering
178 A.D.3d 575 (1st Dep't 2019)

P commenced this action in 2016 alleging that it retained D, an engineering firm, to perform "special inspection" services for "Phase I" of an HVAC installation project, and that Skyline negligently performed those services and breached the contract. In support of its motion for S/J dismissing the action as time-barred, D demonstrated *prima facie* that it completed Phase I work under the contract in 2012 and that it was serving in a professional capacity as an engineering firm when it performed those services, so that CPLR 214(6) applied. Court held the action was not time-barred because the continuous representation doctrine is applicable and tolled the accrual of the limitations period until 2014. P submitted evidence showing D provided special and progress inspection and testing services for "Remediation of Phase I" of the project, pursuant to a 2014 agreement. Although this work was completed under a separate agreement, D rendered these services to correct the engineering and construction defects that it failed to identify during its Phase 1 inspection in 2012. Since D continued to provide services in connection with Phase I in 2014, the action commenced in 2016 is timely under CPLR 214(6).

WSA Group, PE-PC v. DKI Engineering & Consulting USA
178 A.D.3d 1320 (3d Dep't 2019)

P entered into a subcontract with D, a professional engineering firm, by which D agreed to inspect certain state bridges pursuant to P's prime contract with the Department of Transportation. The subcontract provided that the time period for D's performance was January 1, 2012 through May 31, 2014, and included a provision requiring D to indemnify P for certain costs and expenditures arising from D's errors, omissions or negligence. In March 2017, D's employee, Ahmad, was convicted of falsifying a 2013 inspection report for one of the bridges covered by the subcontract. As a result, P incurred costs related to cooperating in the investigation, providing information and appearing and testifying at administrative and judicial hearings, and was required to reimburse DOT for sums paid to D for Ahmad's work. D declined P's request for indemnification of these costs. In May 2018, P commenced this action against D stating causes of action in negligent supervision and breach of contract, and seeking to recover its expenditures arising from Ahmad's misconduct. D moved to dismiss the complaint as time-barred under CPLR 213 (6). P asserts that the claims are timely because they could not be pleaded until the damages resulting from Ahmad's actions in 2017 were in fact incurred, and that the payments of those costs, fees, and expenses were made less than three years before commencement of this action in 2018. Court rejected the argument, finding it contrary to the well-established rule that a claim for professional malpractice against an engineer or architect accrues upon the completion of performance under the contract and the consequent termination of the parties' professional relationship; and that a contrary rule would vitiate the purposes of the 1996 amendments to CPLR 214(6). Thus, to the extent that P's claims sound in professional malpractice, they are deemed to accrue when such a claim would accrue. Here, the subcontract specified a completion date in May 2014 and did not contemplate any continuing professional responsibilities beyond that date. Thus, Supreme Court correctly determined that the parties' professional relationship terminated in May 2014, that the negligent supervision cause of action and the aspect of the breach of contract cause of action that sounds in professional malpractice accrued at that time, and that these claims are time-barred because the action was not commenced within three years thereafter.

Leeder v. Antonucci
174 A.D.3d 1469 (4th Dep't 2019)

P alleged D committed malpractice during an estate accounting proceeding by failing to timely file objections to the proposed accounting. Court held initially that D showed the action, commenced on 11/15/13, was time-barred under CPLR 214(6) as the cause of action accrued on 11/1/10, the last date on which to file objections to the accounting. However, Court held P had raised a triable issue of fact that the SOL was tolled by the continuous representation doctrine. It noted that in order for the continuous representation doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney which often includes an attempt by the attorney to rectify an alleged act of malpractice. Here, P submitted evidence that D made several unsuccessful attempts to file the objections within the weeks after the deadline and that he made preparations to appear at a scheduled conference on the objections on November 23, 2010. Those efforts could be viewed as attempts by the attorney to rectify an alleged act of malpractice, and thus P raised a triable issue of fact

E. Medical Malpractice – CPLR 214-a

Dookhie v. Woo
180 A.D.3d 459 (1st Dep't 2020)

In this medical malpractice action based on D's failure to properly diagnose renal cell carcinoma, Court noted that where, as here, a malpractice claim is predicated upon an alleged failure to properly diagnose a condition, the continuous treatment doctrine may apply as long as the symptoms being treated indicate the presence of that condition. Here, P raised an issue of fact as to whether Dr. Woo continuously treated the decedent for conditions related to renal cell carcinoma. P's expert opined that Dr. Woo treated the decedent for symptoms of back pain, hypertension, and insomnia, all of which were symptoms of and related to renal cell carcinoma, a diagnosis that should have been considered given the findings in the 2006 MRI of a renal mass. Thus, P sufficiently established that such treatment continued through the decedent's hospitalization in July 2012. **COMMENT:** Court also noted that the one-year and three-month gap between April 2011 visit and the July 2012 note did not preclude application of the continuous treatment doctrine.

Wesolowski v. St. Francis Hosp.
175 A.D.3d 1461 (2d Dep't 2019)

Decedent was injured during an incident on August 12, 2005, while he was a patient at the D hospital. The decedent got out of bed in a "confused" state, started to walk through the hallway, refused assistance, and attempted to hit hospital staff. On August 7, 2008, P commenced this action, *inter alia*, to recover damages for personal injuries, alleging, among other things, that D was negligent in failing to train its employees to safely restrain patients. Court denied D's S/J motion seeking dismissal of the action as time-barred. It held D failed to establish, *prima facie*, that P's claims were time-barred under the 2½-year SOL applicable to medical malpractice actions. Since D did not present any evidence that a doctor ordered the decedent to be restrained at any point prior to or during the subject incident, the D failed to establish that the P's claims

related to medical treatment, as opposed to the failure of hospital staff to exercise ordinary and reasonable care to prevent harm to the decedent.

Mula v. Sasson
181 A.D.3d 686 (2d Dep't 2020)

In this medical malpractice action, P underwent a mammogram and ultrasound at HVDI on 4/18/15. After reviewing the results, D radiologist Racanelli, employed by HVDI, recommended a biopsy which was performed on 11/5/15 and which indicated the presence of cancer. On 2/5/18 P commenced this action against HVDI and Racanelli, alleging they were negligent in failing to diagnose breast cancer and failing to timely notify her of the biopsy recommendation. Supreme Court dismissed the action as time-barred. Court noted initially that effective 1/31/18, a discovery rule for negligent failure to diagnose cancer or a malignant tumor was enacted. (see L 2018, ch 1). The law applies to acts, omissions, or failures occurring on or after 1/31/18 (see L 2018, ch 1, § 5), as well as to acts, omissions, or failures occurring on or after 7/31/15. (see L 2018, ch 1, § 6). Court agreed with the Supreme Court's determination that these provisions were inapplicable to the instant case, as the alleged omission occurred on 4/18/15. However, Court noted the 2018 enactment also includes a provision providing for the revival of certain claims, such that an action may be commenced within six months after the effective date, *i.e.*, by 7/31/18, when it alleges a failure to diagnose cancer or a malignant tumor, and when it became time-barred within 10 months prior to the effective date, *i.e.*, on or after 3/31/17. (see L 2018, ch 1, § 4). Here, P's claim against Ds qualifies for revival pursuant to that provision, as it became time-barred on 10/18/17 and the action was commenced on 2/5/18, prior to the 7/31/18 deadline. Thus, Supreme Court should have denied the motion.

Angelhow v. Chahfe
174 A.D.3d 1285 (4th Dep't 2019)

In this medical malpractice action, Court granted D's motion for S/J as to P's claims arising from a 2005 surgical procedure, on the ground it was untimely. It held Ds had established that those claims are time-barred inasmuch as more than 2½ years elapsed between the date of the alleged conduct and the commencement of the action and failed to raise an issue of fact in opposition. Contrary to P's contention, the continuous treatment doctrine does not apply. It is undisputed that P did not treat with D in relation to the 2005 surgery after her final follow-up appointment in 2005, and that she did not return to D until 2010. The surgical procedures in 2005 and 2010 were discrete and complete events that cannot be linked by way of the continuous treatment doctrine, and there was no evidence of anticipated further treatment related to the 2005 procedure at the time P left D's care in 2005.

F. Intentional - CPLR 215

CPLR 215(9), eff. Sept. 4, 2019

CPLR 215 was amended by L. 2019, c. 245 by the addition of subdivision (9). It provides that an action to recover damages related to domestic violence as defined shall be commenced within two years.

Kessel v. Adams
181 A.D.3d 1186 (4th Dept 2020)

Court granted D's motion to dismiss complaint as against her as time-barred. P had alleged a sole cause of action for negligence for injuries she sustained when Ds, two of her students, began fighting one another and P, who was standing between them, was propelled into a locker. Court held on D's S/J motion that P was injured as a result of intentional conduct that constituted a battery and not negligent conduct. It noted a "valid claim for battery exists where a person intentionally touches another without that person's consent and the intent required for battery is intent to cause a bodily contact that a reasonable person would find offensive; there is no requirement that the contact be intended to cause harm." The deposition testimony of P and Ds submitted in support of the motion established that Ds intentionally caused offensive bodily contact with each other by engaging in a physical fight. Although Ds did not intend to make physical contact with or to injure P, the contact that resulted in P's injuries was nevertheless intentional under the doctrine of "transferred intent." As the conduct occurred more than 1 year before action was commenced, the action was time-barred.

G. Child Victims Act (L. 2019, ch. 14)

Act amended CPLR 208 to extend SOL to bring a civil action for the sexual abuse of a child until P reaches the age of 55. CPLR 214-g was added to revive for one year from August 14, 2019 previously time-barred actions. Other statutory provisions were also amended.
COMMENT: Act requires a close reading.

H. Municipality

Fitzgerald Morris v. Mayor of Village of Hoosick Falls
179 A.D.3d 1361 (3d Dep't 2020)

In this action seeking payment of legal fees, Court noted as to P's quantum meruit cause of action, Court viewed the cause of action as one arising from a breach of contract. Thus, the SOL for contract actions against a Village was governed by the 1 ½ year SOL under CPLR 9802, which accrued at the time of the P's discharge.

I. Wrongful Death

E. Reed v. New York State Electric & Gas Corp.
183 A.D.3d 1207 (3d Dep't 2020)

In this wrongful death action, D Town argued that the wrongful death action must be filed within the limitations period for the underlying negligence claim. Court rejected the argument, noting that P's action is not alleging separate claims for P/I and wrongful death; it is just an action for wrongful death under EPTL 5-4.1(1). As it was commenced within two years from the child's death, Supreme Court erred in dismissing the negligent design and installation claims against the County and all claims against the Town as untimely.

O'Dell v. County of Livingston
174 A.D.3d 1307 (4th Dep't 2019)

In this action for false arrest against the municipality, Court noted that it arose on the date of his arrest, 9/7/15, and the SOL began to run on that date. The complaint, however, was not filed until 8/8/17, which was beyond the expiration of the SOL on 12/7/16.

III. TERMINATION / NEW ACTION: CPLR 205

U.S. Bank Assn. v. DLJ Mortgage Capital
33 N.Y.3d 72 (2019)

In this action involving alleged misrepresentations of quality of bonds in a mortgage backed securities trust, P's timely first action was dismissed for failure to comply with a contractual condition precedent. Court held second action timely under CPLR 205(a) as first action was dismissed for failure to comply with a contractual condition precedent. Court noted the statute applies in instances where an action has been terminated for some fatal flaw unrelated to the merits of the underlying claim and is to be liberally construed. Since the agreement's notice and sole remedy provisions were not substantive elements of the cause of action, but rather are procedural prerequisites, they are not related to the merits of a claim based on alleged violations of representations and warranties.

U.S. Bank Assn. v. DLJ Mortgage Capital
33 N.Y.3d 72 (2019)

This action was initially commenced by individual certificate holders and was dismissed for lack of standing. The trustee of the trust recommenced the action which was dismissed with prejudice as barred by the SOL. P now relied upon CPLR 205(a). Court held P failed to preserve its claim that it may refile the action under CPLR 205 (a). Court observed that D in a footnote in its motion to dismiss, argued that P could not use CPLR 205 (a) to cure the pleading deficiency by refashioning the case with the trustee as P. In its response, the trustee made no mention of section 205 (a) and did not argue before Supreme Court that it should be considered the same P as the certificate holder for purposes of that section. Because D's argument by its terms sought to persuade Supreme Court to dismiss the claim with prejudice, P trustee was required to respond and present its view of CPLR 205 (a) to that court to preserve its argument on appeal.

Federal Home Loan Bank v. Moody's Corp.
176 A.D.3d 518 (1st Dep't 2019)

P's prior action, filed in MA, was removed to federal district court in MA and was then transferred from that court which lacked P/J over Ds, to the Southern District pursuant to 28 USC §1631. That provision allows a federal court to transfer an action when there is no P/J to a federal court in which the action could have been brought, and that "the action … shall proceed as if it had been filed in … the court to which it is transferred on the date upon which it was actually filed in … the court from which it is transferred." Thus, Supreme Court for purposes of CPLR 205(a), which only applies to actions commenced in a federal court in NY properly treated P's prior action as if it had been filed in the SDNY.

Sokoloff v. Schor
176 A.D.3d 120 (2d Dep't 2019)

This medical malpractice action was initially commenced in decedent's name and P's (his wife) name in 2013 after decedent, unbeknownst to P's attorney, had died. The action was dismissed by the trial court as a "nullity," but the order dismissing it did not set forth any reason for the dismissal. P then as administratrix of the decedent's estate commenced a new action in 2016 pursuant to CPLR 205(a). Court held in an instructive opinion by Justice Dillon that she was entitled to commence the new action as the order directing the dismissal of the action did not set forth on the record a specific pattern of conduct constituting a neglect to prosecute required by CPLR 205(a) to preclude the commencement of subsequent litigation against Ds. The dismissal was actually based on lack of capacity, a defect that did not preclude the application of CPLR 205(a).

Wells Fargo Bank v. Porto
179 A.D.3d 1204 (3d Dep't 2020)

In this mortgage foreclosure action, the action was dismissed on 6/26/13 as abandoned. P moved to vacate in May 2014 and on 8/18/15 denied the motion, but agreed to entertain a renewal motion made within 60 days of service of notice of entry. No such motion was made and on 7/13/16 Supreme Court dismissed the complaint and no appeal was taken. On 10/11/16, P commenced this second foreclosure action. In applying CPLR 205(a), Court concluded that the first cause of action was terminated for CPLR 205 (a) purposes 30 days after the entry of the August 2015 order, *i.e*., on September 18, 2015 when P's right to appeal expired. Court concluded the July 2016 dismissal order ministerial in nature and somewhat of a mischaracterization, for the complaint was dismissed in the July 2013 order and was never reinstated. As such, the six-month window in which P could commence a new action expired by March 18, 2016, rendering the second action untimely under CPLR 205 (a).

***Best Global Alt., Ltd. v. American Storage & Transport, Inc*.**
__ Misc.3d __ (Sup. Ct. Nassau Co. 2020) (Brandveen, J.)

D moved to dismiss on the ground the action was barred by the applicable SOL. As stated by the Court: "Ds' motion presents not only procedural issues suitable for a Bar examination, but a novel question which ahs not specifically been addressed by an appellate court: should the clause in CPLR 205(a)'s six-month extension of time to refile an action that has bene dismiss - provided that service upon D is effected within such six-month period - mean that service of process pursuant to CPLR 308(2) must be delivered to a person of suitable age and discretion and mailed to person's last known residence of actual place of business in accordance with the two-step procedural requirements of that statute, before the expiration of that six-month period or should the word effected be interpreted to mean that the process must also, within the six-month window, be filed with the Clerk of the Court and then completed tend days after the filing? In a thoughtful decision with a thorough analysis of pertinent precedent, Court opted for the former interpretation.

IV. TOLLS

Lubonty v. U.S. Bank Nat. Assoc.
34 N.Y. 250 (2019)

P mortgagor filed an action seeking cancellation and discharge of mortgage after dismissal of assignee's foreclosure action for lack of P/J. He argued that enforcement of the mortgage was barred by the SOL. D's motion to dismiss based upon a claim that the SOL period had been tolled during stays prompted by the mortgagor's bankruptcy filings. Second Department affirmed the granting of the motion and a split court affirmed. The majority initially held that the automatic bankruptcy stay was a "statutory prohibition" under CPLR 204(a). It then held that P could invoke the provision even thought he had commenced an action under the bankruptcy stay went into effect. Judge Stein dissented in an opinion in which Judges Rivers and Fahey concurred. She found the express language of CPLR 204(a) to be unambiguous and to apply only to the "commencement" of an action. She pointed to CPLR 304, which defines commencement an action is commenced by filing a S&C or summons with notice. She thus concluded that CPLR 204(a) is only available where a would-be P is precluded from duly filing the applicable papers - thereby commencing an action - as the result of a stay or statutory prohibition.

Schlapa v. Con. Ed.
174 A.D.3d 934 (2d Dep't 2019)

In this P/I action, arising out of an accident that occurred on 1/6/12, Supreme Court granted leave to P on 3/23/15 to serve a supplemental summons and amended complaint to add a new party within 30 days after service of the order with NOE. While the order was promptly filed, P did not serve the order until 10/21/16, and then filed the process on 10/24/16 against the added D. That D moved to dismiss the action as against it as time-barred. Supreme Court granted the motion and the Court affirmed. Court noted that while the SOL period is tolled where, as here, a motion for leave to file and serve amended process is made prior to the expiration of the SOL, the toll encompasses only the period from the date the motion for leave to amend is filed until the date the order granting that motion is entered, with the SOL period commencing to run again after entry of the order. Here, even after deducting the period between the filing of P's first motion to amend on 9/16/14 and the entry of the order granting relief on 3/31/15, P's commencement of the action against the new D by the filing of the amended pleadings on 10/24/16 occurred long after the expiration of the 3-year SOL.

Szarka v. Paratore
179 A.D.3d 864 (2d Dep't 2020)

On 11/20/12, D's decedent was operating a MV in which P was a passenger, and was involved in an action in which the decedent was injured and died the next day. P commenced the action against D as administrator of his estate on April 13, 2017, and D moved to dismiss on ground the 3-year SOL had expired. Supreme Court denied the motion and Court affirmed. Contrary to D's argument, Court noted that the application of CPLR 210(b) did not depend on the circumstances surrounding the actual appointment of a D administrator in a particular action, or the time when a P actually became aware of the D's appointment. Rather, where the cause of action exists at the

time of the decedent's death, CPLR 210(b) tolls the SOL from the moment of the decedent's death until 18 months later, at which time the SOL automatically resumes running. Here, the decedent died on the day that the cause of action accrued. Thus, the three-year SOL did not begin to run as to the D administrator until May 20, 2014, 18 months after the decedent's death and this action was timely commenced.

V. RELATION-BACK - CPLR 203(f)

U.S. Nat. Bank Assn. v. DLJ Mortgage Capital
33 N.Y.3d 84 (2019)

In the context of an untimely filed consolidated complaint by P, the trustee of 3 residential mortgage-backed securities trust, alleging that D violated representations and warranties regarding the quality of loans contained in the securitization trust instruments, Court held the complaint could not relate back under CPLR 203(f) to a certificate holder's timely filed actions. 203(f) applies only in those cases were a valid preexisting action has been filed. Here, the 3 trusts were each governed by separate pooling and servicing that included a no action clause and mandatory remedial provisions requiring any party that discovered a breach to promptly notify the other party and allow D to remedy the defect. While the certificate holder filed timely separate summonses and notice for each trust, the lower courts concluded that under the no action clause the certificate holder could not bring the action on behalf of itself, or the trustee. Thus, there was no valid preexisting action to which a claim in a subsequent amended pleading could relate back.

Vanyo v. Buffalo Police Dept.
34 N.Y.3d 1104 (2019)

P filed but did not serve the original S&C, but then filed an "amended S&C after the SOL had run and served them. The Fourth Department held that P had unsuccessfully sought to amend as of right and the trial court did not abuse its discretion in denying P's motion for an extension under CPLR 306-b, and the relation-back doctrine did not apply because the failure to serve the original complaint did not give them the required notice of the occurrences to be proved pursuant to the amended complaint. In a memorandum decision, the Court, in essence, reversed. It held that the relevant causes of action were identical in both the original and amended complaints; those claims were timely interposed in the original complaint (making relation back inapplicable); and Ds waived their right to contest service of the original complaint by not properly raising such an objection. Court remanded for a consideration of D's motion to dismiss under CPLR 3211(a)(7).

Stanger v. Shoprite of Monroe
180 A.D.3d 408 (1st Dep't 2020)

In this P/I action, Court affirmed denial of D Brixmo's motion to dismiss the complaint as time-barred. Ps relied upon the relation back doctrine. Court noted that where a P under *Buran v. Coupal* (87 N.Y.2d 173, 178) seeks to add a new D under the relation back doctrine, the following three criteria must be met: "(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is united in interest' with the original defendant, and by reason of

that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well." While the first and third elements were not in dispute, an issue was present as to the second. Court noted that at this stage of the litigation, in which discovery has not yet taken place, Brixmor Monroe's argument that Ps' submissions do not establish that it is united in interest with Brixmor is unavailing, since on a motion to dismiss, the pleadings are to be liberally construed, and Ps are entitled to the benefit of every favorable inference.

Petruzzi v. Purow
180 A.D.3d 1083 (2d Dep't 2020)

In this medical malpractice and wrongful death action, Court affirmed grant of motion for leave to amend the complaint to add a non-party as a D. While the SOL had expired, Court found that the relation-back doctrine was applicable. In an thorough decision, Court found the three requirements set forth in *Buran v. Coupal* (87 N.Y.2d 173, 178) were established. **COMMENT:** Motion was made pursuant to CPLR 1003.

VI. BORROWING STATUTE: CPLR 202

Deutsche Bank v. Barclays Bank
34 N.Y.3d 327 (2019)

P, trustee of residential mortgage-backed securities trust and a CA resident, brought action against D banks alleging breach of contract. At issue was where its causes of action accrued. As stated by the Court: Here, P asks us to apply a multi-factor analysis to determine that its cause of action accrued in NY for purposes of CPLR 202. We decline to apply such a test, and instead rely on our general rule that when an economic injury has occurred, the place of injury is usually where P resides. We further conclude that P's causes of action accrued in CA, and that its actions are untimely pursuant to CPLR 202. **COMMENT:** CA's SOL was 4 years.

Part Five

PARTIES AND PLEADINGS

I. PARTIES

Franco v. Ketterer
174 A.D.3d 578 (2d Dep't 2019)

The death of the D several months prior to the commencement of this action rendered the action a legal nullity from its inception. Under these circumstances, Supreme Court was without jurisdiction to entertain the underlying motion and cross motion, and the order rendered, must be vacated as a nullity. Likewise, the notice of appeal purportedly filed on behalf of D is a nullity and the Court had no jurisdiction to hear and determine the purported appeal.

Li v. Xiao
175 A.D.3d 672 (2d Dep't 2019)

In this medical malpractice action, Court held the mere fact that this action was commenced before P moved pursuant to CPLR 1202 to be appointed guardian ad litem of her husband does not provide grounds for dismissal of the complaint. An incapacitated individual who has not been judicially declared incompetent may sue or be sued in the same manner as any other person, and CPLR 1202(a) expressly contemplates that a motion for the appointment of a guardian ad litem may be made "at any stage in the action." Thus, there is no strict legal requirement that P should have been appointed guardian before the commencement of this action. While it would have been better for the action to have been commenced in Zheng's name, rather than by P "as Proposed Guardian Ad Litem of [Zheng]," the defect is not fatal, particularly given the relatively short delay between the commencement of the action and the filing of P's guardianship motion.

Wells Fargo Bank v. Schubnel
176 A.D.3d 1313 (3d Dep't 2019)

"As an initial matter, we must first address the impact of D's death upon this Court's jurisdiction to entertain this appeal. The death of a party generally stays an action until a personal representative is substituted for the deceased party. Strict adherence to this rule, however, is unnecessary where a party's demise does not affect the merits of the case. Here, D's death did affect the merits. Thus, because an automatic stay was in effect upon D's death, Supreme Court was without jurisdiction to consider D's motion and, therefore, the November 2017 amended order is a nullity. As such, the appeal must be dismissed."

Navas v. New York Hosp.
180 A.D.3d 796 (2d Dep't 2020)

In this medical malpractice action, Court held Supreme Court properly exercised its discretion in granting D's motion to dismiss the complaint and denying P's cross-motion for substitution

pursuant to CPLR 1201. It took into account P's delay in seeking substitution. P contended that the delay in seeking substitution was only six weeks, as measured from the restoration of the case in October 2017 to the making of the P's cross-motion in January 2018. However, the true measure of delay is more than four years, commencing with the death of the P in November 2013. Court also noted that there is no indication that counsel for the plaintiff was aware of the plaintiff's death. While it may be that the surviving members of the plaintiff's family were aware of the plaintiff's death, there is no indication on this record that the family was aware of the legal significance of that fact. Nevertheless, there was an unexplained period of inactivity that lasted nearly four years, which reflects a lack of diligence in pursuit of the action.

II. COMPLAINT

A. Sufficiency

Sloninski v. City of New York
173 A.D.3d 801 (2d Dep't 2019)

Court held: (1) "When a cause of action alleging negligence is asserted against a municipality, and the municipality is exercising a governmental function, the P must first demonstrate that the municipality owed a special duty to the injured person. A s relevant here, a special duty exists when the City 'voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty' P failed to allege any particular action or promise on the part of the City to act on behalf of the P, or justifiable reliance by the P on any act or promise by the City. (2). D failed to state a cause of action to recover damages for nuisance. "The elements of a private nuisance cause of action are: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.). Here, the P's conclusory allegations that the City created a nuisance, which interfered with his use and enjoyment of his property, were insufficient to state a cause of action alleging nuisance".

P.D. & Assoc. v. Richardson
64 Misc.3d 763, 104 N.Y.S.3d 876 (Sup. Ct. Westchester Co. 2019) (Ruderman, J.)

Ps, an attorney and his law firm, commenced this defamation action seeking money damages and injunctive relief for critical and insulting statements posted by D, a former client, on websites such as Facebook and Yelp. Court held Ps' unilateral adoption of a caption that did not state their names was not warranted. It noted the determination of whether to allow a P to proceed anonymously requires the court to use its discretion in balancing the P's privacy interest against the presumption in favor of open trials and against any potential prejudice to the D. Here, Ps' desire to preserve their privacy, and to prevent further dissemination of D's criticisms and claims against them, did not amount to the type of truly sensitive and highly personal claims that create a privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings.

III. ANSWER

A. Timeliness

Bey v. Sobro Local Dev. Corp.
177 A.D.3d 448 (1st Dep't 2019)

Court affirmed Supreme Court's order permitting D to serve a late answer pursuant to CPLR 3012(d). It wrote: "D's de minimis delay, combined with its reasonable excuse of having lost track of filing deadlines, the absence of any indication that the delay was willful or that it was prejudicial to P, the merits of D's defense, and the State's policy of resolving cases on the merits, supported the relief." **COMMENT:** Note First Department, while not requiring a showing of merit, presence of merit is a factor in determining whether to grant relief. Second Department and Fourth Departments require a showing of merits. *See McKiernan, Vaccaro,* 168 A.D.3d 826 (4th Dep't 2019); *Sutton v. Williamsville School Dist., infra*.

Green Tree Servicing v. Weiss
180 A.D.3d 654 (2d Dep't 2020)

In this foreclosure action, P moved for an order of reference when D failed to interpose a timely answer; and D cross-moved to dismiss the action as time-barred or in the alternative to serve a late answer. Court affirmed the order granting the motion and denying the cross-motion. As to the cross-motion, Court observed that Ds waived a SOL defense by failing to raise it in an answer or in a timely pre-answer motion to dismiss. Court further noted that a D who has failed to timely answer a complaint and who seeks leave to file a late answer must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action. Here, since Ds failed to proffer a reasonable excuse for their delay in answering the complaint, it is not necessary to determine whether they demonstrated a potentially meritorious defense to the action.

Bank of New York v. Van Roten
181 A.D.3d 549 (2d Dep't 2020)

In this mortgage action, Court affirmed Supreme Court's order granting P leave to enter a default judgment and denying D's motion to compel P to accept his late answer. Court held P offered sufficient proof of a viable cause of action. In so holding, Court noted that given in default proceedings D has failed to appear and P does not have the benefit of discovery, P's proof "need only allege enough facts to enable a court to determine that a viable cause of action exists."

Preferred Mut. Ins. Co. v. DiLorenzo
183 A.D.3d 1091 (3d Dep't 2020)

In finding a default in failing to answer, Court noted that as D was served pursuant to CPLR 308(2), service is not complete until 10 days after the filing of proof of service. As P filed the AOS on 11/20/18, service was complete on 12/10/18, giving him 30 days after that date to answer.

Sutton v. Williamsville Surburban LLC
174 A.D.3d 1467 (4th Dep't 2019)

P moved for a default judgment and Ds cross-moved for an extension of time to file an answer pursuant to CPLR 2004. Court granted motion and denied cross-motion. It wrote: "To successfully oppose P's motion, the Ds had the burden of proving that they had a reasonable excuse for the default and a meritorious defense to the action. It is well-settled law that this burden require[s] Ds to put forth non-speculative evidence that constitutes a *prima facie* defense. Ds, however, failed to submit admissible evidence sufficient to demonstrate the existence of a potentially meritorious defense, and their proposed answer was not verified by anyone with personal knowledge of the facts. Inasmuch as the D' cross motion for an extension of time to answer pursuant also required a showing of a meritorious defense, we conclude that the court erred in granting the cross motion."

IV. THIRD-PARTY COMPLAINT

Santoro v. Poughkeepsie Crossing, LLC
180 A.D.3d 12 (2d Dep't 2019)

In this wrongful death action, plaintiff alleged that defendant residential health care facility failed to provide adequate treatment to decedent after her hospitalization for a heart attack. D filed a third-party action against decedent's adult daughter for indemnification and or contribution based upon the daughter's alleged negligent supervision of decedent in failing to follow its discharge instructions. Court in a comprehensive decision authored by Justice Hinds-Radix addressed both of the third-party claims. (1) As to indemnification, the Court noted that in the classic indemnification case, the one seeking indemnity had committed no wrong, but by virtue of some relationship with the tortfeasor or obligation imposed by law, was nevertheless held liable to the injured party. Here, D did not allege any scenario under which it could be held vicariously or statutorily liable for any negligence of the daughter. Any liability for damages imposed upon D for decedent's injuries would be imposed upon it by virtue of its own conduct. (2) As to the contribution claim, D alleged that the daughter either caused, contributed to, or exacerbated the dec3edent's injuries, which could be a basis for contribution, based upon a duty owed either to the decedent or to D. Court found no duty existed. It noted that there was no allegation that the daughter assumed a contractual duty to decedent to take care of her or to provide treatment for her condition. While D alleged that the daughter assumed a duty of care for decedent in accordance with D's instruction "that would have ordinarily been owed to any other person," ordinarily a person owes no duty to members of the public at large except to avoid injury to them by forces set in motion by such person or those acting as his or her agents, and there was no allegation that the daughter or her agents set forces in motion which caused decedent's injuries. Nor did the daughter voluntarily assume a duty of care by taking decedent home, as there is no common-law duty of a child to care for a parent.

Martinez v. Kaz USA
183 A.D.3d 720 (2d Dep't 2020)

In this P/I action, infant P was injured when she knocked over a humidifier in her home. Her parents sued D manufacturer of humidifier, and D impleaded the parents as third-party Ds. Court granted motion to dismiss third-party action, noting the acts complained of in the third-party complaint were encompassed within the intrafamily immunity for negligent supervision.

V. AMENDMENTS

Sutton Animal Hosp. v. D&D Dev. Corp.
177 A.D.3d 467 (1st Dep't 2019)

Court held Supreme Court erred in granting *sua sponte* P leave to file a second amended complaint to assert an unpleaded negligent misrepresentation claim in the absence of a cross motion and an accompanying proposed pleading. The lack of proposed pleading precludes meaningful review of the sufficient of the allegations, including D's contention that such a claim is time barred. **COMMENT:** Don't overlook CPLR 3025's requirement!

Ness Technology v. Pactera Technology
180 A.D.3d 607 (1st Dep't 2020)

Court affirmed Supreme Court's motion to amend answer to add an affirmative defense and counterclaims. In so holding, Court noted D failed to explain why it waited until the brink of the discovery deadline to file its motion and why it did not move by OTSC or otherwise convey in a timely fashion the "emergency" that arose when it realized that Ps' belated document production contained previously unknown admissions that formed the basis for the counterclaims.

Atlas MF Mezzanine LLC v. Macquarie Texas LLC
181 A.D.3d 488 (1st Dep't 2020)

Court held Supreme Court did not abuse its discretion in denying leave to amend the first amended complaint, particularly where P acknowledged that it could have sought, but strategically chose not to seek, leave sooner. Court also noted the additional allegations against D supplement claims this Court already deemed sufficiently pleaded, and those further allegations would prejudice D at this late stage, when discovery has closed, trial was scheduled to commence, and D's S/J motion to dismiss the claims was pending.

Bradford v. Chowdhury
183 A.D.3d 431 (1st Dep't 2020)

P was awarded damages and Supreme Court denied D's motion to amend their answer to assert a setoff defense. P commenced this action, arising from a motor vehicle accident, against Ds, who owned and operated the taxi in which she was a passenger, and two other individuals, who owned and operated the second vehicle involved in the accident. P settled with the other individuals, and proceeded to trial against Ds four years later. Although D were informed of the settlement and received copies of the settlement documents, they did not seek to amend their

answer to assert the affirmative defense of a setoff under GOL §5-108(a), until after the jury returned a verdict in P's favor. If the setoff defense applied, P would have recovered no damages from Ds. Court affirmed denial based on Ds' unexcused delay in making their motion, which prejudiced P by causing her to expend significant time and expense in preparing for trial under the belief that Ds would not seek an offset. Such preparation, as well as P's approach to settlement discussions with defendants, may have been altered if P was aware of Ds' intent to assert an offset defense.

Philadelphia Indemnity Ins. Co. v. Harleysville Preferred Ins. Co.
179 A.D.3d 959 (2d Dep't 2020)

Court affirmed Supreme Court's denial of D's motion to amend Second Amended Answer to add additional counterclaims on the ground it was "palpably insufficient."

Hendricks v. Annucci
179 A.D.3d 1232 (3d Dep't 2020)

In this Article 78 proceeding, Supreme Court declined petitioner's request to consider his amended petition while respondent's motion to dismiss was pending. Court found no error, noting that pursuant to CPLR 7804(b) petitioner was obligated to obtain Supreme Court's permission to file an amended petition and petitioner failed to obtain that permission.

Park v. Home Depot
183 A.D.3d 645 (2d Dep't 2020)

Court affirmed order granting leave to amend complaint to correct the date of the accident. It noted that leave should be freely granted in the absence or prejudice and there was no prejudice here.

VI. BILL OF PARTICULARS

Silber v. Sullivan Properties
182 A.D.3d 512 (1st Dep't 2020)

In granting D's S/J motion, and denying P's cross-motion to amend the BOP, Court held initially P's expert improperly raised for the first time a new theory of liability that had not been set forth in the complaint or BOP. As to the motion to amend, served two months after Ps opposed Ds' S/J motion, Court noted that P did not submit an affidavit or any other admissible evidence to show a reasonable excuse in moving to amend the BOP about three months after the NOI was filed and three years after the action was commenced. Further, the violations P sought to add to the original BOP constituted untimely substantive additions to the theory of the case, warranting denial of the motion.

Cherry v. Longo
175 A.D.3d 1481 (2d Dep't 2019)

In this MV accident case, P moved for leave to serve a supplemental BOP alleging that P's decedent's death was caused by the subject accident. Supreme Court had previously issued an order dated February 7, 2017, which provided that the P "is precluded from specifically alleging the accident which is the subject of this lawsuit as a cause of death pursuant to the prior court order dated 12/21/16." Supreme Court denied the motion and Court affirmed. It commented that a P seeking leave to amend a BOP by asserting a new injury must show a reason for the delay in asserting the injury and include a medical affidavit showing a causal connection between the alleged injury and the original injuries sustained. Here, Supreme Court providently exercised its discretion in determining that the P failed to proffer a sufficient reason for failing to allege that Ali's death was caused by the accident, in response to the court's deadline. Moreover, P failed to submit a medical affidavit that sufficiently demonstrated a causal connection between Ali's death on January 4, 2015, and the injuries allegedly sustained in the accident.

Anonymous v. Gleason
175 A.D.3d 614 (2d Dep't 2020)

In this medical malpractice action, P sought leave to amend the complaint and BOP in response to D's S/J motion. Court affirmed denial of motion. It noted that once discovery has been completed and the case has been certified as ready for trial, a party will not be permitted to amend the BOP except upon a showing of special and extraordinary circumstances. Here, P failed to show special and extraordinary circumstances.

Cioffi v. S.M. Foods
178 A.D.3d 1006 (2d Dep't 2019)

In this PI action, Supreme Court denied Ps' motion for leave to amend their BOP. Court reversed. Initially it noted that when a motion for leave to amend a BOP alleging new theories of liability not raised in the complaint or the original BOP is made on the eve of trial, leave of court is required, and judicial discretion should be exercised sparingly, and should be "discreet, circumspect, prudent, and cautious". Nevertheless, leave to amend a bill of particulars may properly be granted, even after the note of issue has been filed, where the P makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the D. Here, despite their unreasonable and unexplained delay in seeking leave to amend their bill of particulars and interrogatory responses, the Ps did not seek to assert any new theory of liability, but rather, sought to narrow a theory previously asserted. Specifically, whereas the Ps had previously alleged violation of "all provisions of the [Federal Motor Carrier Safety Regulations] Parts 300 to 399," their proposed amendment sought to narrow this allegation to specify a violation of 49 CFR 392.2 as a result of a violation of Tuckahoe Village Code § 21–33.1. Since the proposed amendment was meritorious and sought to narrow the issues before the Supreme Court, the court should have granted the Ps' cross motion for leave to amend their bill of particulars and interrogatory responses as requested.

Jeannette v. Williot
179 A.D.3d 1479 (4th Dep't 2020)

In this medical malpractice action, Court held Supreme Court properly granted Ds' motion to strike P's "supplemental" BOP as the documents that P labeled "supplemental" BOPs were actually amended BOPs because they listed a new injury, *i.e*., hypovolemic shock. Thus, Supreme Court properly granted the motions to strike P's "supplemental" BOPs inasmuch as they were actually amended BOPs. Court further concluded that the amended BOPs are "a nullity" inasmuch as the NOI had been filed and P failed to seek leave to serve amended BOPs before serving them upon Ds. Court also held Supreme Court properly denied P's cross motion to the extent that she sought leave to serve the amended BOPs, noting "Leave to serve an amended BOP should not be granted where a [NOI] has been filed, except upon a showing of special and extraordinary circumstances." Here, P failed to allege any special and extraordinary circumstances that would permit her to amend her BOPs.

***Lazzari v. Qualcon Constr.*62 Misc.3d 1082 (Sup. Ct. Bronx Co. 2019) (Higgitt, J.)**

Supreme Court granted P leave to amend his BOP more than two years after filing the note of issue to assert a new injury on the condition that P pay Ds a reasonable attorneys' fee for the time and effort their counsel expended in preparing the opposition to P's motion. Court noted that CPLR 3025 (b) demands that leave be granted "upon such terms as may be just including the granting of costs and continuances." In support of its condition, Court noted Ds' opposition to the motion was focused mainly on P's unexplained, significant delay in seeking leave to amend. Had P sought leave to amend sooner, Ds may well have stipulated to permit the amendment or allowed a motion for leave to amend to go unopposed. P put Ds in the position of opposing the motion to amend on the ground that P inexcusably waited a significant period of time before seeking leave to plead a new injury—a good faith argument against granting leave. While a court cannot impose "costs" under CPLR 3025 (b) to punish a party for exercising his or her right to seek leave to amend, the attorneys' fee imposed was not designed to punish P for seeking leave, but to compensate Ds for an unnecessary litigation expense.

Part Six

MOTIONS

I. SUMMARY JUDGMENT

A. Generally

Hornsby v. Cathedral Parkway
179 A.D.3d 584 (1st Dep't 2020)

Court held Supreme Court did not improvidently exercise its discretion in denying Ds' S/J motion on the ground that their affirmation in support far exceeded the motion court's page limitation rules. **COMMENT:** See 22 NYCRR9.1.

Pabon v. 940 Southern Blvd., LLC
181 A.D.3d 547 (1st Dep't 2020)

In this slip and fall action, Court held Supreme Court erred in granting P's motion for partial S/J on liability. It noted P alleged he slipped and fell on premises owned by D and that P's account of his accident was uncorroborated by any witnesses, reports to others, or his medical files, and he did not seek treatment for his injury to his wrist until several weeks after his fall. Since the manner in which P's alleged accident occurred is within his exclusive knowledge, and the only evidence submitted in support of Ds' liability is P's account, Ds should have the opportunity to subject P's testimony to cross-examination to have his credibility determined by a trier of fact.

Fischer v. American Biltrite, Inc.
184 A.D.3d 446 (1st Dep't 2020)

In denying D's S/J motion, Court emphasized the moving party's burden on S/J is not to show that there are "gaps" in P's proof which would preclude P from prevailing but that D has no liability.

MTGLQ Indus., LP v. White
179 A.D.3d 790 (2d Dep't 2020)

In this foreclosure action, Supreme Court granted P's "unopposed" S/J motion, and Court reversed. It found that P had not provided an AOS of its motion upon D when D said he never received it. It noted: "The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void."

Bacalan v. St. Vincents Med. Ctr.
179 A.D.3d 989 (2d Dep't 2020)

In this medical malpractice action, Court found P's submissions insufficient to defeat D's S/J motion. In so ruling, the Court noted: "A P cannot, for the first time in opposition to a motion for S/J, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the BOP."

Wells Fargo Bank v. Apt.
179 A.D.3d 1145 (2d Dep't 2020)

Court held P's second S/J motion did not violate the rule against successive motions for S/J. While P had previously moved for S/J following the filing of a NOI, and its motion was denied on the ground that it had not been made within the time allowed by CPLR 3212(a), the NOI was subsequently vacated. The vacatur of the NOI returned the case to its pre-note of issue status .

Czajka v. Pendell
174 A.D.3d 970 (3d Dep't 2019)

"A court cannot, *sua sponte*, grant S/J in the absence of any CPLR 3212 motion for such relief."

B. ***Brill***

Bricenio v. Perez
178 A.D.3d 1002 (2d Dep't 2020)

In this P/I action, parties agreed that deadline for making a S/J motion was 8/29/16. D argued his motion was served that day, but submitted no evidence that service was made on that date. In the absence of any proof of service, Court upheld denial based on the motion being served untimely.

Wells Fargo Bank v. Apt.
179 A.D.3d 1145 (2d Dep't 2020)

In this foreclosure action, Court affirmed denial of D's S/J motion on ground it was untimely. Court noted the motion was filed approximately seven months after the NOI was filed and approximately 80 days after the deadline for making a motion for S/J. P's failure to apply for leave to file the 2014 motion and failure to establish good cause for its delay warranted denial of the 2014 motion without consideration of its merits. **COMMENT:** *Brill* is not something to ignore.

Lozzi v. Fuller Road Mgt.
175 A.D.3d 1815 (4th Dep't 2019)

Court affirmed denial of D's cross-motion for S/J as it was untimely. The scheduling order required S/J motion to be filed and served within 60-days of the filing of the NOI. P filed the NOI on 11/20/17. His motion for S/J was timely. The cross-motion was filed on 3/19/18 and was therefore untimely. While D was required to provide good cause for the untimely motion in

its moving papers, it did not do so. Court rejected good cause averments made in reply. Furthermore, D's cross-motion was not "made on nearly identical grounds" and thus it did not relate back to P's timely motion.

C. Convert Dismissal Motion to Summary Judgement Motion

Frank v. Metalico Rochester, Inc.
174 A.D.3d 1407 (4th Dep't 2019)

In this declaratory judgment action, Court held Supreme Court did not err in converting that part of D's motion seeking to dismiss P's first cause of action into a motion for S/J pursuant to CPLR 3211(c). While a court is normally required to give notice of proposed conversion, Supreme Court properly dispensed with notice as the issue here rested entirely upon the construction of the parties' contract, which presented legal issues.

D. Proof on Motion

Salinas v. World Houseware Prod.
34 N.Y.3d 925 (2019)

P sought damages for injuries she sustained while using a potholder manufactured by D, when she was removing a food item from the oven, she noticed the potholder was on fire, and then her clothing caught fire. At her EBT, she repeatedly said the potholder did not touch the oven's heating element. The defense expert opined that based on that testimony, the potholder would not ignite at a distance of 1 inch from the element. In opposition, P's experts conceded that a potholder would not have ignited if it did not contact the hearing element. However, they concluded that, notwithstanding P's testimony, the potholder did touch the heating element. Court denied D's S/J motion. It held: "Although P's deposition testimony partially contradicted the factual conclusions reached by her expert witnesses, the expert opinions were based upon other record evidence and were neither speculative nor conclusory. Insofar as P raised genuine issues of fact on the element of causation, S/J should not have been granted on that ground.

Attilio v. Torres
181 A.D.3d 460 (1st Dep't 2020)

On Ds' threshold motion, Court held that it did not consider the affidavits by Ds' putative expert biomechanical engineer, because they were notarized without the state and not accompanied by the requisite certificate of conformity, as required by CPLR 2309(c). Court also noted the technical defect was not corrected, despite P's timely objection in opposition to Ds' motion.

Attilio v. Torres
181 A.D.3d 460 (1st Dep't 2020)

In the course of denying Ds' S/J motion, Court noted that P made a timely objection to Ds' submission of affidavits in opposition that were not properly notarized. It then commented that if no objection is made to the submission of evidence as inadmissible, the evidence can be considered and no appellate issue has been preserved.

Curl v. Schiffman
183 A.D.3d 415 (1st Dep't 2020)

In this P/I action, Court affirmed grant of P's motion for partial S/J on liability. It noted D failed to raise a triable issue of fact as his affidavit was inconsistent with the police report and with the report of motor vehicle accident that he had filled out six days after the accident. "Due to these inconsistencies, his affidavit raises feigned issues of fact, and is insufficient to defeat the motion."

Nelson v. Lighter
179 A.D.3d 933 (2d Dep't 2020)

In this dental malpractice action, Court held P failed to raise an issue of fact in response to D's S/J motion. P had submitted the unsworn affirmation of a dentist who was licensed to practice dentistry in NJ. Court noted that CPLR 2106 only authorizes attorneys, physicians, osteopaths or dentists licensed in NY to utilize an affirmation in lieu of a sworn affidavit.

Williams v. New York City Housing Auth.
183 A.D.3d 523 (1st Dep't 2020)

In denying D's S/J motion, Court held affidavit submitted in opposition by P could be considered, rejecting Supreme Court's treatment of it. Court wrote: "We do not reject the Ruiz notarized statement out of hand based on the perceived infirmities relied on by the motion court, such of the lack of a caption and the absence of a declaration that it was sworn to under penalty of perjury. These are technical errors that did not prejudice a substantial right of the Ds. We similarly reject D's position that the affidavit is "stale." This action involves a static set of facts that have not changed since the day of the accident. The fact that the affidavit was prepared contemporaneously makes it more probative than had it been made at the time of the S/J motions, not less.

Stradtman v. Cavaretta
179 A.D.3d 1468 (4th Dep't 2020)

In this medical malpractice action, Court held P's expert surgeon's affirmation submitted in opposition to D's S/J motion was not in admissible form as P's expert failed to state he was licensed to practice medicine in NY. However, Court held on motion to renew the "technical" defect was cured.

E. CPLR 3212 (f) Option

Lyons v. New York City Economic Dev. Corp.
182 A.D.3d 499 (1st Dep't 2020)

In this slip and fall action, Court denied Ds' S/J motion as premature. It noted that at the time Ds filed their motion, no depositions had taken place and the record does not show that the parties have exchanged any paper discovery, such as records concerning the installation, maintenance,

or repair of the mesh walkway on which P fell. Thus, Ps met their burden of demonstrating that facts essential to justify opposition to the motion may lie within Ds' exclusive knowledge or control.

Cascio v. YRC, Inc.
183 A.D.3d 864 (2d Dep't 2020)

Court affirmed denial of S/J motion on ground it was premature. It noted that a party who contends that a S/J motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. Here, P moved for S/J on the issue of liability approximately one month after D filed his answer, and prior to the exchange of any discovery, and the record reflects that discovery might lead to relevant evidence pertaining to the circumstances of the accident.

F. Plaintiff's Motion for Partial Summary Judgment on Liability

Rodriguez v. City of New York
31 N.Y.3d 312 (2019)

In this P/I action, P moved for partial S/J on liability. He was injured when a city sanitation truck backed into a car that he was standing in front of, propelling that car into P. Court held that P does not have to establish the absence of his or her own fault to obtain partial S/J on liability. **COMMENT:** Court also observed: "When D's liability is established as a matter of law before trial, the jury must still determine whether P was negligent and whether such negligence was a substantial factor in causing P's injures. If so, the comparative fault of each party is then apportioned by the jury. Therefore, the jury is still tasked with considering P's and D's culpability together. As a practical matter, a trial court will instruct the jury in a modified version of PJI 1:2B that he issue of D's negligence, and in some cases, the related proximate cause question, have been previously determined as a matter of law." The result is that where liability is established on the S/J motion, there will be no need for a bifurcated trial as P's fault, if any, will be determined with damages.

Castillo v. Slupecki
63 Misc.3d 325 (Sup. Ct. Bronx Co. 2019) (Higgitt, J.)

In this MV accident case Court noted a conflict in the case law as to whether a D's negligence must be a proximate cause of the accident, P's injuries, or both. Court stayed with PJI 2:70 which refers to proximate cause between D's alleged negligence and P's injuries.

G. Motion In Lieu of Complaint

Punch Fashion v. Merchant Factors Corp.
180 A.D.3d 520 (1st Dep't 2020)

In this commercial litigation, Court held D Banyan's guarantee, which is an absolute and unconditional guarantee of payment, qualifies as an instrument for the payment of money only

under CPLR 3213. However, Court held Cleary's guarantee, which is a guarantee of both payment and performance did not.

Peter Ginsberg Law, LLC v. J&J Sports
181 A.D.,3d 430 (1st Dep't 2020)

Court denied P's motion for S/J as the invoices P relied upon do not qualify for CPLR 3213 relief because it is necessary to consult extrinsic evidence aside from the invoices and proof of nonpayment in order for P to establish its entitlement to S/J on its account stated claim.

H. Vacate Grant of Summary Judgment

Deep v. City of New York
183 A.D.3d 586 (2d Dep't 2020)

In this MV accident case, Ds moved for S/J. P was advised by court that to request an adjournment such request had to be made at the Calendar Call on the scheduled return date of the motion. P did not serve any opposing papers and did not appear to adjourn the motion, and Supreme Court granted Ds' unopposed motion. Court affirmed. Supreme Court's denial of Ps motion to vacate the order pursuant to CPLR 5015(a)(1). It rejected P's law office failure excuse, noting the alleged clerical error in miscalendaring the return date was not supported by a detailed and credible explanation of the default.

II. MOTION TO DISMISS

A. CPLR 3211(a)(1)

Lloyd's Syndicate 2987 v. Furman Kornfeld
182 A.D.3d 487 (1st Dep't 2020)

Court granted Ds' motion to dismiss Ps legal malpractice action to dismiss pursuant to CPLR 3211(a)(1). It noted in support that Ps alleged they sustained damages when they relied on Ds' negligent advice that they could disclaim coverage of their insured in an underlying malpractice action; and in support of their motion to dismiss, Ds properly relied on documentary evidence, including the challenged disclaimer letter and the relevant policy, since their authenticity is undisputed and their contents are "essentially undeniable." The disclaimer letter sets forth an analysis of Ps' right to refuse coverage to their insured on two independent bases. Ps' failure to allege with specificity or argue that one of the two bases for Ds' advice was incorrect, requires dismissal of this legal malpractice action.

B. CPLR 3211(a)(4)

XL Specialty Ins. Co. v. Continental Cas. Co.
1 A.D.3d (1st Dep't 2020)

In this commercial litigation, Court held Supreme Court providently exercised its discretion in denying Ds' motions to dismiss pursuant to CPLR 3211(a)(4) based on another action pending,

or pursuant to CPLR 327 for forum non conveniens, or alternatively, to stay this action, which was filed a day before defendants-appellants commenced an action against Ps in Delaware, seeking to litigate most, but not all, of the same issues. Court noted "NY courts generally follow the first-in-time-rule, which instructs that the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere. However, "chronology is not dispositive," especially, where, as here, this action at the early stages of litigation or filed in close proximity. Nevertheless, here NY has a more substantial nexus to the parties and the dispute, and this action is more comprehensive than the DE action. Moreover, the fact that NY is the logical and proper place . . . to go forward, negates any inference that this constitute preemptive litigation intended to deprive defendants of their chosen forum."

C. CPLR 3211(a)(7)

Grassi & Co., CPAs v. Honks
180 A.D.3d 564 (1st Dep't 2020)

In affirming denial of motion to dismiss, Court observed: "When assessing a CPLR 3211(a)(7) motion to dismiss, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true, P is accorded the benefit of every possible favorable inference, and the court determines only whether the facts alleged fit within any cognizable legal theory. Further, a court may freely consider affidavits submitted by P to remedy any defects in the complaint, and the criterion is whether the proponent of the pleading ahs a cause of action, not whether they have stated one. Under these standards, the complaint sufficiently alleges claims for breach of the employment agreement's non-solicitation provision and tortious interference. Ds attacks on the reasonableness, breadth, legality, and enforceability of the non-recruitment provision are all premature at this early state of the litigation as they are each fact-based determinations.

Carr v. Wegmans Food Mkt.
182 A.D.3d 667 (3d Dep't 2020)

In this commercial tort action, D sought dismissal pursuant to CPLR 3211(a)(1) and (a)(7). Court denied the motion insofar as based on (a)(1). The proof submitted, sworn statements did not qualify as documentary evidence. With respect to (a)(7), the Court stressed that a P could submit an affidavit to remedy any defects in the complaint, which P did here.

Duffy v. Baldwin
183 A.D.3d 1053 (3d Dep't 2020)

On an appeal from grant of D's motion to dismiss complaint alleging private and public nuisance causes of action, initially Court noted that what Ps can ultimately prove, or whether emotional damages of this sort are recoverable, is not our concern when determining a motion to dismiss for failure to state a cause of action. Rather, the dispositive inquiry is whether Ps have a cause of action and not whether one has been stated, *i.e.*, whether the facts as alleged fit within any cognizable legal theory. Here, after applying the "strict" standards of a pre-answer motion to dismiss, Court held that Supreme Court erred in dismissing Ps' cause of action for private

nuisance. However, it upheld dismissal of public nuisance cause of action.

III. BIFURCATION

Castro v. Malia Realty
177 A.D.3d 58 (2d Dep't 2019)

Court, speaking through Presiding Justice Scheinkman, issued a thoughtful and instructive opinion regarding bifurcation. It noted while trial courts have discretion to determine whether a personal injury trial should be unified or bifurcated in accordance with the standard set forth in the statewide rule which encourages judges to order a bifurcated trial "where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action," 22 NYCRR 202.42(a), Second Department precedent continues to hold that unified trials should only be held where the nature of the injuries has an important bearing on the issue of liability. Neither the statewide rule nor the governing precedent absolutely requires that the trial of a personal injury action be bifurcated. Although bifurcation is encouraged in appropriate settings, bifurcation is not an absolute given and it is the responsibility of the trial judge to exercise discretion in determining whether bifurcation is appropriate in light of all relevant facts and circumstances presented by the individual cases. As to the case before it, Supreme Court had ordered bifurcation. In determining whether this was a proper exercise of discretion, Court noted that Ds contended that P did not fall from a scaffold and sustain a head injury, but rather, injured his neck and back as a result of lifting wooden planks. Evidence relating to P's brain injuries, which would not have occurred from lifting wooden planks, was probative in determining how the accident occurred. At the bifurcated trial on the issue of liability, Supreme Court allowed P to elicit testimony from his treating neurologist as to whether P's injuries were consistent with a fall and not with a lifting injury, but refused to permit the witness to explain certain diagnostic test results and how those test results supported his expert opinion that P sustained injuries as the result of a fall. Because the issues of liability and P's injuries were so intertwined, the court's insistence upon bifurcation and its ensuing limitations on the scope of the medical evidence that could be elicited by the Ps deprived them of a fair trial.
COMMENT: In essence, Court holds that bifurcation is not absolutely required and should give way to a unified trial where nature of injuries has important bearing on liability.

Marzan v. Levine
65 A.D.3d 939 (Sup. Ct. Bronx Co. 2019) (Higgit, J.)

P bicyclist was injured when D pedestrian stepped into the bicycle lane causing P to maneuver to avoid her and strike nearby construction fencing. Court denied D's motion to bifurcate because the issues of liability and damages were intertwined. D here, whose liability had not been established, had pleaded numerous affirmative defenses relating to P's comparative fault, asserting that P was, in whole or in part, responsible for his injuries. As a factfinder would need all of the evidence—evidence regarding D's liability, evidence regarding P's comparative fault, and evidence regarding P's injuries—to consider the issues of liability and damages, those issues were not distinct and severable, and bifurcation would not have assisted in the clarification or simplification of the issues nor promoted a fair and more expeditious resolution of the action.

IV. CPLR 3216 - WANT OF PROSECUTION

Ramirez v. Reyes
171 A.D.3d 1114 (2d Dep't 2019)

Court emphasizes that when a valid 90-day notice is service, dismissal can be avoided only if a justifiable excuse for the failure to abide by the demand is provided and a potentially meritorious cause of action is demonstrated.

Waterfall Victoria Master Fund v. Gurley
172 A.D.3d 783 (2d Dep't 2019)

Court emphasizes that the 90-day notice must contain the CPLR 3216(b)(3) warning. If not, the notice is ineffective and does not provide a basis for dismissal.

Islam v. HPENY Housing Dev. Fund
182 A.D.3d 585 (2d Dep't 2020)

Court affirmed dismissal of the action pursuant to CPLR 3216. It noted P was served with 90-day demand, and failed to either file a NOI or move to vacate the demand or extend the 90-day period, and was thereby deemed to be in default. In order to obtain vacatur of his default, P was required to demonstrate a justifiable excuse for his failure to take timely action in response to the 90-day demands, as well as a potentially meritorious cause of action, but failed to make such a showing.

V. CPLR 3404 - ABANDONED CASES

Ryskin v. Corniel
181 A.D.3d 742 (2d Dep't 2020)

In this P/I action, court denied as unnecessary the branch of P's motion which was to restore the action to the active calendar. Since the NOI P filed was vacated, thereafter, the action was restored to the pre-NOI discovery stage. Because no NOI had been filed, the action was not on the trial calendar. Therefore, the court's action of marking the action "disposed" as of 4/15/14, after P failed to file and serve a NOI by the court-ordered deadline, did not dismiss the action. For the same reason, CPLR 3404 was inapplicable. As the action was never properly dismissed, there was no need for a motion to restore.

VI. VOLUNTARY DISCONTINUANCE

Onewest Bank v. Jack
180 A.D.3d 1061 (2d Dep't 2020)

In this mortgage foreclosure action, Supreme Court granted P's motion for leave to discontinue the action, but did so with prejudice. Court reversed and granted motion without prejudice. In so ruling Court noted that under CPLR 3217(b), a P should be permitted to discontinue the action without prejudice, unless D would be prejudiced thereby. Here D showed no prejudice.

Green Tree Servicing v. Fei Ju
182 A.D.3d 840 (3d Dep't 2020)

Court affirmed grant of P's motion to discontinue action voluntarily without prejudice its mortgage foreclosure action. It noted that although this action had been pending for approximately three years at the time of the motion, the litigation itself remained in its early stages. In addition, the record confirmed that D never sought default nor moved to compel discovery. Furthermore, the parties had not yet participated in the mandatory settlement conference. Although D alleged that she would sustain prejudice if her discovery went unanswered, Supreme Court correctly determined that there was no evidence of prejudice to D or other improper consequences flowing from the discontinuance, as the parties can engage in necessary discovery in a subsequent foreclosure action. **COMMENT:** Court noted that "delay, frustration and expense in preparation of a contemplated defense do not constitute prejudice warranting denial of a motion for voluntary discontinuance."

VII. RENEWAL

Arena v. Shaw
179 A.D.3d 415 (1st Dep't 2020)

Court denied P's motion to renew motion to compel discovery because it was not "based upon new facts not offered on the prior motion" and did not "contain reasonable justification for the failure to present such facts on the prior motion." Court held P's claimed ignorance of a confidentiality order entered for his benefit in a related case raising identical issues does not constitute reasonable justification.

Dookhie v. Woo
180 A.D.3d 459 (1st Dep't 2020)

In this medical malpractice action, Court granted P's motion for renewal of S/J grant to D. Court noted that it was not until reply that Ds contended, for the first time, and notwithstanding Dr. Woo's records and testimony, that the July 2012 treatment was unrelated to the decedent's renal cancer. A party's submission of new evidence or argument in reply on the underlying motion constitutes reasonable justification for granting renewal.

Ortiz v. Mar-Can Trans. Co.
180 A.D.3d 515 (1st Dep't 2020)

Court held Supreme Court providently exercised its discretion in granting Ds' motion to renew their S/J motion, in order to correct a procedural error by the court, which had overlooked a prior order by another justice precluding P from submitting opposition papers. Contrary to P's contention, Ds had a right to enforce the preclusion order, which had been served upon her with NOE.

Preferred Mut. Ins. Co. v. DiLorenzo
183 A.D.3d 1091 (3d Dep't 2020)

Court initially noted that Supreme Court erred in denying D's cross-motion to renew as untimely, noting Supreme Court confused the cross-motion to renew with a motion to reargue and summarily denied it since it was not made within 30 days, which time period applies solely to motions to reargue. Supreme Court also erred in refusing to consider D's opposition papers with respect to the motion he sought renewed of since D attempted to timely file them but filing was rejected erroneously since efiling was not required.

VIII. ATTORNEY WITHDRAWAL

Matter of Cassini
182 A.D.3d 13 (2d Dep't 2020)

The Court in an opinion by PJ Scheinkman examined the interplay between CPLR 321(b)(2), which permits the attorney of record for a party to withdraw by order of the court, with the court having the ability to stay proceedings pending substitution of new counsel, and CPLR 321(c), which automatically and effectively suspends all proceedings against a party whose attorney becomes incapacitated until 30 days after notice to appoint another attorney has been served upon that party. The carefully crafted opinion spells out in detail the interplay and how the attorneys and Court are to proceed.

IX. SANCTIONS

Matter of Citigroup Global Mkts. v. Fiolla
178 A.D.3d 567 (1st Dep't 2019)

D moved to vacate a judgment entered against it by OTSC. Supreme Court denied the motion and, upon Supreme Court's invitation, moved for sanctions pursuant to Rule 130-1.1. Supreme Court granted the application and awarded sanctions in the amount of $200,000.00. Court affirmed. In affirming Court rejected D's argument that the signing of the OTSC proved that the application was not frivolous, noting the OTSC was "simply a substitute for a notice of motion."

Part Seven

DISCOVERY

I. DISCOVERABLE MATTER

A. Generally

Forman v. Henkin
30 N.Y.3d 656 (2018)

In this P/I action, D moved to compel P to provide him with an unlimited authorization to obtain P's entire "private" Facebook account arguing that the photographs and written postings therein would be material and necessary to his defense, specifically to the scope of P's injuries and her credibility. Supreme Court granted the motion to compel to the limited extent of directing P to produce all photographs of herself privately posed on Facebook prior to the accident that she intends to introduce at trial, all after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time P posted a private message after the accident and the number of characters or words in the messages. Supreme Court did not order disclosure of the content of any of P's written Facebook posts, whether authored before or after the accident. The First Department modified by limiting disclosure to photographs posted on Facebook that P intended to introduce at trial whether pre or post-accident; eliminating the authorization permitting D to obtain data relating to post-accident messages, and otherwise affirmed. Court held Appellate Division erred in modifying Supreme Court's order to further reflect disclosure, limiting discovery to only those photographs P intended to introduce at trial. It observed the threshold inquiry for courts addressing disputes over the scope of social media discovery is not whether the materials sought are private, but whether they are reasonably calculated to contain relevant information. Courts should first consider the nature of the event giving rise to litigation and the injuries claimed, as well as any other information specific to the case that is likely to be found on Facebook. Second, balancing the potential utility of the information sought against privacy or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy. Temporal limitations may also be appropriate. To the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court.

Wilson v. Simpson West Realty, LLC
179 A.D.3d 417 (1st Dep't 2020)

In this P/I action, Court held Supreme Court providently exercised its discretion by denying D's motion to compel production of P's entire employment file for a three-year period prior to her accident. Discovery of P's entire employment file would have been overly broad and was not material or necessary to her claims that she had a traumatic brain injury, where she testified that she was informed by her employer that she was not improperly performing her work duties as a result of her accident. To the extent that P claimed that as a result of the accident she had

impaired instability and balance, Court held disclosure of records regarding her two knee replacements was appropriate, as they are sufficiently related to that claim.

Birro v. Port Authority
179 A.D.3d 434 (1st Dep't 2020)

Court held Supreme Court did not abuse its discretion in denying Ds' motion for leave to depose two physicians, one who treated P for prior injuries, and another who treated P following the accident at issue. Ds failed to show that P's statements as recorded by the physicians conflicted with his deposition testimony and absent proof of a discrepancy between the medical records and P's testimony, Ds failed to show that the deposition of the physicians was material and necessary to their defense. Furthermore, Ds failed to demonstrate that the physicians' testimony regarding P's spine and knee conditions would be unrelated to their diagnosis and treatment, and is the only avenue of discovering the information sought.

Caserta v. Triborough Bridge & Tunnel Auth.
180 A.D.3d 532 (1st Dep't 2020)

In this P/I action, Supreme Court granted D's motion for a so-ordered subpoena compelling access to P's social media accounts only to the extent of directing P to provide "those items which show or discuss P attending and/or performing in concerts or playing musical instruments since March 6, 2015." Court modified the motion granted without subject matter limitation. It noted the discovery sought by Ds, including photographs, videos, and other social media postings regarding P's social and recreational activities that might contradict his claims of disability, is relevant, useful, and reasonable. P has not specified any items that may be irrelevant or private, has not sought *in limine* review and has actually agreed to execute an authorization releasing such information. Accordingly, the order directing disclosure only of posts regarding musical events and performances, was unduly restrictive.

Dani v. 551West 21st Street Owner LLC
181 A.D.3d 420 (1st Dep't 2020)

In this MV accident case, Supreme Court denied Ds' motion to compel production of P's cell phone records. Court affirmed, noting that Ds failed to satisfy the "threshold requirement" that the request was reasonably calculated to yield information that is "material and necessary." The affidavits submitted in support of the motion simply stated that P was holding his cell phone in his hand prior to the trip and fall accident, and that the cell phone was found near his body after the accident. As such they were too speculative to warrant disclosure of the records.

Currid v. Valea
184 A.D.3d 511 (1st Dep't 2020)

Ps claimed that D employed them as a caretaker for her ailing aunt and that Ds violated several state laws regarding their pay; and D denied she was Ps' employer for purposes of those laws but admitted to paying Ps by checks. D who denied that she was the source of the cash payments, Ps' federal and state tax returns for 2010 to 2013, claiming she needed the returns to verify the cash amounts, as well as Ps' assertion that they were employees, and not independent contractors.

Court held, while noting that compelling disclosure of tax returns is generally disfavored, D demonstrated both that the specific information ordered disclosed was necessary to defend the action, and unavailable from other sources. Since Ps were paid in cash between 2010 and 2013 and there is no other evidence in the record establishing who paid their wages and how much they were paid during those years, D showed a specific need for the production of the three years of tax returns, which might show the amounts claimed by Ps as income from the caretaker work, as well as whether they claimed the income as wages or as money earned through self-employment.

Mendives v. Cuscio
174 A.D.3d 796 (2d Dep't 2019)

In this MV accident case, Court held P's request for D's cellular telephone records may result in the disclosure of relevant evidence, was reasonably calculated to lead to the discovery of information bearing on P's claim, and was sufficiently related to the issues in litigation to make the effort to obtain them in preparation for trial reasonable.

Gilbert v. Hackett
183 A.D.3d 654 (2d Dep't 2020)

In this P/I action, P served non-party Suffolk County Police Dept. with two subpoenas duces tecum for production of certain 911 call records, and Dept. moved to quash. Court affirmed denial of motion, noting its conclusory assertions that disclosure of the 911 recordings would interfere with an ongoing homicide investigation more than eight years after decedent's death did not outweigh P's interest in disclosure of material which was relevant to P's action.

Appleyard v. Tigges
66 Misc.3d 390 (Sup. Ct. Bronx Co. 2019) (Capella, J.)

In this medical malpractice action, Court held the non-settling Ds were not entitled to disclosure of the confidential settlement entered into by P and the settling D as the terms of the settlement were not material and necessary to the defense of an action. GOL §15-108(a) obligates the disclosure of the confidential agreement's settlement amount, but only after a verdict is rendered against Ds to determine post-verdict apportionment. Ds alleged that they were entitled to that information before trial because if the settlement amount "seems small given the P's injuries," then they will introduce at trial evidence of another physician's negligence, and if the settlement appeared close to the full value of the case, then at trial they might just challenge the severity of the injuries claimed. Ds' opinion that the settling D's fault or the severity of P's injury could somehow be determined by the settlement amount was pure speculation and amounted to nothing more than trial strategy. The term "material and necessary" as used in CPLR 3101(a) is not intended to address D's desire to obtain the settlement information with the express goal of using it as some form of trial strategy.

Reyes-Nunez v. State
66 Misc.3d 728 (Ct. Claims 2019) (Weinstein, J.)

Court also requires Ds to disclosure of the last known address and phone number of a student who witnessed the accident, provided that such disclosure was made only to claimant's counsel, who was directed to use the information solely for litigation and otherwise maintain it as confidential. The witness had information clearly relevant to the case, as he was present at the accident scene and his account was described in Ds' post-accident report. Further, there was no statutory ban to prevent disclosure of the information sought. While revealing an individual's home address clearly implicates privacy concerns, these could be limited by a protective order restricting its dissemination.

Reyes-Nunez v. State
66 Misc.3d 728 (Ct. Claims 2019) (Weinstein, J.)

In this P/I action arising out of a campus (CUNY) woodshop accident, Court directed Ds to disclose an accident report, which was created after claimant was injured and which memorialized the findings of the investigation into the facts and causes of the accident and set forth recommendations for future improvements. It noted that although claimant here does not suggest that there is any dispute as to CUNY's control over the workshop or equipment in this case, she does argue that the evidence is necessary to establish a dangerous condition. Court found upon a review of the Report that — except as noted below — it meets the relevance standard of CPLR 3101 for this purpose, *i.e*., its contents bears on the question of the dangerousness of Ds' practices and procedures, to the extent that it may at very least assist the parties in preparation for trial on that issue. In so holding, Court did not rule on the admissibility of this document or any portion thereof at trial; as such would be judged at the time of trial and in the context of the record as a whole. Ds were directed to redact the section entitled "Required Corrective actions," which recommended certain remedial measures but did not describe whether they were actually undertaken by Ds.

B. Non-Party

Matter of Barber v. BorgWarner
174 A.D.3d 1377 (4th Dep't 2019)

CPLR 3101(a)(4)allows a party to obtain discovery from a nonparty, and provides that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof' " The phrase "material and necessary" in "must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity'". An 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", and the burden is on the party seeking to quash a subpoena to make such a showing. Here, a witness's sworn denial of any relevant knowledge, however, is insufficient, standing alone, to establish that the discovery sought is utterly irrelevant to the action or that the subpoena, if honored, will obviously and inevitably fail to turn up relevant evidence."

C. Privilege, Work Product, and Materials Prepared in Anticipation of Litigation

1. Attorney-Client

Saran v. Chelsea GCA Realty
174 A.D.3d 759 (2d Dep't 2019)

In this declaratory judgment action, D moved for a protective order suppressing emails between its CEO and in-house counsel which had been inadvertently disclosed to P, claiming the emails were protected by the privilege. Court denied the motion. It noted the communications related to the business of the D, rather than legal issues, and nothing stated by in-house counsel in the emails sets him apart as a legal advisor in the discussion. The affidavits of the D's CEO and in-house counsel, submitted in support of the motion, merely stated in a conclusory manner that the communications were confidential and privileged, and D pointed to no particular communication in which in-house counsel gave legal advice, or in which D's other employees sought legal advice from in-house counsel.

2. Work Product and Material Prepared in Anticipation of Litigation

Markel v. Pure Power Boot Camp
171 A.D.3d 28 (1st Dep't 2019)

In this P/I action, Court held the notes, reports, memoranda, photos, and other materials prepared by an individual hired by P's attorney to be an observer or "watchdog" at P's IME were protected from discovery under the qualified privilege applicable to materials prepared for litigation. (CPLR 3101[d][2]). Here, Ds failed to show the requisite substantial need for the materials or why they could not obtain without undue hardship their substantial equivalent.
COMMENT: Justice Gishe's thoughtful opinion is discussed in Hutter, "*Markel* and the Discovery Privileges," NYLJ, 6/6/19, p. 3, col. 3.

Venture v. Preferred Mutual Ins. Co.
180 A.D.3d 426 (1st Dep't 2020)

In this action, Supreme Court denied Ps' motion for the production of documents on the basis of the work product privilege. Court modified. It noted the privilege is absolute but applies "only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." Since P retained counsel and did not allow D's cause and origin expert to take a written or recorded statement from him, D retained Dodge to schedule an examination under oath based on his professional skills with SIU investigations, particularly, Dodge's knowledge of National Fire Protection Association (NFPA) guidelines, which pertained to fire science and fire investigation, and had a foundation of questions to ask in a case that involved a suspicious fire. Dodge's involvement was only part of the process and was as an attorney, not a claims investigator. Court then noted that certain emails between McGuire and Dodge that appear in email chains forwarding nonprivileged messages between McGuire and witnesses or government employees pertaining to the investigation should be redacted to obscure

only communications between McGuire and Dodge, and the entire documents must be produced in redacted form. The remainder of each of these email chains, which include forwarded emails between McGuire and other parties, contain nonprivileged communications regarding defendant's investigation and should be produced. Court concluded: "Pleadings, communication with opposing counsel, and communications solely between investigators, should be produced without redactions, since they do not contain legal advice, a request for legal advice, attorney work product, or any other category of privileged information."

1415, LLC v. New York Marine & General Ins.
181 A.D.3d 629 (2d Dep't 2020)

In this coverage dispute action, P sought disclosure of certain notes in D's file. Court held: "Upon our *in camera* inspection, we agree with the Supreme Court's determination that the withheld material was protected by the attorney-client privilege and was privileged material prepared for litigation. Generally, the payment or rejection of claims is part of the regular business of an insurance company, and, thus, reports prepared by insurance investigators, adjusters, or attorneys before the decision is made to pay or reject a claim are not privileged and are discoverable. While the material P seeks from D was prepared before the determination to reject P's claim for defense and indemnification in the underlying P/I action, the withheld material concerns the defense of Park Developers in the third-party action brought by P. It consists of communications with the attorney representing Park Developers in the third-party action and other information relating to the defense of the third-party action. Thus, under the circumstances, D demonstrated that the withheld material should not be disclosed.

Bennett v. State Farm
181 A.D.3d 774 (2d Dep't 2020)

In this action, Ps moved pursuant to CPLR 3103 for a protective order precluding the deposition of a nonparty witness concerning the results of soil boring tests performed at the property in 2018 and preventing the disclosure of an investigation report prepared by their engineering expert based upon those test results. Court held Supreme Court providently exercised its discretion in granting Ps' motion pursuant to CPLR 3103 for a protective order precluding the deposition of a nonparty witness concerning the results of soil boring tests performed at the property and preventing the disclosure of an investigation report prepared by Ps' engineering expert based upon those test results. Ps established that the data sought was generated solely in anticipation of litigation or for trial. Further, D failed to establish that it had a substantial need for the report and deposition in the preparation of its case and could not, without undue hardship, obtain the substantial equivalent of the information sought by other means.

Katz v. Bnoseinu
181 A.D.3d 798 (2d Dep't 2020)

In this P/I action, Court affirmed Supreme Court's denial of P's motion to compel D to produce the notes and records of D's examining physician. It is undisputed that D provided P with a copy of its examining physician's medical report. Contrary to P's contention, the notes and records created by D's examining physician were not discoverable because they were privileged as material prepared for litigation, and P failed to demonstrate that she had a substantial need for

the material or that she was unable, without undue hardship, to obtain the substantial equivalent of the material by other means.

John Mezzalingua Assoc., LLC v. The Travelers Co.
178 A.D.3d 1413 (4th Dep't 2019)

See Mezzalingua discussion *supra*. P also argued that certain documents were not discoverable because they were material prepared in anticipation of litigation. Court noted the materials here that were prepared by third parties were mixed purpose reports, and P failed to establish that they were prepared solely in anticipation of litigation. Because P did not establish that the requested material was protected by the qualified immunity privilege set forth in CPLR 3101(d) for material prepared exclusively in anticipation of litigation, the burden did not shift to D to establish that they had substantial need for the material and could not obtain it without undue hardship.

John Mezzalingua Assoc., LLC v. The Travelers Co.
178 A.D.3d 1413 (4th Dep't 2019)

See *Mezzalingua* discussion *supra*. P also argued that some of the documents were protected by the attorney work product privilege. D argued that the privilege could not be invoked as it was waived because the documents were shared with third parties. Court rejected the argument, noting the privilege can extend to experts retained as consultants to assist in analyzing or preparing the case. Court remanded for a determination as to whether the privilege actually could be invoked.

3. Medical

Brito v. Gomez
168 A.D.3d 1 (1st Dep't 2018), *revd*. 33 N.Y.3d 1126 (2019)

In this MV accident case, P sought to recover for lost earnings and loss of enjoyment of life. In her BOP she alleged injuries only to her cervical spine, lumbar spine and left shoulder. After EBT, she testified that in 2009 she had surgery on her left knee and in 2012 she had surgery on her right knee. Ds sought authorizations for P's medical records relating to her knee surgeries. Court in an opinion by Justice Singh, with Justice Friedman writing a dissent, held P did not waive the physician/patient privilege with regard to her knee surgeries as neither her BOP or EBT placed these injuries in controversy. It noted further her claims for lost earnings and loss of enjoyment of life alleged in the BOP were limited to her spinal and shoulder injuries. P did not claim that her prior knee injuries were exacerbated or aggravated as a result of the MV accident. Moreover, a claim for loss of enjoyment of life is not a separate item of recoverable damages, but a factor in assessing pain and suffering. The factfinder, in evaluating damages for pain and suffering, may consider the effect of the injuries on P's capacity to lead a normal life. **COMMENT:** Court noted that in *Greco v. Wellington Leasing L.P.* (144 A.D.3d 981, 43 N.Y.S.3d 64 [2d Dep't 2016]) the Second Department held that a party places his or her entire medical condition in controversy through "broad allegations of physical injuries and claimed loss of enjoyment of life due to those injuries. **COMMENT:** Court of Appeals reversed in Memorandum (SSM), stating only: "P affirmatively placed the condition of her knees into

controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages. (*see generally, Arons v. Jutkowitz*, 9 NY3d 393, 409, 850 NYS2d 345 [2007]; *Dillenbeck v. Hess*, 73 NY2d 278, 287, 539 NYS2d 707 [1989]). Under the particular circumstances of this case, P therefore waived the physician-patient privilege with respect to the prior treatment of her knees and the discovery sought by authorizations pertaining to the treatment of P's knees is "material and necessary" to Ds' defense of the action. Accordingly, Supreme Court erred in denying Ds' motion to compel P to provide discovery related to the prior treatment of her knees." How was the condition in fact placed in controversy? For further discussion, *see* Hutter, "Waiver of the Physician-Patient Privilege," NYLJ, Oct. 3, 2019.

Abrew v. Triple C Properties
178 A.D.3d 526 (1st Dep't 2019)

P, as a result of his accident, underwent two back surgeries. According to the two post-operative reports, P's surgeries were complicated and protracted due to a prior hernia operation. Court held privilege was waived as to records from the hernia operation as they were relevant to the injuries to the parts of the body that were placed in controversy. However, Court refused to find a waiver as to records of P's general medical condition both before and after the accident based on P's claim that his injuries are permanent and have prevented him from enjoying life. As to the latter, Court cited its prior precedent relied on by the panel in *Brito*. **COMMENT:** Court did not cite to *Brito* and its reversal by the Court of Appeals.

Jayne v. Smith
__ A.D.3d __ (2d Dep't 6/3/20)

P was seriously injured when he was assaulted by a patient at a psychiatric facility where P worked as a nurse. He commenced an action against Ds who were the patient's treating psychiatrists. P moved pursuant to CPLR 3124 to compel Ds to appear for depositions and to answer questions seeking non-privileged information regarding the patient. Court initially observed that information relating to the nature of medical treatment and the diagnoses made, including "information communicated by the patient while the physician attends the patient in a professional capacity, as well as information obtained from observation of the patient's appearance and symptoms," is privileged and may not be disclosed. (citing Mental Hygiene Law § 33.13[c][1]). However, the physician-patient privilege generally does not extend to information obtained outside the realms of medical diagnosis and treatment." Thus, the privilege is generally limited to "information acquired by the medical professional through application of professional skill or knowledge.'" Here, the patient did not waive the physician-patient privilege and P has not demonstrated "that the interests of justice significantly outweigh the need for confidentiality." (Mental Hygiene Law § 33.13[c][1]). Thus, P was not entitled to any privileged information regarding the patient, such as information regarding the treatment rendered to him by the individual Ds or information they collected in their professional capacity so as to render a diagnosis or treatment plan. Nevertheless, P is entitled to inquire into any nonprivileged information regarding the patient.

Almalahi v. NFT Metro Systems, Inc.
175 A.D.3d 1043 (4th Dep't 2019)

In this bus accident case, P alleged she sustained a "serious injury" with respect to her cervical spine and right shoulder when she fell from the bus before she could disembark. P executed authorizations for D to obtain her medical records, but only with respect to her cervical spine, left shoulder, and lumbar spine. D eventually moved to compel P to execute additional unrestricted authorizations covering other health conditions in P's medical history, including prior injuries to her left and right knees; a replacement of her right knee; injuries to her hip, buttock, elbow, hands and left upper arm as a result of two prior falls in 2014 and 2015; a carpal tunnel surgery five days before her fall on the bus; diabetes; and high blood pressure (collectively, disputed health conditions). The record established that some of those disputed health conditions, among others, had rendered P permanently disabled since the 1990s and required her to use a walker outside the home since the year 2000. Supreme Court granted motion and Court affirmed. It held P waived the privilege because she affirmatively placed in controversy her health conditions, which involved her ability to stand, steady herself and ambulate, by her allegation that D's negligence was the sole cause of her accident and injuries. The records sought may contain relevant information material and necessary to the defense of the action as to causation or to D's related defense of comparative negligence. **COMMENT:** Result the same after *Brito*?

D. Protective Order

Matter of Delopange v. RealReal, Inc.
182 A.D.3d 421 (1st Dep't 2020)

P in order to assist it in brining a conversion action filed a petition pursuant to CPLR 3102(2) to compel D to disclosed the identity of persons who posted for sale on its consignment website articles of clothing allegedly stolen from P; and D challenged the petition pursuant to CPLR 3103(a). Court initially held that D could challenge the petition by seeking a protective order. On the merits Court held P established a right to relief but affirmed Supreme Court's confidentiality order governing disclosure by D.

Lisa I. v. Manikas
183 A.D.3d 1096 (3d Dep't. 2020)

P's 15-year old daughter was sexually assaulted when attending a sleep-over at the home of a friend, owned by the Ds, the friend's parents, by an adult relative of Ds. At the deposition of the friend Ds'attorney extensively questioned the friend about the child's prior sexual history and drug use. In anticipation that Ds would conduct an examination of the child in the same manner, P moved for a protective order, pursuant to CPLR 3103(a), to preclude defendants from questioning the child during the deposition about her sexual history and drug use. P argued that any questions of this nature would be for the purposes of intimidation and harassment. Plaintiff further argued that the Rape Shield Law, codified in CPL 60.42, afforded the child the same protections as a victim in a criminal case, and any testimony as to her sexual history and alleged pregnancies would be irrelevant and immaterial to this civil litigation. Ds opposed the motion arguing that this line of questioning would be relevant to credibility and as to whether the child

had a motive to fabricate the allegations for reasons of a purported pregnancy. Ds assured Supreme Court that it was not their intent to harass or embarrass the child. Supreme Court partially granted P' motion by precluding Ds from examining the child regarding her prior sexual history, but permitted Ds to examine her regarding her purported drug use. In reaching this conclusion, the court determined that the Rape Shield Law applies to civil cases. In a thoughtful opinion by Justice Reynolds-Fitzgerald, the Court held that Supreme Court did not err in partially granting the motion for a protective order. However, in arriving at this conclusion, it deemed unnecessary to reach the question as to whether CPL 60.42 applies to civil cases, as Supreme Court had the responsibility and authority pursuant to CPLR 3103(a) to issue a protective order to protect a party from harassment, irrespective of the application of the criminal statute. Given that P demonstrated how the child would be subject to undue embarrassment and harassment by being questioned about her sexual history, and that her sexual history is irrelevant and immaterial to the elements of the causes of action and any defenses to the action, Court concluded that Supreme Court did not abuse its discretion in granting a protective order precluding questions as to the child's sexual history.

II. DEPOSITIONS

Greenman v. 2451 Broadway Mkt.
181 A.D.3d 514 (1st Dep't 2020)

In this slip and fall action, Court held trial court erred in permitting Ds to use the transcripts of P's and his non-party wife's depositions at trail as they were never served upon P and his wife in accordance with CPLR 3116(a). It noted that Ds used transcripts extensively, both on cross-examination and as direct evidence, and, given the centrality of the issue of credibility, the error could not be regarded as harmless.

Monti v. Shaw
183 A.D.3d 722 (2d Dep't 2020)

In this P/I action, Court affirmed grant of P's motion to compel D Suffolk Coach to produce an additional witness for a deposition on the issue of nature, scope or existence of a relationship between it and Lindy's Taxi. It noted P satisfied its burden to obtain that relief by demonstrating that the witness produced by Suffolk Coach for a deposition had insufficient knowledge of the business relationship between Suffolk Coach and Lindy's, that further discovery on the limited issue of "the nature, scope or existence of a relationship between [Suffolk Coach] and Lindy's" was material and necessary to the prosecution of the action, and that there was a substantial likelihood that another representative of Suffolk Coach possessed that information.

III. MOTION PRACTICE

A. Affidavit of Good Faith

Bronstein v. Charm City Housing
175 A.D.3d 454 (2d Dep't 2019)

Court held the affirmation of good faith submitted by D's counsel in support of the cross motion

for sanctions pursuant to CPLR 3126 failed to provide any detail of the claimed efforts to resolve the issues. While D's counsel asserted that he had conversations with P's counsel, he did not identify the dates of such conversations or the name of the attorney with whom he conversed. Therefore, the cross motion should have been denied.

Encalada v. Riverside Retail
175 A.D.3d 467 (2d Dep't 2019)

Court held Supreme Court was not required to deny that branch of the Ds' motion on the ground that the D failed to submit an affirmation attesting to a good faith pre-motion attempt to resolve the dispute with the P. While it may be the better practice for the movant to detail such good faith efforts in an affirmation separate from the affirmation addressing the merits of the motion, under the circumstances of this case, the requirements of 22 NYCRR 202.7 (c) were satisfied by the primary affirmation of counsel submitted in support of the motion wherein counsel detailed her efforts to obtain the P's compliance with the extant court order, including the failure of the P to appear for a duly noticed examination and the failure of the P's counsel to respond to correspondence, submitted with the Ds' motion papers, seeking the P's voluntary cooperation. Thus, the Ds amply demonstrated that the P was refusing to voluntarily cooperate with a court-ordered examination. **COMMENT**: Result seems justifiable.

B. Palpably Improper Demands

Kiernan v. Booth Memorial Hosp.
175 A.D.3d 1396 (2d Dep't 2019)

Court held D's failure to object to Ps' discovery demand within the time period set forth in CPLR 3122 (a) (1) did not foreclose review of its challenge to that demand on the basis that the demand was palpably improper. In this regard, disclosure demands may be palpably improper where they seek irrelevant information, are overbroad and burdensome, or fail to specify with reasonable particularity many of the documents demanded. Here, the Ps' request for additional information and color photographs of certain Forest View personnel who worked on the floor where the decedent resided on February 5 and 6, 2008, was palpably improper because it was overbroad and unduly burdensome.

Lomeli v. Falkirk Management Corp.
179 A.D.3d 660 (2d Dep't 2020)

In this putative class action, Court held Supreme Court properly denied P's motion to compel Ds to respond to discovery demands. It noted that where demands are overbroad, the appropriate remedy is to vacate the entire demand rather than prune it. Here, the information sought by P in her first set of interrogatories and first request for the production of documents was largely burdensome or immaterial, and thus denial was proper.

LaBuda v. LaBuda
175 A.D.3d 39 (3d Dep't 2019)

In this P/I action in which P alleged D operated an ATV on P's properly without permission and struck P, D served P with disclosure demands seeking photographs, video recordings, including video stored on P's phone and all metadata. P did not respond and D moved for dismissal. P argued that D's demands were overbroad. Court held that because P failed to make a timely objection or application for a protective order within the time periods set forth in CPLR 3122(a)(1), its review of the matter was limited to whether the demands were "palpably improper." Under that standard of review, Court held that D's requests were narrowly drawn to seek relevant information with P's possession.

C. Document Production Costs

Greenberg v. Spitzer
63 Misc.3d 554 (Sup. Ct. Putnam Co. 2019) (Grossman, J.)

Court held D, a former Governor and Attorney General of New York being sued for defamation, was required to reimburse half of the out-of-pocket document production costs P incurred responding to D's pretrial discovery document requests, which covered a dozen lawsuits over more than a decade in addition to more than 40 accounting actions at the multinational insurance firm that P formerly chaired as chief executive officer. Court noted no specific statutory authority imposes production costs on the party that makes a discovery request and trial courts are left to their best efforts and discretion to address emerging issues in electronic discovery. Applicable criteria include the tailoring of the request for information and documents; the availability of information from other sources; production costs; the resources of each party; the ability of each party to control costs; the issues at stake in the litigation; and the benefits to the parties involved. Moreover, a court has the power "to prevent unreasonable . . . expense, . . . disadvantage, or other prejudice to any person" (CPLR 3103 [a]) and that consideration is also appropriate at a preliminary conference. Here, P's expense for production costs was significant and not seriously disputed, but the lack of an explanation prevented the court from fully determining the legitimacy of the claimed expense, whether there was a less expensive alternative, or whether the form of production was cost-effective. Thus, at that stage of the proceedings, D was required to reimburse P for half of the claimed production costs, subject to a further determination and award of disbursements at the conclusion of the action.

Matter of Khagan (Elghanayan)
66 Misc.3d335 (Sup. Ct. Queens Co. 2019) (Kelly, S.)

In this Surrogate's Court trust accounting proceeding, non-party applicants, who were hired as real estate consultants for a developmental project involving a multimillion-dollar trust sought reimbursement for legal fees incurred by them in reviewing and producing documents responsive to subpoenas duces tecum issued by respondents. Court held they were potentially reimbursable as production expenses under CPLR 3122(d) as long as they are reasonable and, in the absence of a prior agreement between the demanding party and the non-party, subject to the exercise of the court's power to limit or deny them to prevent unreasonable expense or other prejudice. Here the reimbursement amount was determined after consideration of case law stating that

counsel fees for review of documents for privilege and relevancy should be borne by the producing party; the breadth of the subpoenas' demands, which necessitated review of nearly 20,000 electronic records; the failure of the parties to reach an agreement on reducing the scope of the subpoenas to certain documents; the lack of prior notice give to respondents that the non-party applicants would be seeking reimbursement for their legal fees; and the relationship between the non-parties and the petitioner trustees in the management of the trust.

IV. EXPERT DISCLOSURE

Rivera v. New York City Housing Auth.
177 A.D.3d 499 (1st Dep't 2019)

Court affirmed denial of D's motion to preclude P's engineering expert from offering his report and to direct P to provide all materials used by his expert in the preparation of his report. In so ruling, Court noted P withheld information about an expert he retained and who performed a comprehensive inspection and report before the demand for expert disclosure was served, failed to disclose this in response to such demand, and continued to withhold such information over the course of many court conferences and the years that the case was pending. He offers no excuse for his delay or for having served a response to D's expert disclosure demand that was arguably misleading. However, when P eventually did disclose the expert, it was not on the eve of trial. His disclosure was made six weeks before the originally-scheduled trial date, a lead time further expanded with the court's 60–day adjournment. Court further noted D did not show prejudice due to the untimely disclosure. **COMMENT:** Statewide adoption of Third JD expert disclosure rule, requiring within 60 days after the filing of the Note of Issue?

Dunn v. New Lounge 4324
180 A.D.3d 510 (1st Dep't 2020)

In this P/I action Court held Supreme Court properly granted P's cross motion for sanctions for spoliation and found that an adverse inference charge at trial is appropriate. P established that D was on notice that its surveillance footage, which captured what happened inside of its club and a portion of the area immediately outside of its club, might be needed for future litigation. After receiving such notice, D did not take steps to ensure that the video footage was preserved.

China Dev. Indus. Bank v. Morgan Stanley
183 A.D.3d 504 (1st Dep't 2020)

In this commercial action, Court denied Ds motion for spoliation sanctions based on destruction of emails, audio recordings and files. It determined that there was no basis to conclude that P had an obligation to preserve the documents which involved transactions between the parties. The documents were destroyed in 2007 and a litigation held was not imposed until 2010. Court held the evidence did not show that P "reasonably anticipated" litigating against Ds at that time, but shows rather that a credible probability of litigation against Ds arose only significantly later. Thus, there was at the time of the destruction no duty to preserve the documents.

Doerrer v. Schreiber Foods
173 A.D.3d 838 (2d Dep't 2019)

P alleged that she choked on an object that was in a piece of Swiss cheese manufactured and sold by D. A plastic object was surgically removed from her esophagus when P was taken to the hospital. D sought to engage in a destructive test of the object to determine its chemical composition. P objected, arguing a nondestructive test was available. to determine composition. Trial court denied request and Court affirmed. It stated: "Although forensic testing may, in an appropriate case, promote the just determination of legal controversies, testing which destroys or materially alters the item or sample being tested should be permitted only where the court determines, in the exercise of its discretion, that such testing is required in the interest of justice. We agree with Supreme Court's determination denying Ds' motion to permit them to alter the plastic object in order to test it on the grounds that Ds failed to establish that there is no adequate nondestructive test and that altering the evidence is the only method by which they may obtain the information they seek." **COMMENT**: If your expert needs to do some "destruction," get permission first from court. Otherwise, likely spoliation sanction.

Rosen v. Mosby
180 A.D.3d 1253 (3d Dep't 2020)

In this real property related action, Court held trial court did not improperly preclude testimony of P's expert regarding the value of purported damages to the shared roadway. P's expert disclosure failed to provide notice that he would be offering testimony as to the cost of damages, and P failed to otherwise demonstrate good cause for such delayed expert disclosure.

Reed v. New York State Electric & Gas Co.
183 A.D.3d 1207 (3d Dep't 2020)

In this P/I action, Supreme Court on D's *in limine* motion precluded the testimony of P's economist on the ground the expert disclosure for the economist lacked reasonable details as to how the value that the economist assigned to P's lost services and support would be calculated. Court reversed and denied the motion. Court noted that despite the expert witness disclosure deficiencies outlined by Supreme Court the record is devoid of any prejudice suffered by D or that P intentionally withheld the information. Furthermore, the trial of this matter was not imminent. However, preclusion of a witness's testimony is a drastic measure that should generally be resorted to only when it can be shown that the offending party's failure to disclose was "willful, deliberate, and contumacious." Court then stated: "As we see no evidence of this, and can discern no prejudice to D, we find that Supreme Court abused its discretion in precluding this testimony. A more appropriate remedy would have been to allow P to provide additional information as to the basis and grounds for the calculation, within a specified time. At such time, the matter could then be reexamined by Supreme Court."

V. NOTE OF ISSUE

AiKanat v. Spruce Assoc.
182 A.D.3d 437 (1st Dep't 2020)

Court affirmed denial of Ds' motion to vacate NOI and compel further discovery. It held the trial court providently exercised its discretion in declining to vacate the NOI or permit post-NOI discovery in light of Ds' failure to seek the discovery at an earlier time. Although Ds requested authorization to obtain P's tax returns in 2015, they took no action to enforce their request until after the NOI was filed. Similarly, they did not seek the Facebook Data until soon before the note of issue was filed, despite the asserted need for the information based on P's testimony in his depositions, the last of which was taken in July 2018. Also, the certificate of readiness correctly stated that P responded to all outstanding discovery requests, in that objections are an appropriate response.

Ruiz v. Park Gramercy Owners Corp.
182 A.D.3d 471 (1st Dep't 2020)

Court noted that a NOI should be vacated when [it] is based upon a certificate of readiness which contains an erroneous fact, such as that discovery has been completed. Here, the motion to vacate the NOI should have been granted since P had not provided authorizations allowing her out-of-state medical providers to release her medical records to Ds, as well as certain receipts for expenses incurred as a result of her injuries, before filing the NOI and certificate of readiness.

VI. CPLR 3126

Vega v. Beacon 109
179 A.D.3d 549 (1st Dep't 2020)

Court affirmed as proper exercise of discretion D's motion to dismiss complaint pursuant to CPLR 3126 based on a clear showing that had repeatedly failed to comply with multiple discovery orders, which was "dilatory, evasive, obstructive and ultimately contumacious." Willfulness may be inferred when a party repeatedly fails to respond to discovery demands and/or comply with discovery orders, coupled with inadequate excuses, and while P may have ultimately provided the requested document discovery, he unduly delayed the progress of the action and failed to appear for a court-ordered deposition despite several adjournments. Furthermore, the court provided him with many opportunities to comply with its discovery orders and, despite three years of effort, P still did not meet those obligations.

Maxim Inc. v. Gross
179 A.D.3d 536 (1st Dep't 2020)

Court granted discovery sanctions against P. It noted: Ps' continued discovery abuses, including their refusal to produce proper witnesses for depositions, withholding of responsive documents, and refusal to properly answer interrogatories, and their general obstructionist behavior and cavalier attitude with respect to discovery obligations and deadlines warrant the further exercise of this Court's discretion to impose monetary sanctions on them in the amount of D's reasonable

legal fees incurred in discovery." It also ruled grant of Ps' motion to amend complaint should be conditional upon Ps' payment of the sanction.

Wolf Props. Assoc. v. Castle Restoration
174 A.D.3d 838 (2d Dep't 2019)

Court held conditional order striking D's answer unless D responded to P's discovery requests by certain date was unenforceable against D, even though D did not respond to requests. P did not serve copy of conditional order on D with NOE. P had argued that since the order did not specify that P had to serve a copy of that order with NOE upon D, P did not have to do so before that order was enforceable against D. Court rejected the argument as CPLR 2220 requires such. Since D did not have notice of the order, its failure to provide discovery responses by the specified date was not willful. **COMMENT:** Serve all orders with NOE!!!

Ahmed v. Ahmed
175 A.D.3d 1363 (2d Dep't 2019)

In this RPAPL article 16 action, Court observed that the nature and degree of the penalty to be imposed pursuant to CPLR 3126 who refuses to comply with court ordered discovery is a matter within the discretion of the court. It further noted that the striking of a pleading may be appropriate as a sanction where there is a clear showing that the failure to comply with discovery demands is willful and contumacious. The willful or contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands or to comply with discovery orders, and the absence of any reasonable excuse for these failures. Here, Supreme Court providently exercised its discretion in conditionally striking the Ds' answer unless they fully and meaningfully complied with the outstanding discovery requests.

Bouri v. Jackson
177 A.D.3d 947 (2d Dep't 2019)

In this MV accident case, Court held Supreme Court providently exercised its discretion in adhering to earlier court order granting P's motion to strike D's answer, which court originally granted on condition that D failed to appear for a deposition on a specified date. D failed to appear for deposition within specified time, and the fact that D disappeared or made himself unavailable did not provide a basis for denying Ps' motion.

Marino v. Armogan
179 A.D.3d 664 (2d Dep't 2020)

In this P/I action, Court affirmed Supreme Court's determination that P's conduct in failing to produce the requisite discovery was willful and contumacious because P failed to offer an adequate explanation for her persistent failure to comply with court-ordered discovery. Pursuant to the May 2017 order, P's failure to provide the requisite discovery precludes her from offering medical evidence, which is a necessary element of her *prima facie* case. Thus, the court providently exercised its discretion in granting Ds' motion pursuant to CPLR 3126 and directing dismissal of the complaint.

Pinnock v. Mercy Med. Ctr.
180 A.D.3d 1086 (2d Dep't 2020)

In this action, P sought to strike D Ahmed's answer or alternatively for preclusion of evidence or an adverse inference instruction as a sanction for his invocation of the Fifth Amendment during his deposition. Court affirmed denial of motion, noting that while CPLR 3126 permits a court to strike an answer as a sanction if D refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed. However, the drastic remedy of striking an answer is inappropriate absent clear showing that D's failure to comply with discovery demands was willful or contumacious. Here, contrary to P's contention, Ahmed's refusal to answer most questions during the deposition, which refusal was occasioned by his exercise of the privilege against self-incrimination, was not demonstrated to be willful or contumacious so as to warrant the sanctions sought. **COMMENT:** How should counsel proceed when a witness at a deposition invokes the Fifth? Motion to compel?

Turiano v. Schwaber
180 A.D.3d 950 (2d Dep't 2020)

In this P/I action, Supreme Court granted D's motion to strike the complaint as a discovery violation sanction. Court modified. It noted repeated failure to appear for her continued deposition, coupled with her failure to demonstrate a reasonable excuse for that failure, supports an inference that her conduct was willful. While P proffered the health condition of her attorney as an excuse for failing to appear for the continued deposition, the attorney did not submit medical evidence or sufficient documentary facts to support the claim, or explain why his per diem attorney was unable to attend the deposition. However, Court found striking the complaint was too drastic a remedy. It ordered instead that P was precluded P from offering evidence at trial with respect to any of the new injuries alleged in the P's supplemental BOP.

Mesiti v. Weiss
178 A.D.3d 1332 (3d Dep't 2019)

In this P/I action, Ds moved to strike P's complaint pursuant to CPLR 3126. Supreme Court granted motion based on P's failure to comply with outstanding discovery demands within 30 days from its order. Court reversed. "Appreciating" Supreme Court's concerns regarding the length of time that this action has been pending and the fact that the various discovery responses that P's counsel did provide were unquestionably untimely, Court did not find that Ds have established a "deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay [by P] that would be deserving of the most vehement condemnation." Rather, given that Ds have not demonstrated any prejudice resulting from this protracted discovery dispute and in light of P's continued willingness to provide Ds with any and all outstanding discovery, striking the complaint was not warranted.

Peterson v. New York Central Mut. Ins.
174 A.D.3d 1386 (4th Dep't 2019)

Trial court dismissed P's complaints pursuant to CPLR 3126, and Court affirmed. It noted the conclusion that Ps' conduct was willful and contumacious can be inferred from their repeated

failure to comply with the court's scheduling orders, D's demands for discovery, and the motions to compel, despite D's good faith extensions of time to respond to the demands. Although in both actions Ps' attorney offered the excuse of "staffing issues" in November 2016, this was the only excuse provided by Ps. They failed to offer any excuse for their continued failure to respond during the ensuing eight months, despite repeated requests, deadlines imposed by the court, and a motion by D in each action. Court further noted that to the extent Ps eventually responded in part to D's discovery demands, those responses were inadequate, inasmuch as the responses were untimely, incomplete. **COMMENT:** Supreme Court's CPLR 3126(3) order was not a conditional order. Decision indicates that a conditional order is not required.

Ramulic v. State
179 A.D.3d 1494 (4th Dep't 2020)

In this slip and fall action, Court rejected D's argument that trial court erred in precluding it from offering into evidence at trial an Agreement pertaining to property on which the accident occurred as a discovery sanction. It noted where a party fails to disclose information that the court finds ought to have been disclosed, it is within the trial court's discretion to determine the nature and degree of the penalty, and the sanction will remain undisturbed unless there has been a clear abuse of discretion. It further noted: "although a party may not be compelled to produce or sanctioned for failing to produce information which [it] does not possess . . . , the failure to provide information in its possession will . . . preclude it from later offering proof regarding that information at trial. Here, although D previously produced an unsigned copy of the Agreement in response to claimants' discovery demands, it did not produce a signed Agreement until the pretrial conference three days before trial and failed to establish that it was not previously in possession of the signed Agreement."

Windnagle v. Tarnacki
184 A.D.3d 1180 (4th Dep't 2020)

In this P/I action, P failed to complete discovery and file a NOI and statement of readiness in accordance with the scheduling order issued by Supreme Court, and defendants moved pursuant to CPLR 3126 for an order dismissing the complaint or, in the alternative, compelling, *inter alia*, P's deposition. Ds requested oral argument on the motion, but the court issued a decision on the motion prior to the return date dismissing the complaint with prejudice based on P's failure to comply with the scheduling order. Court held dismissal of the complaint was an abuse of discretion. It noted Ds made no showing that P's noncompliance with the court's scheduling order was willful, contumacious, or in bad faith, and the court made no such finding. Ds merely alleged that P's failure to comply with the discovery deadlines set forth in the scheduling order was due to the representations of P's attorney that he was engaged in settlement negotiations with a claims adjuster. P's attorney apparently believed that settlement of the case was imminent and, thus, that depositions would not be necessary. In sum, Court held there was nothing in the record to indicate that P ignored any warnings from the court that continued noncompliance with discovery orders could lead to the court striking the complaint, or that Ds were prejudiced by the delay in conducting discovery.

VII. SPOLIATION

Pegasus Aviation v. Varig Logistica
26 N.Y.3d 543 (2015)

Court held: "A party that seeks sanctions for spoliation of [electronic] evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." And "Where the evidence is determined to have been intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed. On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense. **COMMENT:** (1) Court adopted rule from pre-December 2015 Second Circuit precedent, including *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 [SD N.Y. 2003]). (*See, generally* Schlosser, "New York Should Catch the Federal ESI Wave Before It's Too Late," NYLJ, 12/23/15, p. 3, col. 3); and that precedent was rejected by amendment to FRCP 37(e), effective December 1, 2015. (*See Id*.). (2) Does this standard apply to non-electronic evidence spoliation cases? (3) As Judge Stein's carefully crafted decision shows, applying this standard will not always be a simple task.

Brandsway Hospitality v. Delshah Capital
173 A.D.3d 457 (1st Dep't 2019)

In this breach of contract action, Court held Supreme Court did not abuse its discretion by referring issues of alleged spoliation of electronic evidence to information technology expert rather than granting D's motion to dismiss the action as sanction for spoliation, even though it was undisputed that email messages relevant to the action were deleted. Parties to action presented sharply conflicting accounts of when and by whom emails were deleted, and trial court properly sought more information on the timing of deletions and potential recovery of admissible evidence before making a ruling on Ds' motion.

Rossi v. Doka USA
181 A.D.3d 523 (1st Dep't 2020)

In this products liability action based on a design defect claim involving a ratchet being used on a construction site, D moved to dismiss when the ratchet was never recovered after the accident. It contended P should have secured the ratchet. Court noted that when that drastic remedy is appropriate in the case of ordinary negligence, it is because the non-spoliating party carried its burden of establishing that the missing evidence was its "sole means" of defending the claim, its defense was otherwise "fatally compromised" by the spoliation, or it had become "prejudicially bereft" of being able to defend. Initially, Court held that in cases like this, where the claim is based on a design defect (as opposed to a manufacturing defect), the absence of the product is not necessarily fatal to the D. As the Court has observed, a product's design "possibly might be evaluated and the defect proved circumstantially." Circumstantial evidence could, one would imagine, be the testimony of someone involved in the design process, and plans or photographs of the product before it entered the stream of commerce. It could also, assuming that the missing

product was one of multiple units manufactured using the same design, be another one of those units. Court also observed that it is "questionable whether P could be held responsible for the absence of the ratchet. Court denied the motion.

Sanchez v. City of New York
181 A.D.3d 522 (1st Dep't 2020)

In this P/I action, Court granted P's motion for sanctions to the extent of imposing an adverse inference charge. The motion was made due to the failure of Ds to preserve pre-accident audio recordings. It held Ds had an obligation to preserve the pre-accident audio recordings at the time they were destroyed because the Police Department (NYPD) internal report and P's notice of claim, which attached the public police accident report, put Ds on notice that they would likely assert an emergency operation defense. Therefore, pre-accident audio communication between the dispatcher and the NYPD vehicle or officers involved in the accident should have been preserved in case it was needed for future litigation. Under the circumstances presented, the imposition of an adverse inference charge would be an appropriate sanction.

Delmur, Inc. v. School Constr. Auth.
174 A.D.3d 784 (2d Dep't 2019)

In this property damage action, P's truck which was allegedly struck by D's truck, was stored at a yard. To cover the storage costs when they were not paid, owner of yard seized the truck and sold it. Court upheld striking of complaint as sanction for the spoliation. It noted P was obligated to preserve the truck at the time it was seized, and D's ability to prove their defense was fatally compromised.

Labuda v. Labuda
175 A.D.3d 39 (3d Dep't 2019)

In this P/I action arising out of allegations that D, while operating an ATV on P's property without permission, struck P twice with the ATV. Shortly after the incident, D requested P by letter to preserve all evidence involved in the alleged accident, including P's cell phone and any video taken on the date of the incident. A year later P informed D that he no longer had the phone, trading it in for a new one some 7 months after the incident. D moved for spoliation sanctions. While Court did not condone P's failure to preserve the phone and his failure to provide D with access to alleged preserved information that the phone contained, Court was concerned about the possible prejudice to D as a result of the failure to preserve the phone. It noted P had averred that the information contained in the phone had been preserved and continued to exist in different forms, specifically police investigators had examined the phone and had extracted and downloaded all relevant photos and videos; the AG's office had created a folder in cloud storage that contained pertinent electronic files, and he provided a hyperlink that allegedly provided access to these files; and when he replaced his phone, technicians for his carrier extracted "all of the data" and uploaded it to his new phone, as well as to cloud storage that P is able to access. D still complained because without the phone he could not access its metadata and determine whether there were additional photos that had been deleted. Court remanded the matter to the trial court for its determination whether D was prejudiced in his defense without the phone and its metadata, considering all of the photographs that were

apparently available.

Matter of Thomas
179 A.D.3d 98 (4th Dep't 2019)

In this Surrogate's Court proceeding seeking determination of stock ownership, Court held adverse inference was not warranted because of respondent's failure to produce certain corporate records. It so ruled because petitioner failed to show respondent negligently lost or intentionally destroyed the corporate book.

Martinez v. Nelson
64 Misc.3d 225 (Sup. Ct. Bronx Co. 2019) (Higgitt, J.)

In this MV accident case, D sought spoliation sanctions because P failed to submit to an IME before having surgery with respect to her cervical spine, which she alleged was injured in the accident. The surgery was not dictated by an emergency situation. Court held Ds established that P had an obligation to preserve the condition of her cervical spine at the time of its alteration by virtue of a preservation letter that was served on P approximate one-month prior to her unannounced surgery. Ds also demonstrated that, at the least, P was guilty of ordinary negligence in having the surgery. Court noted it was possible that she may have altered the condition of her cervical spine intentionally, willfully or in gross negligence, which would trigger a rebuttable presumption that the evidence was relevant to the defense of the action, but her state of mind could be ascertained only after relevant discovery proceedings.

VIII. CONDITIONAL ORDER

Wolf Properties, L.P. v. Castle Restoration
174 A.D.3d 838 (2d Dep't 2019)

In this action alleging a breach of a lease, Supreme Court granted conditional order, striking D's answer unless it provided discovery responses by a specified date. When D failed to meet deadline, P moved for S/J and Supreme Court granted motion and struck D's answer. Court reversed. The basis for its reversal was that D was not served a copy of Supreme Court's order with notice of entry, and thus time to respond did not start running. Court rejected P's argument that it did not need to serve the order with notice of entry because the order did not require service with notice of entry. **COMMENT:** Always serve court orders with notice of entry!

Mehler v. Jones
181 A.D.3d 535 (1st Dep't 2020)

Court affirmed issuance of a conditional order based on P's history of non-compliance with orders to appear for her deposition. While P contended her behavior was neither willful nor contumacious, Court noted that by issuing a conditional order, Supreme Court relieved itself of the unrewarding inquiry into whether P's resistance was willful.

Humble Monkey, LLC v. Rice Sec., LLC
184 A.D.3d 498 (1st Dep't 2020)

Court noted that when Ds failed to comply with the self-executing, conditional order striking their answer if they did not produce a witness for deposition by a date certain, the order became absolute. Ds' proper recourse then was to move to vacate the conditional order on the ground of excusable default. They did not seek that relief. In any event, the excuses for failing to comply with the court's order that Ds asserted in opposition to P's motion were not reasonable, and Ds failed to seek an adjournment from the court or take any other action to avoid their knowing default.

Part Eight

STIPULATIONS, SETTLEMENTS, RELEASES AND JUDGMENTS

I. STIPULATIONS AND SETTLEMENTS

Woodward v. Levine
179 A.D.3d 429 (1st Dep't 2020)

Involved on this appeal was the parties' so-ordered stipulation where Ps agreed that Ds' motion to amend their answer to assert counterclaims was granted. Ps now moved to strike the counterclaims. Court held the stip bars Ps challenge to Ds' assertion of the counterclaims. The stip was not simply an agreement to accept service or to set a deadline for reply, but one that plainly allowed Ds to amend the answer to include counterclaims. By signing the stip, Ps waived the challenges to the counterclaims they assert here, including their collateral estoppel argument grounded in BCL §1312, asserted only on reply.

Pruss v. Infiniti
180 A.D.3d 163 (1st Dep't 2020)

In this P/I action the Infiniti Ds sought to vacate a judgment entered against them on the ground their attorneys did not have authority to settled on their behalf and sign the agreement upon which the judgment was entered. In an opinion by Presiding Justice Acosta, Court held the Ds implicitly ratified settlement agreement by making no formal objection for over 1½ years after entry of judgment in negligence lawsuit; Ds did not submit evidence that they had no knowledge of settlement and did not authorize such settlement, and attorneys appears on behalf of Ds for numerous conferences with court.

Darlene W. v. Montefiore Med. Ctr.
180 A.D.3d 602 (1st Dep't 2020)

In this medical malpractice action, P's prior action was removed to federal court, the parties entered into a stipulation, which was so-ordered by the U.S. District Court for the Southern District of New York, that the prior action would be discontinued without prejudice and that any subsequent medical malpractice claims against Ds, including Montefiore, would be brought in federal court. Although this action encompasses claims against other entities and for a later time period, there is an overlapping period of time. Thus, it is for the federal court to determine whether plaintiff's claims allege violations of the Federal Tort Claims Act or whether the matter should be remanded to state court. As a result, the dismissal of the present action was proper.

Matter of 121 Willow, LLC v. Board of Assessors
181 A.D.3d 587 (2d Dep't 2020)

In this Real Property Tax Law proceeding against the Nassau County Assessment Board and Commission, P retained the law firm of HKCC to prosecute and HKCC separately retained another attorney to prosecute difficult tax proceedings ("SCAR") on behalf of HKCC clients. At some point, Ds sent the attorney a spreadsheet with proposed settlements of various real estate appeal proceedings, but the spreadsheet listed both SCAR and Real Property Law article 7 proceedings. He agreed to settle all the proceedings on the spreadsheet, including the Real Property Law article 7 proceedings. Ps thereafter moved to vacate the stipulation of settlement, arguing, *inter alia*, that he did not have authority to settle the Real Property Law article 7 proceedings. While the attorney did not have actual authority to settle the present proceeding, Court recognized that apparent authority to settle might be present. However, there was no basis here for apparent authority as HKCC had submitted letters to Ds stating the attorney would be handling all SCAR cases and had authority to settle such cases. With these letters, there was no basis for a finding of apparent authority.

II. JUDGMENTS

Zhou v. Kuang
183 A.D.3d 810 (2d Dep't 2020)

Court affirmed judgment entered upon a decision of the trial court after a non-jury trial. D argued judgment was not timely submitted. Court rejected the argument, noting that since Supreme Court's decision at the conclusion of the trail did not expressly direct that the judgment be settled or submitted on notice, provisions of 22 NYCRR 202.48 do not apply, and the judgment was not untimely submitted.

III. RELEASES

Sandomirsky v. Velasquez
179 A.D.3d 419 (1st Dep't 2020)

In this MV accident action, Court granted D's motion pursuant to CPLR 3211(a)(5) based on a signed release. Court noted: "A plain reading of the release between P and D's insurer, nonparty GEICO, unambiguously reveals that P released and discharged D from any claims arising out of the October 16, 2017 motor vehicle accident. The release identifies P as releasor. It also clearly refers to "In Re: Geico Insured: Blanca Velasquez" in the handwritten note at the top of the release, under which P's counsel wrote his initials, and signed his name. Further, the settlement check (which P negotiated) has the same claim number that was used in the release, which is the same claim number specified in paragraph 3 of the complaint as D's "active claim number" with GEICO, and states that it is payment for full and final settlement of all claims for the October 16, 2017 accident.

Gorunkati v. Baker Sanders, LLC
179 A.D.3d 904 (2d Dep't 2020)

Court denied D's motion to dismiss P's legal malpractice and accounting claims pursuant to CPLR 3211(a)(5) on the basis of release. Court noted that D failed to show that the involved release in which P agreed to hold D harmless from and waive any claims related to payment of funds to specified agents "unambiguously" encompassed the claims.

IV. ENFORCEMENT OF FOREIGN JUDGMENTS AND ORDERS

Brothers Pac Four v. War Entertainment
173 A.D.3d 617 (1st Dep't 2019)

Supreme Court entered judgment upon a CA judgment against Ds and in favor of P. Court affirmed. It noted that Supreme Court correctly concluded that CA had long-arm jurisdiction over the non-resident Ds, based upon their soliciting P in CA by phone, exchanging drafts of the investor agreement by email, emailing status reports of the proposed venture, and flying to CA to meet with P, conduct which cumulatively evinced that they purposefully availed themselves of the benefits and protection of CA law, from which this dispute arose. In the circumstances, it is fair to require that Ds account in CA for the consequences that arose from their activity.

USI Systems AG v. Gliklal
176 A.D.3d 555 (1st Dep't 2020)

Court affirmed Supreme Court's grant of S/J to P recognizing under CPLR article 53 a Swiss judgment issued against D and awarding P a money judgment. Court rejected D's argument that he was not personally served, noting that his appearance before the Swiss court precluded the argument under CPLR 5305(a)(2).

V. DEFAULTS

A. Entry

Katz v. Mangel
173 A.D.3d 989 (2d Dep't 2019)

P moved for entry of a default judgment, and D cross-moved to dismiss complaint on ground P abandoned the action by failing to seek a default judgment on the unanswered complaint within one year after the default. Court noted that such a failure may be excused if sufficient cause is shown as to why the complaint should not be dismissed; and sufficient case is established where a reasonable excuse for the delay is shown and P has a potentially meritorious cause of action. Here, P's "conclusory and unsubstantiated" assertions failed to establish a reasonable excuse for the delay.

HSBC Bank v. Stone
174 A.D.3d 866 (2d Dep't 2019)

Court granted Ds motion pursuant to CPLR 3215(c) to dismiss the complaint as abandoned. Court noted that a failure to timely seek a default judgment may be excused "if sufficient cause is shown why the complaint should not be dismissed. To establish sufficient cause as required by CPLR 3215(c), a P must proffer a reasonable excuse for the delay in timely moving for a default judgment and demonstrate that it has a potentially meritorious cause of action. Here, P gave no reason why it never took steps to initiate default proceedings.

Flushing Bank v. Sabi
182 A.D.3d 582 (2d Dep't 2020)

In this mortgage foreclosure action, Court dismissed the complaint pursuant to CPLR 3215©, noting P provided no explanation for the almost four-year delay after D defaulted in 2011 before it filed a request for judicial intervention in February 2015 requesting a residential mortgage foreclosure settlement conference. Under such circumstances, the Supreme Court should have found that P had not demonstrated a reasonable excuse for its delay in seeking a default judgment.

Wells Fargo Bank v. McKenzie
183 A.D.3d 574 (2d Dep't 2020)

Court granted D's motion to dismiss the complaint as abandoned. It noted that as P failed to take proceedings for the entry of judgment within one year after D's default, to avoid dismissal of the complaint insofar as asserted against D, P was required to make a showing of sufficient cause, which required that it demonstrate that it had a reasonable excuse for its delay in taking proceedings for the entry of a judgment and that it had a potentially meritorious action. Under the circumstances present, P failed to demonstrate that it had a reasonable excuse for its delay in taking proceedings for the entry of judgment against D.

Kowel v. JackFromBrooklyn, Inc.
183 A.D.3d 407 (1st Dep't 2020)

Court denied D's motion to vacate. It held D's "one-sided explanation" that Ps would refrain from prosecuting their lawsuit while D negotiated to sell itself did not constitute a reasonable excuse. Court in so ruling rejected Supreme Court's finding that the excuse was "plausible" was a standard for determining "reasonableness."

B. Vacate

Frazier v. 871 E. 178th St. Realty
183 A.D.3d 413 (1st Dep't 2020)

On this appeal from a denial of D's motion to vacate a default judgment, Court noted that even assuming that P's affidavit of merit did not satisfy CPLR 3215(f), that defect would not provide a basis to vacate the default judgment as D moved to vacate the judgment under CPLR

5015(a)(1), but failed to demonstrate a reasonable excuse for its default.

Harrison v. Toyloy
174 A.D.3d 579 (2d Dep't 2019)

P moved to vacate dismissal of her action entered after she did not oppose D's S/J motion. Court noted that a party seeking to vacate an order entered upon his or her default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion. Here, Supreme Court did not abuse its discretion in applying this standard to deny P's motion. P's attorney's affirmation in support of the motion contained conclusory and unsubstantiated allegations regarding his proffered excuse that he was unable to obtain a signed affidavit from the P and his additional excuse of expert unavailability. The attorney further failed to identify the expert by name, did not provide any details concerning his purported "reasonable efforts" to contact the expert, and failed to submit the affidavit of the expert in support of the P's motion to vacate.

Bank of NY Mellon v. Faragalla
174 A.D.3d 677 (2d Dep't 2019)

In this foreclosure action, P moved for S/J. D did not submit opposition papers or appear on the motion's return date to request an adjournment. Motion was granted and D subsequently moved to vacate the default in opposing the motion pursuant to CPLR 2005 and 5015(a). Court granted the motion. Under the circumstances presented here, Court found Ds set forth a reasonable excuse for their failure to appear at the centralized motion part of the Supreme Court on the return date of the P's motion based on evidence of law office failure. In an affirmation, the Ds' attorney explained that upon receiving P's motion, he directed his office's legal assistant to note the return date of the motion on the office calendar, but that the return date had not been noted on the calendar. In addition, the Ds demonstrated a potentially meritorious defense based upon the SOL.

Nestor I, LLC v. Moriarty-Gentile
179 A.D.3d 936 (2d Dep't 2020)

In this foreclosure action, Supreme Court granted D's cross-motion to dismiss the complaint as time-barred. Court reversed. It wrote: "CPLR 3211(e) provides that a defense based upon the SOL is waived if not asserted in an answer or in a timely motion to dismiss pursuant to CPLR 3211(a). Such a motion is timely if it is made before service of the answer is required (*see* CPLR 3211[e]). Here, Ds never answered the complaint, and their cross motion, *inter alia*, to dismiss the complaint was served at least six months after service of the answer was required. Thus, unless Ds' default is vacated or excused, Ds waived their SOL defense, and in their cross motion, Ds did not seek relief from that waiver. Accordingly, the Supreme Court should not have granted that branch of Ds' cross motion which was to dismiss the complaint insofar as asserted against them as time-barred without first determining whether Ds were properly held in default.

P & H Painting, Inc. v. Flintlock Constr.
179 A.D.3d 1086 (2d Dep't 2020)

Court granted D's motion to vacate the judgment entered against it and to compel P to accept its late answer. Here, the less than six-week delay between when D's time to answer expired and when D moved to vacate the default judgment is brief, and P does not allege that D's default was intentional or part of a pattern of neglect. Moreover, in light of the lack of prejudice to P resulting from D's short delay in appearing and seeking to answer the complaint, the existence of a potentially meritorious defense, and the strong public policy favoring resolution of cases on the merits, supported Court's holding.

Deep v. City of New York
183 A.D.3d 586 (2d Dep't 2020)

P moved to vacate a prior order granting Ds' unopposed motion for S/J. Court affirmed denial, rejected P's excuse of law office failure occasioned by a "clerical error," which resulted in "the date being miscalendared," since it was not supported by a "detailed and credible explanation of the default."

Elderco, Inc. v. Kneski & Sons
183 A.D.3d 703 (2d Dep't 2020)

Court denied D's motion to vacate judgment. It found D's proffered excuse that its president failed to open and review the contents of a package following its personal delivery upon him, and that the summons and verified complaint may inadvertently have been discarded thereafter, were insufficient to demonstrate a reasonable excuse for the default.

Wells Fargo bank v. Isley
181 A.D.3d 1082 (3d Dep't 2020)

In this mortgage foreclosure action, Court noted that a D waives the right to seek a dismissal pursuant to CPLR 3215(c) by serving an answer or taking any other steps that may be viewed as a formal or informal appearance.

Lai v. Montes
182 A.D.3d 646 (3d Dep't 2020)

On this appeal seeking vacatur of a default judgment, Court granted Ds motion. It noted in a comprehensive opinion by Justice Colangelo that the requisite elements, reasonable excuse and potentially meritorious defenses were established. As to the latter, the Court noted that although those defenses may prove to be unsuccessful, they were potentially meritorious.

Preferred Mut. Ins. Co. v. DiLorenzo
183 A.D.3d 1091 (3d Dep't 2020)

Court held P's motion to enter a default was proper, noting P complied with the requisite notice pursuant to CPLR 3215(g)(1). D's contention that additional notice was required pursuant to

CPLR 3215(g)(3) was rejected. Court noted notice is required if the "action is based upon nonpayment of a contractual obligation." The instant action is one for breach of contract, fraud and a declaratory judgment, and P seeks compensation for fees involved in investigating the claim. As this is not an action for nonpayment of a contractual obligation, such additional notice was not required.

C. CPLR 317

Fisher v. Lewis Construction
179 A.D.3d 407 (1st Dep't 2020)

In affirming denial of D's motion to vacate default judgment, Court held D failed to show lack of actual notice of the action as required by CPLR 317. It noted: "Both its principal and its attorney acknowledged they had actual notice before P served the Secretary of State, thereby giving it sufficient time to defend."

Bookman v. 816 Belmont Realty, LLC
180 A.D.3d 986 (2d Dep't 2020)

In this P.I action, Court denied D's motion pursuant to CPLR 317 and CPLR 5015(a)(1) to vacate the default judgment. Court noted D was not entitled to relief under CPLR 317 because D, since 2011, had not filed with the Secretary of State, the required biennial form that would have apprised the Secretary of State of its current address (see Limited Liability Company Law §301[e]), thus raising an inference that D deliberately attempted to avoid notice of actions commenced against it. As to CPLR 5015, Court noted that in contrast to a motion pursuant to CPLR 317, on a motion pursuant to CPLR 5015(a)(1), the movant is required to establish a reasonable excuse for his or her default. Under the circumstances of this case, D's failure to keep the Secretary of State apprised of its current address over a significant period of time did not constitute a reasonable excuse.

LeChase Constr. Serv. v. J.M. Business
181 A.D.3d 1294 (4th Dep't 2020)

Court held D's president's affidavit "merely" denying receipt of process from Secretary of State was insufficient to satisfy CPLR 317.

Golden Eagle Capital v. Paramount Mgt.
__ A.D.3d __ (2d Dep't 7/8/20)

Court granted D's motion to vacate pursuant to CPLR 317 its default in appearing or answering the complaint. It held D established its entitlement to relief from its default under CPLR 317 by demonstrating that the address on file with the Secretary of State at the time the S&C were served was incorrect, and that it did not receive actual notice of the S&C in time to defend itself against this action. In addition, the evidence did not suggest that D's failure to update its address with the Secretary of State constituted a deliberate attempt to avoid service of process. Moreover, D met its burden of demonstrating the existence of a potentially meritorious defense.

D. Inquest

Dejesus v. H.E. Broadway, Inc.
175 A.D.3d 1485 (2d Dep't 2019)

Supreme Court struck D's answer and schedule an inquest on damages. At the inquest, following direct testimony by P, the court denied defense counsel's request to cross-examine P, since D's answer had been stricken. The court awarded P damages in the principal sum of $267,221.77. Court reversed. It noted a D whose answer is stricken as a result of a default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit P's conclusion as to damages. Thus, where a judgment against a defaulting D is sought by motion to the court, D is entitled, at an inquest to determine damages, to cross-examine witnesses, give testimony, and offer proof in mitigation of damages. According, a remand here was necessary.

E. CPLR 3215(c)

Wells Fargo Bank v. Martinez
181 A.D.3d 470 (1st Dep't 2020)

In this mortgage foreclosure action, Court granted D's motion to dismiss the action as abandoned under CPLR 3215(c). It noted stated that P waited almost three years to seek a default judgment and failed to provide sufficient cause to excuse that delay. It also rejected P's argument that D waived his right to seek dismissal pursuant to 3215(c) because he participated in the settlement conferences is equally unavailing. Although a party may waive it rights under CPLR 3215(c) "by serving an answer or taking any other steps which may be viewed as a formal or informal appearance," D's participation in settlement conferences did not constitute either a formal or an informal appearance "since [he] did not actively litigate the action before the Supreme Court or participate in the action on the merits."

VI. TAXABLE DISBURSEMENTS

Matter of Rosa-Myers
63 Misc.3d 251 (Surr. Ct. Queens Co. 2019) (Kelly, S.)

Before the court was a petition for leave to settle and compromise causes of action for the personal injuries and the wrongful death of decedent and to judicially settle the executor's account. Court held counsel for petitioner, the executor of decedent's estate, was not permitted to recover disbursements for computerized legal research arising out of a petition for leave to settle and compromise causes of action for decedent's personal injuries and wrongful death related to a medical malpractice claim and to judicially settle the executor's account. The right to be reimbursed for disbursements is entirely dependent upon the existence of statutory authorization (CPLR 8301). While legal research is not specifically enumerated as an appropriate disbursement under the statute, CPLR 8301 (a) (13) allows items to be taxed as disbursements "according to the course and practice of the court." Here, regardless of how counsel chose to characterize the manner in which legal research was billed, a legal fee could not be a disbursement. Legal research is what counsel does in order to earn a fee; it constitutes a legal

service rendered to a client. Attorney's fees have been historically disallowed as a disbursement. Legal research is merely a substitute for an attorney's time and is not a separate taxable item. Although petitioner stated that the retainer agreement allowed for reimbursement of the expenses for computerized legal research, that claim was belied by the express terms of the agreement, which made no reference to computerized legal research. In any event, the court was not bound by such terms.

VII. JUDGMENT BY CONFESSION

L. 2019, C. 214 Amending CPLR 3218 (a)(1), eff. Aug.30, 2019

With the amendment, the filing of confession affidavits is permitted only in the county within New York where the debtor resided at the time the affidavit was executed. It ends the use of the statute by parties where debtor has no residence-based connection to NY. For further discussion, see Justice Dillon’s analysis at Practice Commentary to CPLR 3218, C3218:1 (2019), McKinney’s Con. Laws.

Part Nine

APPEALS

I. APPEALABILITY

Matter of Spectrum News v. New York City Police Dept.
179 A.D.3d 578 (1st Dep't 2020)

In this article 78 proceeding, petitioner appealed from an "interim decision" of Supreme Court. Court held the "interim decision" was not an appealable paper. It then stated: "The lack of an appealable paper here deprives the Court of jurisdiction and requires dismissal of Spectrum's appeal, albeit without prejudice. Where, as here, a party brings an appeal from a non-appealable paper, this Court regularly dismisses the appeal for lack of jurisdiction. While there are instances where this Court has deemed a paper denominated as a "decision" to nonetheless be appealable because it contained all the hallmarks of an order, that is not the situation here. As Supreme Court itself noted, it issued the interim decision without any motion for relief pending. Instead, it appears that the court was limiting the scope of the hearing, and the decision did not result in any order being issued.

Nicol v. Nicol
179 A.D.3d 1472 (4th Dep't 2020)

Over a dissent, Court held the paper appealed from, a decision, met the essential requirements of an order, and thus appeal was properly before it.

LeChase Constr. Serv. v. JM Business
181 A.D.3d 1294 (4th Dep't 2020)

Court held that a party may appeal from an order granting leave to enter a default judgment. It noted this situation is different from the situation where a D seeks to appeal from an order entered upon the default of the appealing party.

Knapp v. Finger Lakes NY, Inc.
__ A.D.3d __ (4th Dep't 6/12/20)

The Court in a well-reasoned opinion authored by Justice Troutman held that an order otherwise appealable as of right entered after the entry of a final judgment is not subsumed in the judgment, but is independently appealable. In so holding, Court rejected its prior precedent. **NOTE:** P had moved to set aside a jury verdict which was denied on 1/3/19. A final judgment had been entered on 8/21/18. The order but not the judgment was appealed from.

II. REVIEWABILITY

A. Preservation

Kleiber v. Fichtel
172 A.D.3d 1048 (2d Dep't 2019)

In this MV accident case, trial court set aside jury verdict for D, but court reversed and reinstated the verdict. It held: "We recognize that common courtesy requires that an attorney allow opposing counsel the opportunity to argue his or her case to the jury without undue or repetitive interruptions. Nevertheless, where counsel, in summing up, exceeds the bounds of legal propriety, it is the duty of the opposing counsel to make a specific objection and for the court to rule on the objection, to direct the jury to disregard any improper remarks, and to admonish counsel from repetition of improper remarks. Where objection is not, or cannot appropriately be, interposed during summation, counsel should, upon the conclusion of the summation, make appropriate objections, seek curative instructions, or request a mistrial. Where no objection is interposed, a new trial may be directed only where the remarks are so prejudicial as to have caused a gross injustice, and where the comments are so pervasive, prejudicial, or inflammatory as to deprive a party of a fair trial. This standard was not met in this case. We stress that the P's counsel made no complaint regarding the allegedly prejudicial nature of the D's closing statement until after an adverse verdict was rendered. The verdict that the P did not sustain a serious injury was supported by the evidence, and the jury had ample reason to reject the P's claims and accept the arguments of the Ds."

Evans v. New York City Transit Auth.
179 A.D.3d 105 (2d Dep't 2019)

In a thoughtful opinion by Justice Connolly, Court held a party need not make a motion to set aside a verdict to be entitled to an against the weight of the evidence review by the Appellate Division. The source of this authority to review the weight of the evidence absent a motion to set aside the verdict was the language of CPLR 4404(a), together with the recognition that "the power of the Appellate Division … is broad as that of the trial court." Notably, the Court in reaching this conclusion rejected its own prior precedent but also expressly disagreed with contrary holdings from the Third and Fourth Departments.

B. Aggrieved Party

Porco v. Lifetime Entertainment
176 A.D.3d 1274 (3d Dep't 2019)

Porco, a convicted murderer commenced this action against D movie producer, seeking preliminary injunction to prevent airing of film depicting dramatized version of events surrounding murder of his father and attempted murder of his mother. Subsequently, P filed an amended complaint adding his mother as a P, asserting claims on her behalf. Supreme Court granted leave to file the amended complaint. D thereafter moved to dismiss the claims asserted by mother in the amended complaint as barred by the SOL. Ps cross-moved for leave to serve a second amended complaint and opposed D's motion on the grounds that the claims asserted by

mother were timely under the relation back doctrine or, alternatively, a question of fact existed as to whether D "republished" the movie, thereby starting a new statute of limitations period. In its order, although Supreme Court held that Ps could not rely on the relation back doctrine, it agreed with Ps that discovery was needed to resolve the republication issue. As such, the court denied D's motion "without prejudice to making a motion for similar relief at the conclusion of discovery" and granted Ps' cross motion. Ps appeal. In a thoughtful and helpful to the bar opinion, Justice Aarons applied the aggrieved party rules to determine whether Ps' appeal could be heard as the aggrievement requirement is jurisdictional in nature and concluded the appeal must be dismissed as Ps were not aggrieved parties. As to P son, since D's motion sought dismissal of only those claims asserted by mother, and did not seek any relief against son and thus Supreme Court likewise did not grant D any relief against him, P son was not an aggrieved party. As to P mother, Court noted Supreme Court denied D's motion without prejudice to renew upon completion of discovery after considering P' republication argument. Thus, Supreme Court neither granted D any affirmative relief against mother nor withheld any affirmative relief requested by her. Thus, she was not aggrieved. Court then added: "A party is not aggrieved when his or her interests are only remotely or contingently affected by the order appealed from."

C. *In Limine* Rulings

C.H. v. Dolkart
174 A.D.3d 1098 (3d Dep't 2019)

In this med mal action, D moved to preclude the opinions of P's expert witnesses as inadmissible under *Frye*. Trial court denied motion. Court dismissed Ds' appeal. Noting that "an order which merely determines the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission." Here, the trial court's decision merely permits P to offer various testimony of his expert witnesses and does not limit the scope of issues to be tried. Thus, an appeal does not lie. **COMMENT:** But doesn't the denial of D's motion affect a substantial right which under another line of authority permits an appeal? *See generally*, Hutter, "Appealability of Evidentiary Rulings Made Before Trial on Motions *in Limine*," Leaveworthy (NYSBA - Committee on Courts of Appellate Jurisdiction), Vol. V, No. 3 (Fall/Winter 2016, p. 3).

Reed v. New York State Electric & Gas Co.
183 A.D.3d 1207 (3d Dep't 2020)

P appealed from an order which partially granted D's *in limine* motion to preclude the testimony of P's economist. Supreme Court, finding that the expert disclosure lacked reasonable detail as to who the value that the expert assigned to P's lost services and support would be calculated, precluded his testimony with regard to said damages. Court held because this ruling restricts P's ability to prove and recover damages, "this issue is appealable."

D. CPLR 5501(a)(1)

Lai v. Montes
182 A.D.3d 646 (3d Dep't 2020)

Ds on their appeal sought to challenge the denial of their motion (2016) to vacate the default judgment entered against them, from which they did not appeal. However, they did file an appeal from an order (2017) issued after an inquest awarding Ps damages. Court noted the 2017 order, from which Ds did ultimately timely appeal, is a final order in that it "dispose[d] of all of the causes of action between the parties in the action … and [left] nothing for further judicial action." Accordingly, Ds' appeal from the 2017 final order brings up for review the prior, nonfinal 2016 order denying the motion to vacate the default judgment, which "necessarily affect[ed] the final [order]."

III. NOTICE OF APPEAL

Rivera v. Scanska USA
179 A.D.3d 455 (1st Dep't 2020)

Court dismissed P's appeal from an order entered 7/11/16. Court noted P's NOA, dated 9/25/18, states that he is appealing "from a Decision and Order of the Supreme Court, Bronx dated July 5, 2016." He claims that his notice of appeal contains an "inaccurate description" of the paper appealed, as evinced by his attachment of the judgment entered 9/20/18, and requested the Court to exercise its discretion to deem the appeal as a timely one from the judgment. (see CPLR 5520[c]). Court held: "Even if the defect were a mere "typographical error" as claimed by P, we find no interest of justice basis to treat the notice as valid, where P is clearly seeking to circumvent an untimely appeal from the order. In any event, even if we were to grant P's request, the appeal from the judgment would not bring up for review the order, which was final and disposed of all of the causes of action between the parties and left nothing for further judicial action apart from the ministerial entry of the judgment.

Cline v. Code
175 A.D.3d 905 (4th Dep't 2019)

In this M/V accident case, D moved for S/J on the ground that P did not sustain a serious injury; and P cross-moved for partial S/J on the issue of serious injury. Supreme Court denied P's cross-motion, granted D's motion and dismissed the action. P filed a timely Notice of Appeal. Initially, Court 4-1, with Justice Curran dissenting, rejected the assertion of D and the dissenter that P's notice of appeal limited its review to that part of the order and judgment that denied P's cross motion for partial S/J. The notice of appeal provides, in relevant part, that P "hereby appeals . . . from the . . . [o]rder and [j]udgment . . . denying [p]laintiff's [c]ross[m]otion for [s]ummary [j]udgment. P appeals from each and every part of said [o]rder denying [p]laintiff's [c]ross[m]otion." Court concluded that in as much as the notice of appeal states that P sought to appeal from "each and every part" of the order and judgment and does not contain language restricting the appeal to only a specific part the Court concluded that the appeal is not limited to review of the denial of P's cross motion and that the reference thereto simply constituted language describing the order and judgment.

IV. NOTICE OF ENTRY

W. Rogowski Farm, LLC v County of Orange
171 A.D.3d 79 (2d Dep't 2019)

Ps appealed from an order that granted cross-motions by three Ds to dismiss their complaint which alleged that an underlying tax foreclosure proceeding against them had been improperly commenced and that D county's subsequent sale of Ps' real properly was null and void. The order was served with notice of entry three times by three different prevailing Ds on three different dates. The Court in a comprehensive opinion authored by Justice Dillon dismissed Ps' entire appeal as untimely. The basis for the dismissal was that the notice of appeal was filed beyond the time frame of CPLR 5513(a), which according to the court was measured from the *first* service of the order with notice of entry to all the Ps. As stated by the Court: "[T]he service of an order or written judgment with written notice of entry commences the 30-day time to appeal as to not only the party performing the service, but as to all other parties as well." In so ruling, the Court also indicated, albeit in dictum but persuasive dictum nonetheless, that where the notice of entry is served upon some, but not all, parties, the non-served party's time to appeal does not start to run until that party is served with notice of entry. **COMMENT**: While the law governing notice of entry in actions involving multiple parties is clear now in the Second Department, the law in the other Appellate Division departments is not clear. Thus, the First Department has followed the rule that each prevailing party must serve the notice of entry upon a losing party to start that party's 30-day time to appeal as against the serving party, giving no effect to the fact that another party had served notice of entry upon that losing party. *See, Dobess Realty Corp. v. City of New York*, 79 A.D.2d 348, 352-353 (1st Dep't 1981). The law in the Third and Fourth Departments is unclear. Although the *Rogowski* decision appears correctly decided (at least to this commentator), and the First Department precedent is distinguishable as it is based upon an interpretation of CPLR 5513(a) before it was amended in 1996, counsel for all prevailing parties in the First, Third and Fourth Departments should service notice of entry on the losing party.

V. PERFECTION REQUIREMENTS

Practice Rules of the Appellate Division

Effective September 17, 2018, the Practice Rules became effective in all four departments. They are available at 22 NYCRR Part 1250. Each department, however, has supplemented these rules with specific rules for appeals in its Court.

Electronic Filing Rules

All appeals are not subject to the Appellate Division's Electronic Filing Rules, 22 NYCRR Part 1250, which have been supplemented in each department.

"The Tanbook"

Attorneys are required to cite all NY court decisions from the Official Reports, prepared by the

NYS Law Reporting Bureau, int heir legal submission, and not to West's citations, e.g., NYS or NE. These opinions follow the "Tanbook" resource for citing which is available at https://www.nycourts.gov/reporter/Styman_Menu.html. As stated by Judge Gerald Lebovits in "Cite-Seeking, Part I: The Tanbook," NYSBA Journal, October 2018, p. 60: "The Tanbook should be followed for three reasons. First, the Tanbook's authors are experts in NY primary and secondary authority. Second, judges cite according to the Tanbook. Third, lawyers who use the Tanbook make it easier for NY judges to rule in their favor. Forcing judges to spend time checking non-Tanbook citations frustrates the decision-making process."

VI. BRIEFS

Reed v. New York State Electric & Gas Co.
183 A.D.3d 1207 (3d Dep't 2020)

Ds moved before the Court to strike portions of P's brief for being outside the scope of the record and to strike portions of P's reply brief for raising issues for the first time on appeal. Upon discussion of the facts, Court denied the motion. **COMMENT:** Note the motion as the means to bring the issue before the Court.

VII. ATTORNEY'S OBLIGATIONS

Chen v. Caesar & Napoli, P.C.
179 A.D.3d 46 (2d Dept. 2019)

On an appeal from an order which denied Ds' motion for S/J dismissing an action for legal malpractice, Court held trial counsel's failure to immediately notify the Appellate Division of the settlement of the underlying action warranted the imposition of sanctions in the amount of $250. Court noted counsel had an independent obligation to give the Court notice of the settlement, and had assured P's counsel that, as between the attorneys, it would assume responsibility for advising Ds and their appellate counsel of the settlement and directing them to withdraw the appeal. Court noted the statewide Practice Rules of the Appellate Division provide that "[t]he parties or their attorneys shall *immediately* notify the court when there is a settlement of a matter or any issue therein" (Rules of App Div, All Depts [22 NYCRR] § 1250.2 [c][emphasis added]).

Savage v. St. Peter's Hosp.
180 A.D.3d 1264 (3d Dep't 2020)

On this appeal, Court stated: "We have been informed that, during the pendency of these cross appeals, a trial was held on this matter and final judgments have been entered. Therefore, the appeal and cross appeal must be dismissed because the right to appeal from a nonfinal order terminates upon the entry of a final judgment. Finally, we note that the judgments were entered in November 2019. It was not until oral argument on January 9, 2020, however, that this Court was first apprised of the entry of these judgments. We take this opportunity to remind the bar that it must immediately notify this Court of any events that will impact a pending appeal and that the failure to do so may result in sanctions. (*see* 22 NYCRR 1250.2 [c])."