

MEMORANDUM

DATE: August 27, 2019
RE: RECENT CPLR DECISIONS OF INTEREST
FROM: Burton N. Lipshie

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JURISDICTION

CPLR 301 – GENERAL JURISDICTION

Aybar v. Aybar, 169 A D 3d 137 (2d Dept. 2019) – In *Daimler AG v. Bauman*, 571 U.S. 117 (2014), almost certainly its most important jurisdiction decision in some 70 years, an eight-Justice majority of the Supreme Court essentially rewrote the law of general jurisdiction. The result is that a corporation will, with narrow exceptions, only be subject to general jurisdiction in the States in which it is either incorporated or maintains its principal place of business; in the Court’s language, a State in which the corporation is “at home.” The once familiar standard for general jurisdiction – corporate “presence” in a State in which it “does business” both “continuously and systematically” – has been abrogated, except, possibly, in “exceptional” cases. The Court relied heavily on – and expanded upon – its decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), saying that “*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. ‘For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as *at home*’” [emphasis added]. And, for a corporation, “the place of incorporation and principal place of business are ‘paradigm bases for general jurisdiction.’” The Court recognized that “*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums” [emphasis by the Court]. Here, “plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation ‘engages in a substantial, continuous, and systematic course of business’ [citation omitted]. That formulation, we hold, is unacceptably grasping.” This marks a dramatic change in the law. In New York, the formulation proposed by the *Daimler* plaintiffs had been the law since Judge Cardozo’s 1917 opinion in *Tauza v. Susquehanna Coal Company*, 220 N Y 259 (1917). The majority opinion cites *Tauza*, and proclaims that it was “decided in the era dominated by *Pennoyer* [*v. Neff*, 95 U.S. 714 (1878)]’s territorial thinking,” and “should not attract heavy reliance today.” The

new standard articulated by the Court is that the inquiry “is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation’s ‘affiliations with the State are so “continuous and systematic” as to render it essentially at home in the forum State.” The Court acknowledged “the possibility that *in an exceptional case* [citation omitted; emphasis added], a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.” Finally, and importantly, the Court held that “the general jurisdiction inquiry does not ‘focus solely on the magnitude of the defendant’s in-state contacts’ [citation omitted]. General jurisdiction instead calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States [citation omitted]. Nothing in *International Shoe [Co. v. Washington, 326 U.S. 310 (1945)]* and its progeny suggests that ‘a particular quantum of local activity’ should give a State authority over a ‘far larger quantum of activity’ having no connection to any in-state activity.” Last year’s “Update” reported on *BNSF Railway Co. v. Tyrrell, ___ U.S. ___, 137 S.Ct. 1549 (2017)*, in which the Supreme Court re-emphasized its holding in *Daimler* that determining whether a corporation is “at home” in a forum requires measuring its activities in the forum as against its total activities, and that merely doing a lot of business in the forum is not enough to find general jurisdiction. “BNSF has over 2,000 miles of railroad track [6% of its total] and more than 2,000 employees [5% of its total] in Montana [in which it generates almost 10% of its total revenue]. But, as we observed in *Daimler*, ‘the general jurisdiction inquiry does not focus solely on the magnitude of the defendant’s in-state contacts’ [citation omitted]. Rather, the inquiry ‘calls for an appraisal of a corporation’s activities in their entirety’; ‘a corporation that operates in many places can scarcely be deemed at home in all of them’ [citation omitted]. In short, the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana. But in-state business, we clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims like Nelson’s and Tyrrell’s that are unrelated to any activity occurring in Montana.” Justice Sotomayor, who dissented in *Daimler*, continued “to disagree with the path the Court struck in *Daimler*.” Although we have not yet seen cases where the issue is where, in fact, a defendant corporation’s “principal place of business” is, those are also certain to arise. Back in 2010, the Supreme Court, *albeit* in the context of diversity jurisdiction, assayed a definition. In *The Hertz Corp. v. Friend, 559 U.S. 77 (2010)*, the Court concluded “that ‘principal place of business’ is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities. It is the place that Courts of Appeals have called the corporation’s ‘nerve center.’ And in practice it should normally be the place where the corporation maintains its headquarters –

provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the “nerve center,” and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).” Here, in *Aybar*, the Appellate Division deals with one of the questions remaining in the wake of *Daimler*. Under traditional New York law, the registration of a foreign corporation to do business here sufficed to render it subject to general jurisdiction [see, *Flame, S.A. v. Worldlink International (Holding), Inc.*, 107 A D 3d 436 (1st Dept. 2013)]. The issue arises whether *Daimler* mandates a change in that rule. The first appellate decision in New York to address that issue, *albeit* in a more limited context, was *Matter of B&M Kingstone, LLC v. Mega International Commercial Bank Co., Ltd.*, 131 A D 3d 259 (1st Dept. 2015). There, petitioner judgment-creditor sought information from respondent bank, headquartered in Taiwan, by service of an information subpoena on its New York branch. The Appellate Division, First Department, directed enforcement of the subpoena with respect to accounts held in *any* of the bank’s branches. “Mega’s New York branch is subject to jurisdiction requiring it to comply with the appropriate information subpoenas, because it consented to the necessary regulatory oversight in return for permission to operate in New York.” Other Courts have come to a different conclusion. For example, the Second Circuit, in *Brown v. Lockheed Martin Corp.*, 2016 WL 641392 (2d Cir. 2016), concluded that the relevant Connecticut statute for registration of foreign corporations and the designation of an agent for service of process there – which may be the Secretary of State – is “ambiguous” and not “clear enough” as to whether such registration constitutes, under Connecticut law, a “consent” to jurisdiction there. Accordingly, the Court did not need to “raise constitutional questions prudently avoided absent a clearer statement by the state legislature or the Connecticut Supreme Court.” However, in pretty powerful *dicta*, the Court strongly suggested that it would view a clearer statute, like New York’s, which “has been definitively construed to accomplish that end,” as violating due process as interpreted by the Supreme Court in *Daimler*. For, “the analysis that now governs general jurisdiction over foreign corporations – the Supreme Court’s analysis having moved from the ‘minimum contacts’ review described in *International Shoe* to the more demanding ‘essentially at home’ test enunciated in *Goodyear* and *Daimler* – suggests that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate ‘consent’ – perhaps unwitting – to the exercise of general jurisdiction by state courts, particularly in circumstances where the State’s interests seem limited.” And, “it appears that every state in the union – and the District of Columbia, as well – has enacted a business registration statute [citation omitted]. States have long endeavored to protect their citizens and levy taxes, among other goals, through this mechanism. If mere registration and the accompanying appointment of an in-state agent – without an express consent to general jurisdiction – nonetheless sufficed to confer general jurisdiction by implicit consent every corporation would be subject to general jurisdiction in every state in which it registered, and

Daimler's ruling would be robbed of meaning by a back-door thief. In *Daimler*, the Court rejected the idea that a corporation was subject to general jurisdiction in every state in which it conducted substantial business. Brown's interpretation of the Connecticut statute could justify the exercise of general jurisdiction over a corporation in a state in which the corporation had done *no business at all*, so long as it had registered" [emphasis by the Court]. And, in *Genuine Parts Company v. Cepec*, 2016 WL 1569077 (Del. 2016) the Supreme Court of Delaware weighed in on the issue, and, overruling one of its pre-*Daimler* cases, interpreted its statute, which, like New York's, provides for the designation of a State official as agent for service of process upon becoming authorized to do business, as *not* "a broad consent to personal jurisdiction in any cause of action, however unrelated to the foreign corporation's activities in Delaware." After *Daimler*, "it is not tenable to read Delaware's registration statutes" to constitute such consent. For, "an incentive scheme where every state can claim general jurisdiction over every business that does any business within its borders for any claim would reduce the certainty of the law and subject businesses to capricious litigation treatment as a cost of operating on a national scale or entering any state's market. *Daimler* makes plain that it is inconsistent with principles of due process to exercise general jurisdiction over a foreign corporation that is not 'essentially at home' in a state for claims having no rational connection to the state." Now, in *Aybar*, the Second Department directly faces the issue: "We consider on these appeals whether, following the United States Supreme Court decision in *Daimler AG v. Bauman* (571 U.S. 117), a foreign corporation may still be deemed to have consented to the general jurisdiction of New York courts by virtue of having registered to do business in New York and appointed a local agent for the service of process. We conclude that it may not." For, "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 New York courts, to be sued upon causes of action that have no relation to New York." Yet, despite that broad language, seemingly holding, particularly by its reliance upon *Daimler*, that any attempt by New York to make corporate registration constitute consent to jurisdiction would violate the Due Process clause of the United States Constitution, the Court in a footnote, appears to step back from such a sweeping holding. "The parties observe that post *Daimler*, some New York lawmakers have proposed amending Business Corporation Law §1301 to expressly provide that a corporation's application to do business in New York constitutes consent to personal jurisdiction in lawsuits in New York for all actions against the corporation [citation omitted]. 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."

Kyowa Seni, Co., Ltd v. ANA Aircraft Technics Co., Ltd., 60 Misc 3d 898 (Sup.Ct. N.Y.Co. 2018)(Scarpulla, J.) – Here, too, noting that "after the *Daimler* case, most New York courts have rejected general jurisdiction by consent based on corporate

registration,” the Court agrees that “simple registration in New York is an insufficient grounds for this Court to exercise general jurisdiction over” the foreign corporate defendant.

Kline v. Facebook, Inc., N.Y.L.J., 1548057420 (Sup.Ct. N.Y.Co. 2019)(Freed, J.) – The Court denies this application for pre-action discovery from Facebook and Google, seeking the identity of a person who allegedly sent false and defamatory messages about petitioner using those sites. Neither Facebook nor Google is “at home” in New York, and “a corporation’s registration to do business with New York state has also been held as insufficient to confer general jurisdiction.”

Webb-Benjamin, LLC v. International Rug Group, LLC, 192 A.3d 1133, 2018 WL 3153602 (Superior Ct. Pa. 2018) – Disagreeing with the above cases, this Pennsylvania appellate Court holds that a corporate registration statute that advises the registrant of its consent to jurisdiction by registration, does not run afoul of the due process clause as interpreted by *Daimler*. Thus, 42 Pa.C.S.A. §5301, “which provides that a non-resident of Pennsylvania consents to general personal jurisdiction in Pennsylvania by registering to do business there,” is enforceable.

Homeward Residential v. Thompson Hine LLP, 172 A D 3d 459 (1st Dept. 2019) – Last year’s “Update” reported on the Supreme Court decision in this action [N.Y.L.J., 1521521561 (Sup.Ct. N.Y.Co. 2018)]. Supreme Court ruled that a national law firm, organized under the laws of Ohio, does not become subject to general jurisdiction in New York by opening a New York office, and filing as a “foreign limited liability partnership” with the Department of State. Nor is it estopped from arguing the absence of jurisdiction because the Department of State website lists the firm’s Madison Avenue address as its “Principal Executive Office.” For, “that is not a synonym for principal place of business,” but, rather, relates “primarily to issues of venue.” Of course, “a national law firm might be subject to specific jurisdiction arising out of its work or dealings in New York. But that is not the case in this action. Here, plaintiff wants to sue defendant in New York even though the work was performed in Georgia (where defendant has another office), plaintiff made payments issued by defendant’s Ohio office and there is no evidence whatsoever that defendant made any statements or representations that it was headquartered in New York. There is no dispute that defendant does business in New York – it has an office in New York – but plaintiff does not argue that those contacts rise to the level of general jurisdiction. Instead, plaintiff claims that defendant is equitably estopped from arguing about personal jurisdiction.” The Appellate Division has affirmed the dismissal of the complaint. “Plaintiff contends that its attorneys relied on defendant’s filings as a foreign partnership with the New York Department of States (DOS), which identified a New York address as its ‘Principal Executive Office,’ and on a complaint filed by defendant in an unrelated action in which it alleged that its principal place of business was in New York. However, defendant presented evidence showing that any

search for public information would disclose that it is an Ohio-based law firm, with its principal place of business in Cleveland, and, moreover, that plaintiff was aware of this, as it had dealt with the firm in Georgia and Ohio only and sent payments to the Cleveland office. Defendant also showed that it did not affirmatively misrepresent its place of business in its DOS filings, which disclose that it is a foreign limited liability corporation and provide its Cleveland address for service of process.”

Sandella v. Hill, 166 A D 3d 924 (2d Dept. 2018) – One of the significant questions raised in the wake of the *Daimler* decision is the future of “tagging” jurisdiction – which provides that if process is personally delivered to defendant while defendant is physically in New York, the New York courts have general jurisdiction over that defendant. Tagging jurisdiction was upheld as constitutional by a unanimous Supreme Court in *Burnham v. Superior Court*, 495 U.S. 604 (1990). And *Daimler* itself is silent on the issue. But, surely, an individual is not “at home” in New York when the basis for jurisdiction is simply tagging here. Last year’s “Update” reported on *Ford v. Bhatoe*, N.Y.L.J., 1515401434 (Sup.Ct. Kings Co. 2017), in which the Court held that, in light of *Daimler*, “the fact that service was effectuated in accordance with CPLR 308 on an individual who is not domiciled in the State of New York is not sufficient by itself to confer Constitutional personal jurisdiction.” Here, in *Sandella*, the Court focused on one of the exceptions to “tagging” jurisdiction – if defendant is in New York solely for the purpose of voluntarily testifying in a proceeding, the defendant is immune to tagging jurisdiction while in the state. But, “to be entitled to such immunity, a defendant must demonstrate that she or he ‘was, in fact, a nonresident, that her or his sole purpose in appearing in New York was to participate in the relevant legal proceeding, and that there were no available means of acquiring jurisdiction over her or his person other than personal service in New York.’” Here, since defendant was subject to long arm jurisdiction, “he was not entitled to immunity because personal jurisdiction could have been obtained over him by serving him outside of New York pursuant to CPLR 302 and 313.” While the Court did not address the question whether tagging jurisdiction survives *Daimler*, it presumably would not reach the question of the application of an exception to that rule if it does not, in fact, survive.

Wolberg v. IAI North America, Inc., 161 A D 3d 468 (1st Dept. 2018) –Three decades before the *Daimler* decision, The Second Circuit, in *Volkswagenwerk AG v. Beech Aircraft Corporation*, 751 F.2d 117 (2d Cir. 1984), laid out a four-prong test for determining whether the presence in New York of a subsidiary of a non-New York corporation sufficed to provide general jurisdiction here over the parent corporation: (1) common ownership; (2) financial dependence of the subsidiary on the parent; (3) assignment by the parent of executive personnel of the subsidiary, and failure to observe corporate formalities; (4) parental control over the subsidiary’s marketing and operational policies. Post-*Daimler*, that holding is at least called into question, since the non-New York parent is not “at home” in New York. But, in *FIA Leveraged Fund Ltd v. Grant*

Thornton LLP, 150 A D 3d 492 (1st Dept. 2017), reported on in last year's "Update," the Court declined jurisdiction over the non-New York parent corporation because "plaintiffs failed to satisfy the four factors set out in *Volkswagenwerk AG v. Beech Aircraft Corp.* [citation omitted], which we have adopted." Here, in *Wolberg*, as in *FIA Leveraged Fund Ltd.*, which the Court cites with approval, the First Department re-affirms its reliance upon *Volkswagenwerk AG v. Beech Aircraft Corporation*, 751 F.2d 117 (2d Cir. 1984), despite the command of *Daimler* that general jurisdiction is limited to the place where the defendant corporation is "at home." The Court finds that defendant subsidiary, which "does business in New York," is "not a mere department" of the Israeli defendant, and, applying the *Volkswagenwerk* standards, rejects jurisdiction over the parent corporation.

BRG Corporation v. Chevron U.S.A., Inc., 163 A D 3d 1495 (4th Dept. 2018) – Applying the reasoning of the Third Department in *Sementz v. Sherling & Walden, Inc.*, 21 A D 3d 1138 (3d Dept. 2005), *aff'd on other grounds*, 7 N Y 3d 194 (2006), the Court holds that personal jurisdiction does not exist over defendant merely "because it ostensibly bears successor liability for a predecessor corporation that was itself subject to personal jurisdiction in New York." For, "when and if successor liability is found applicable, the corporate successor would be subject to liability for the torts of its predecessor in any forum having *in personam* jurisdiction over the successor, but the successor liability rules do not and cannot confer such jurisdiction over the successor in the first instance."

CPLR 302 – LONG ARM JURISDICTION

Repwest Insurance Co. v. Country-Wide Insurance Co., 166 A D 3d 61 (1st Dept. 2018) – At issue here is "whether an automobile liability policy's territory of coverage clause that covers any accident within the United States and the occurrence of the accident in the forum state are sufficient to confer personal jurisdiction over the primary insurer of the offending vehicle. We find that the connection is not sufficient to comport with federal due process." For, the "minimum contacts" test set out by the Supreme Court requires that those contacts suffice for defendant to "reasonably anticipate being haled into court there," which, in turn, requires that the defendant "purposefully avail" itself of conducting activities in the forum. Merely providing insurance coverage for an accident, wherever it occurs, without more, does not meet that test in a state where it does no business. "There is a qualitative distinction between contracting to cover an insured under a territory of coverage clause and the insurer of the policy being amenable to being haled into court anywhere in the United States in a dispute with another insurer."

Allen v. The Institute for Family Health, 159 A D 3d 554 (1st Dept. 2018) – "Plaintiff alleges that defendant Dauito, a radiologist, negligently read her sonogram, leading to a delay in the diagnosis and treatment of her breast cancer. Dr. Dauito avers that, at all relevant times, he was a New Jersey resident and worked only at an office in New Jersey. However, he acknowledges that he was licensed to practice medicine in New York and that he contracted with defendant Madison Avenue Radiology, P.C., a New York

corporation, to provide radiology services to some of its New York patients. Plaintiff's sonogram was performed in New York, Dr. Dauito relayed his diagnostic findings to Madison Avenue Radiology in New York, and Madison Avenue Radiology issued a report based on his findings that was allegedly relied upon by plaintiff and her doctors. Under these circumstances, New York courts may exercise jurisdiction over Dr. Dauito pursuant to CPLR 302(a)(1), notwithstanding his lack of physical presence in New York, because he transacted business with Madison Avenue Radiology and provided radiology services to patients in New York, including plaintiff, projecting himself into the State by electronically or telephonically transmitting his diagnostic findings."

Glazer v. Socata, S.A.S., 170 A D 3d 1685 (4th Dept. 2019) – The complaint alleges that defendant Aerospace, a French manufacturer, negligently manufactured an airplane pressurization system, which failed, causing a crash off the coast of Jamaica during a flight from New York to Florida. "Inasmuch as Aerospace's purposeful activity consisted of contracting with Socata to provide a component to the manufacturing of a plane that happened to end up in New York, that activity does not subject Aerospace to personal jurisdiction in New York."

Gottlieb v. Merrigan, 170 A D 3d 1316 (3d Dept. 2019) – Plaintiff, a New York lawyer, was retained by a client to prosecute a personal injury action in Massachusetts. The client subsequently discharged plaintiff and retained defendants, a Massachusetts lawyer and his Massachusetts firm. The underlying action having settled, plaintiff seeks a portion of the total fee paid to defendants. The Court affirms the dismissal of the action for lack of jurisdiction over defendants. "There is no evidence that defendants reached out or solicited clients in New York to represent them in personal injury accidents in Massachusetts [citation omitted]. Further, although defendants sent numerous letters and emails to the client's medical providers in New York, those actions were 'responsive in nature, and not the type of interactions that demonstrate the purposeful availment necessary to confer personal jurisdiction' [citations omitted]. Also, those contacts merely served the convenience of the client whose medical treatment took place in New York [citation omitted], which is not unusual and does not indicate that defendants invoked the laws or privileges on New York [citation omitted]. Similarly, the client's signing of a release before a New York notary public was for the convenience of the client and in furtherance of the Massachusetts personal injury case and, as such, did not amount to a deliberate or purposeful use of New York courts."

Kyowa Seni, Co., Ltd v. ANA Aircraft Technics Co., Ltd., 60 Misc 3d 898 (Sup.Ct. N.Y.Co. 2018)(Scarpulla, J.) – Last year's "Update" reported on *D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N Y 3d 292 (2017). There, the Court of Appeals unanimously concluded that the "arises from" inquiry is "relatively permissive" and an articulable nexus or substantial relationship exists 'where at least one element arises from the New York contacts' rather than 'every element of the cause of action

pleaded’ [citation omitted]. The nexus is insufficient where the relationship between the claim and transaction is ‘too attenuated’ or ‘merely coincidental.’” Here, in *Kyowa Seni*, the Court holds that “a plaintiff’s claim must have an ‘articulable nexus’ or ‘substantial relationship’ with the defendant’s transaction of business, and although this inquiry is ‘relatively permissive,’ the claim must not be ‘completely unmoored’ from the transaction [citation omitted]. Here, two Japanese parties negotiated and signed an MOU [for plaintiff’s sales of seat covers for defendant’s airplanes) in Japan and the performance pursuant to the MOU took place in Japan as well. Thus, although the complaint states that the ANA Companies’ passenger plane ‘destinations in the United States include *inter alia* John F. Kennedy International Airport, located within the City of New York and the State of New York,’ it utterly fails to state a specific ‘articulable nexus’ between New York and the claims arising out of the MOU’s termination and the alleged misrepresentations/fraud” that are the basis of the action.

Crozier v. Avon Products, Inc., N.Y.L.J., 1533849511 (Sup.Ct. N.Y.Co. 2018)(Mendez, J.) – Plaintiff, a non-New Yorker, sues, *inter alia*, the non-New York manufacturers of asbestos-contaminated raw talc to which she was exposed upon her purchase of defendant Avon’s body powder. The manufacturers had shipped the raw talc to Avon in New York, where Avon used it to make the powder. The Court concludes that the New York courts may exercise jurisdiction over the manufacturers pursuant to CPLR 302(a)(1) “because there is an articulable nexus or substantial relationship between their in state conduct and the claims asserted.” The defendants sold to Avon, “and shipped into New York on a continuous basis, asbestos-contaminated talc for the manufacture of Avon talc powder, which was subsequently shipped throughout the nation.” And, the complaint alleges that Mrs. Crozier’s injury arose from the use of Avon talc powder containing the asbestos-contaminated talc shipped into New York by the Moving Defendants.”

Williams v. Beemiller, 33 N Y 3d 523 (2019) – Last year’s “Update” reported on the Appellate Division decision in this action [159 A D 3d 148 (4th Dept. 2018)]. In *Walden v. Fiore*, 571 U.S. 277 (2014), a unanimous Supreme Court curtailed the reach of long arm jurisdiction when the cause of action arises from tortious conduct that has taken place outside of the forum state. “For a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State.” Thus, “the relationship must arise out of contacts that the ‘defendant *himself*’ creates with the forum State” [emphasis by the Court]. And, “our ‘minimum contacts’ analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there.” Accordingly, “the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant’s conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.” For “due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’ contacts he makes by interacting with other persons affiliated

with the State.” The Court rejected the argument that defendant’s “knowledge” of plaintiffs’ “strong forum connections” sufficed. For that approach “impermissibly allows a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis. Such reasoning improperly attributes a plaintiff’s forum connections to the defendant and makes those connections ‘decisive’ in the jurisdictional analysis.” In sum, “mere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant’s conduct connects him to the forum in a meaningful way.” Here, in *Williams*, the Appellate Division, and then the Court of Appeals, addressed the impact that *Walden* has on the New York Courts’ interpretation of CPLR 302(a)(3)(ii). That statute provides for long arm jurisdiction over a defendant who commits a tort outside of New York, causing injury in New York, when, *inter alia*, the defendant should expect or reasonably expect the conduct to have consequences here, and defendant derives substantial revenue from interstate or international (but not necessarily New York-related) commerce. If jurisdiction were to be based solely upon a defendant knowing that its out-of-state conduct might injure a New Yorker, it would, it appears, violate due process as articulated in *Walden*. Back in 2012, before *Walden* was decided, *Williams* was before the Fourth Department on plaintiff’s appeal from an order which, *inter alia*, dismissed the complaint against defendant Brown for lack of jurisdiction. Brown was an Ohio-based gun dealer who, the complaint alleged, sold some 180 hand guns in Ohio to one Bostic, who Brown knew or should have known was the leader of a New York gun ring. One of the guns Brown sold to Bostic’s ring ended up in the hands of a gang member in Buffalo, New York, who used it to shoot plaintiff. The Appellate Division concluded that, if it were shown that Brown derived substantial revenue from interstate or international commerce, jurisdiction was appropriate under CPLR 302(a)(3)(ii), and remanded for a hearing on that issue. For, “the complaint sufficiently alleges that Brown expected or reasonably should have expected that his sale of guns to Bostic’s trafficking ring would have consequences in New York.” Now, post-*Walden*, the case came back to the Fourth Department, Supreme Court having found sufficient evidence that Brown in fact derived substantial revenue from interstate commerce. But, ruled the Appellate Division, after *Walden*, that was no longer the dispositive issue. “We hold that the exercise of personal jurisdiction under New York’s long-arm statute does not comport with federal due process under the circumstances of this case.” For, *Walden* makes clear that the constitutionally required relationship among the defendant, the forum, and the litigation, “must arise out of contacts that the defendant *himself* creates with the forum state” [emphasis by the Court]. And, in the absence of efforts by Brown to service the New York market, “Brown’s knowledge that guns sold to Bostic might end up being resold in New York if Bostic’s ostensible plan or hope came to fruition in the future is insufficient to establish the requisite minimum contacts with New York, because such circumstances

demonstrate, at most, Brown’s awareness of the mere possibility that the guns could be transported to and resold in New York.” And plaintiff’s argument “would impermissibly allow the contacts that Bostic, a third party, had with Brown and New York ‘to drive the jurisdictional analysis’ [citation omitted]. In short, Brown did not ‘purposefully avail himself of the privilege of conducting activities within New York’ [citation omitted] and, therefore, he lacks the requisite minimum contacts to permit the exercise of jurisdiction over him.” A narrowly divided Court of Appeals has affirmed. The majority opinion, concluding that the exercise of jurisdiction here would violate due process, did not address whether jurisdiction could otherwise be exercised under CPLR 302(a)(3). “Even assuming that jurisdiction could be exercised under the statute, the constitutional deficiency precludes the action from proceeding against Brown in New York.” For, “despite Bostic’s stated aspiration to open a gun shop in Buffalo, the record is devoid of evidence supporting plaintiffs’ theory that, merely by selling handguns to Bostic, Brown intended to serve the New York market. Even if Bostic indicated that there was a chance that he may – at some undefined point in the future – transport the firearms to New York, Brown cannot be said to have ‘forged constitutionally sufficient ties with New York’ as there is no evidence that he ‘took purposeful action, motivated by the entirely understandable wish to sell his products here’ such that he availed himself ‘of the privilege of conducting activities within’ New York.” Indeed, “even assuming” that Brown believed that Bostic would transport the guns to New York, “knowledge that goods might end up in New York is not the equivalent of purposeful availment.” Two members of the four-Judge majority separately concurred, agreeing that the exercise of jurisdiction on these facts would not comport with due process, but concluding that jurisdiction would also fail under an analysis of CPLR 302(a)(3). First, there was no showing that Brown “regularly solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered” in New York pursuant to CPLR 302(a)(3)(i). That provision “necessitates some *ongoing activity within New York State*” [emphasis by the Court], which was lacking here, as “jurisdiction under the substantial revenue clause has been tied to purposeful activity by the defendant in New York, usually direct sales by the defendant to New York-based customers or usage of New York distributors.” And, “to exercise long-arm jurisdiction over Brown based only on his Ohio sales to Bostic and his associates, all Ohio residents, would contravene the emphasis placed on fairness to the non-domiciliary when subparagraph (i) was crafted.” Similarly, the concurring Judges found no jurisdiction pursuant to CPLR 302(a)(3)(ii). That provision, requiring evidence that defendant “expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce,” was “‘designed to narrow “the long-arm reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but whose business operations are of a *local character*’”” [emphasis by the Court]. Here, “this is not a case where Brown should have ‘foreseen the forum consequences because he

entered into agreements with agents to solicit business in New York’ [citation omitted] or engaged with a ‘New York distributor’ [citation omitted]. In Bostic’s conversations with Brown, the former simply relayed his speculative aspirations: that he ‘planned on possibly’ opening up a store in Buffalo, New York.” And, “Brown’s business was decidedly local.” He “has only sold handguns to in-state residents” of Ohio. But, “even assuming personal jurisdiction under the statute,” the concurring Judges “agree with the majority opinion that such jurisdiction would violate Brown’s federal due process rights.” The dissenters argued, first, that the statute would permit the exercise of jurisdiction. For, Brown “sold a significant number of guns to Bostic and Bostic’s associates” and “those guns were used and consumed in New York State, and those sales constituted approximately one-third of Brown’s total sales that year.” And “‘substantial revenue’ does not measure the *frequency* of contacts between a defendant and this state, but the *size* of even a single association between that defendant and this forum” [emphasis by the Court]. And, “Brown’s business cannot ‘be characterized as “local”” [citation omitted]. By their nature and intent, gun shows attract out-of-state buyers [citation omitted], and Brown conducted business at shows held along Ohio’s ‘I-75’ corridor, which provides easy highway access to buyers from neighboring states including Indiana and Kentucky. Even if we exclude the guns sold to Bostic and the two straw purchasers in this case, approximately 10% of Brown’s sales for the period from 1996-2005 were of an interstate nature.” Furthermore, “it is hard to imagine that Brown did not ‘expect or should have expected’ his sales to Bostic ‘to have consequences in this state’ [citation omitted]. Brown’s commercial relationship with Bostic was not an isolated transaction. Over the course of six months, he sold a total of 182 handguns to Bostic and his associates on six different occasions.” And Brown knew that “‘Bostic “planned on opening a store in Ohio, one in Buffalo.”” The dissent further argued that the exercise of jurisdiction over Brown comported with due process. “CPLR 302 was ‘designed to be “*well within* constitutional bounds” [citation omitted; emphasis by the Court], and subparagraphs (i) and (ii) of CPLR 302(a)(3) “were deliberately inserted” to achieve that goal [citation omitted].’ *A fortiori*, if a non-domiciliary’s actions satisfy CPLR 302(a)(3) requirements, then the same conduct satisfied the federal minimum contacts test.” Moreover, “the majority’s view of minimum contacts is unsupported by United States Supreme Court jurisprudence.” For, unlike the facts of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), or *Walden*, here, “the evidence establishes that Brown intended to serve the New York State market.” And, “the fact that Brown did not hire Bostic as his distributor is of no moment because Bostic was a *de facto* distributor of Brown’s firearms – reselling guns in Buffalo that were sold to him by Brown with Brown’s knowledge of their intended New York destination.” Thus, “unlike *Walden*, where the non-domiciliaries lacked *any* contacts and without even *indirect* interaction with the forum, Brown ‘purposefully directed his activities at residents of the forum’ and plaintiffs’ ‘litigation results from alleged injuries that arise out of or relate to those activities,’

establishing personal jurisdiction over Brown in New York State [emphasis by the Court].”

Deutsche Bank AG v. Vik, 163 A D 3d 414 (1st Dept. 2018) – “To comport with due process, ‘there must also be proof that the out-of-state defendant has the requisite minimum contacts with the forum state and that the prospect of defending a suit here comports with traditional notions of fair play and substantial justice’ [citations omitted]. The ‘minimum contacts’ requirement is satisfied where ‘a defendant’s conduct and connection with the forum State are such that it should reasonably anticipate being haled into court there’ [citation omitted]. Under the ‘effects test’ theory of personal jurisdiction, where the conduct that forms the basis for the plaintiff’s claims takes place entirely out of forum, and the only relevant jurisdictional contacts with the forum are the harmful effects suffered by the plaintiff, a court must inquire whether the defendant ‘expressly aimed’ its conduct at the forum [citation omitted]. Here, defendants did not expressly aim their tortious conduct at New York, and the foreseeability that the alleged fraudulent conveyances would injure plaintiff in New York is insufficient.”

Archer-Vail v. LHV Precast, Inc., 168 A D 3d 1257 (3d Dept. 2019) – “In determining whether the exercise of personal jurisdiction over a nondomiciliary defendant is proper, a court must first assess whether the requirements of New York’s long-arm statute have been met and, if so, whether a finding of personal jurisdiction comports with federal due process.” Here, “plaintiff alleged that, while operating outside the state, [defendant manufacturer] Spillman launched a force or instrument of harm by negligently designing, creating, supplying and distributing to customers a defective nesting diagram depicting how to load and unload a bridge form on and off of a flatbed trailer and that such negligence caused decedent’s injuries within the state. Plaintiff submitted evidence establishing that Spillman maintained an interactive website, which marketed and made its products available to New York customers, provided for custom designs tailored to the needs of the purchaser and highlighted its prior sales to New York and other interstate customers. Plaintiff also relied on affidavits submitted by Spillman to argue that Spillman derives substantial revenue from goods used or consumed in the state or from interstate commerce and that it should have reasonably expected that the design, creation, supply and distribution of the nesting diagram that accompanied its bridge forms could have consequences in this state. Specifically, one affidavit established that Spillman was aware that its bridge forms were used over and over again by precast companies at different sites, that ‘the average useful life-span of a bridge form could be up to 25 years’ and that the bridge forms would be repeatedly transported. Another affidavit established that Spillman ‘sells its products and goods, including bridge forms, to purchasers located throughout the United States,’ that its 2016 New York sales amounted to \$277,822, which constituted 4.2% of its sales that year, and that its 2017 sales had so far amounted to \$219,013, which, at that point, constituted 3.1% of its total sales. Viewing the facts in the light most favorable to plaintiff as the nonmoving party, we agree with Supreme

Court that the foregoing provided the ‘sufficient start’ required to warrant further discovery on the issue of whether personal jurisdiction may be properly exercised over Spillman under CPLR 302(a)(3), while also comporting with federal due process requirements.”

Abad v. Lorenzo, 163 A D 3d 903 (2d Dept. 2018) – “Plaintiff was a passenger in a vehicle returning to New York from Mister East nightclub in New Jersey. While still in New Jersey, the plaintiff exited the vehicle and was allegedly struck by the vehicle.” Plaintiff sues the nightclub in New York, claiming a violation of New Jersey’s “dram shop act.” The Court affirms the dismissal of the action for lack of jurisdiction under CPLR 302(a)(3). “The situs of the injury is New Jersey, where the accident occurred, not New York, where the resultant damages were subsequently felt by the plaintiff.” Nor did defendant’s passive website provide a basis for jurisdiction here.

FORUM NON CONVENIENS

GENERAL CONSIDERATIONS

Crozier v. Avon Products, Inc., N.Y.L.J., 1533849511 (Sup.Ct. N.Y.Co. 2018)(Mendez, J.) – In this action for injuries caused to the non-New York plaintiff by exposure to asbestos-contaminated talc, the non-New York defendants, the manufacturers of the talc, who shipped it into New York to Avon, move to dismiss on grounds of *forum non conveniens*. The motion is denied. “When there is a substantial nexus between the action and New York, not just merely that the corporate defendant is registered or has its corporate offices in New York, dismissal on *forum non conveniens* grounds is not warranted.” For other defendants are New York based, documents regarding the shipping are located in New York, relevant acts occurred here, and there is a substantial nexus between the action and New York. Thus, “the action should not be dismissed as the ‘balance is not strong enough to disturb the choice of forum made by the Plaintiff.’”

Bacon v. Nygard, 160 A D 3d 565 (1st Dept. 2018) – The Court lists various reasons for its refusal to dismiss this action on grounds of *forum non conveniens*. “It is true that the alleged defamation related to events occurring in the Bahamas, and that some of the nonparty witnesses and documents are likely to be located in the Bahamas. However this is not dispositive.” For, “plaintiff is a New York resident. While also not dispositive, this is generally ‘the most significant factor in the equation.’” Also, only one defendant is a resident of the Bahamas, and “all of the defendants have substantial connections to New York.” Because of those connections, and defendants’ “ample resources,” it “would not be a hardship for them to litigate here.” By contrast, “plaintiff would suffer hardship if required to litigate in the Bahamas, which has no jury trial right and no mechanism to obtain pre-trial deposition testimony from Bahamian witnesses.” Finally, “the fact that

defendants waited fourteen months before bringing the instant motion” after motion practice and discovery, “also counsels against dismissal.”

Claude v. Autobus Fleur De Lys, Inc., 166 A D 3d 1120 (3d Dept. 2018) – “The applicability of foreign law is an important consideration in determining a *forum non conveniens* motion.” Here, while the accident took place in New York, all of the parties are domiciled in Quebec, Canada. And, thus, “the law of Canada must be applied, in particular to loss allocation.” And this “is significant because Quebec’s loss allocation rules relating to automobile accidents as defined in the Quebec Automobile Insurance Act (hereinafter AIA) deeply conflict with New York law.” Thus, “because Quebec law applies here, not only are plaintiffs prohibited from bringing an action for noneconomic loss, but Supreme Court would be required to interpret and apply the concepts that govern no-fault compensation under the AIA [citations omitted]. There is no doubt this would unduly burden the New York court [citation omitted], with no attendant benefit to the Canadian plaintiffs, and, when considered with the remaining factors as examined by Supreme Court, we cannot say that the court abused its discretion in dismissing plaintiffs’ action on *forum non conveniens* grounds.”

FORUM SELECTION CLAUSES

Somerset Fine Home Building v. Simplex Industries, N.Y.L.J., 1545809806 (Sup.Ct. Suffolk Co. 2018)(Emerson, J.) – A forum selection clause “does not affect the jurisdiction of the court [citation omitted]. As a term of the contract between the parties, however, the contractual forum-selection clause is documentary evidence that may provide a proper basis for dismissal under CPLR 3211(a)(1).” The Court rejects plaintiff’s argument that the forum selection clause here is “unconscionable.” The clause was “not hidden or tucked away within a complex document of inordinate length. It appears in the same size print as the rest of the agreement [citation omitted], each page of which has been initialed by the plaintiff’s principal. The plaintiff does not contend that the defendant used high-pressure tactics to get it to sign the agreement. Rather the plaintiff contends that it was in a weaker bargaining position than the defendant and that it had no choice. The fact that the parties do not possess equal bargaining power does not invalidate a contract as one of adhesion.”

Milmar Food Group II, LLC v. Applied Underwriters, Inc., 61 Misc 3d 812 (Sup.Ct. Orange Co. 2018)(Bartlett, J.) – The contract between the parties provided for exclusive jurisdiction of any dispute in the courts of Nebraska, and that “this Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska.” Plaintiff opposes defendant’s motion to dismiss this New York action because of the binding forum selection clause, urging that Nebraska procedural law prevents enforcement of the forum selection clause. Defendant argues that New York procedural law, which favors such clauses, governs. Noting the absence of dispositive New York law on the question of which state’s law would govern the enforcement issues – although

the few decisions at *nisi prius* in New York suggest that “the rule is that ‘questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature’” – the Court concluded that here, under either state’s law, the forum selection clause would be enforced.

Stein v. Frontier Travel Camp, N.Y.L.J., 1526968398 (Civ.Ct. N.Y.Co. 2018)(Nock, J.) – The claim that a “contract, in general, is tainted by ‘fraud in the inducement,’ is not sufficient to overcome a forum selection clause. Absent an allegation “that the forum selection clause, *per se*, was the result of any fraud or coercion,” the clause will be enforced.

Integrity International, Inc. v. HP, Inc., 60 Misc 3d 750 (Sup.Ct. Albany Co. 2018) (Hartman, J.) – The agreement between the parties provided for the exclusive jurisdiction over any disputes in “the ordinary courts of New York.” Plaintiff commenced an action in the United States District Court for the Northern District of New York, relying upon that provision. Defendant moved to transfer that action to the Southern District of Texas, arguing that plaintiff’s commencement of an action in federal, rather than state, court waived the choice of forum provision, and that defendant had no other jurisdictional contact with New York. The Northern District agreed that the agreement’s language meant to choose New York State Courts as the proper forum, but was unwilling to hold that plaintiff had waived the provision. It therefore dismissed rather than transfer. Defendant moves to dismiss this subsequent State Court action on the same ground of waiver. The Court rejects that argument. Waiver requires intent, and “such intent cannot be inferred here, where plaintiff did not ‘disregard’ the forum selection clause when it initially filed its action in a federal district court in New York rather than a New York State court. Although, as the District Court held, case law defines ‘ordinary courts of New York’ as referring only to state courts, the forum selection clause here does not explicitly confine the proper forum to state, as opposed to federal, courts in New York. Further, plaintiff in its federal complaint invoked the very forum selection clause that defendants argue plaintiff waived by commencing that action.”

VENUE

Tower Broadcasting, LLC v. Equinox Broadcasting Corp., 160 A D 3d 1435 (4th Dept. 2018) – Plaintiff seeks a declaration “that it owns a broadcast tower located on real property owned by defendant and has a right to remove the tower from that property.” Defendant seeks a change of venue from Monroe County to Chemung County, where “the tower and the real property upon which it is situated” are located. The Court affirms the denial of that motion. “First, this action concerns a broadcasting tower, which is a trade fixture and therefore retains its character as personal property [citations omitted]. Thus, CPLR 507, which concerns actions involving real property, is inapplicable.

Second, although CPLR 508 provides that the ‘place of trial of an action to recover a chattel *may* be in the county in which any part of the subject of the action is situated at the time of the commencement of the action’ [emphasis by the Court], that section is permissive and not mandatory. Thus, it does not preclude an action in another venue, particularly where, as here, there is a written agreement fixing the place of trial in that other venue.”

Faustino v. Amin, N.Y.L.J., 1538468115 (Sup.Ct. N.Y.Co. 2018)(Masley, J.) – Effective October 23, 2017, CPLR 503(a) has been amended. Previously, the only proper venue of a “transitory” cause of action – an action not involving ownership, use or possession of land or of a chattel – was the county of residence of any of the parties, regardless where the facts giving rise to the cause of action occurred. The statute now provides, as an additional basis for venue of such an action, “the county in which a substantial part of the events or omissions giving rise to the claim occurred.” The Court here holds that, since that amendment, “residence is only one path to establishing venue.” Thus, even though plaintiff incorrectly based venue in part on a misperception of the corporate defendant’s principal place of business, that error does not provide a basis to change venue when the action was commenced in “the county in which a substantial part of the events or omissions giving rise to the claim occurred.”

Marrero v. Mamkin, 170 A D 3d 1159 (2d Dept. 2019) – “In order to prevail on a motion pursuant to CPLR 510(1) to change venue, a defendant must show that the plaintiff’s choice of venue is improper, and also that the defendant’s choice of venue is proper.” Here, plaintiff placed venue in Queens County, where no party resided, and defendant demanded a change of venue to Richmond County, where defendant resided. But, under the amended CPLR 503(a), “although the defendant’s choice of venue [in her demand] was proper since it was based upon her residence, she did not meet her burden of demonstrating that the plaintiff’s choice of venue was improper as the events occurred in Queens County.”

Zee N Kay Management v. Thyme Natural Market, N.Y.L.J., 1528444282 (Civ.Ct. N.Y.Co. 2018)(Padilla, J.) – This commercial holdover proceeding was transferred from Queens County, where the property is located, to New York County, which was the forum agreed upon in the parties’ sublicense. The Court here, *sua sponte*, re-transfers the proceeding to Queens County. “A summary proceeding for the recovery of real property is a special proceeding governed exclusively by statute.” And such a proceeding “is not a common law action which allows other considerations, like a parties’ contractual desires, to come into play [citations omitted]. RPAPL 701(2), concerning the commencement of summary proceedings for the recovery of real property, states in pertinent part: ‘The place of trial of the special proceeding *shall* be within the jurisdictional area of the court in which the real property or a portion thereof is situated [emphasis by the Court]. Moreover, the NYC CCA §303 states, ‘A summary proceeding to recover possession of

real property’ ‘*shall* be brought in the county in which the real property or a part thereof is situated’ [emphasis by the Court]. Lastly, NYC CCA §302 states, ‘a real property action, no matter by whom asserted, may be tried in a county other than that in which the real property or a part thereof is situated *only* if there is reason to believe that an impartial trial cannot be had in the latter county’ [emphasis by the Court].” Thus, “if the action is brought and tried in a county of New York City other than that where the property is located, the court lacks jurisdiction unless the court has made a finding that an impartial trial cannot be had in the county where the property is located.” Since there was no such finding here, there is a “defect in subject matter jurisdiction, [and] this Court can raise the issue *sua sponte*.”

Matter of Aaron v. Steele, 166 A D 3d 1141 (3d Dept. 2018) – CPLR 511(b) provides that if defendant seeks to change venue on the ground that plaintiff has chosen an improper venue, “the defendant shall serve a written demand that the action be tried in a county he specifies as proper. Thereafter the defendant may move to change the place of trial within fifteen days after service of the demand, unless within five days after such service plaintiff serves a written consent to change the place of trial to that specified by the defendant. Defendant may notice such motion to be heard as if the action were pending in the county he specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him is proper.” Defendant here, having served a demand, moved to change venue, in the Court in which the action was pending, *four* days after serving the demand, plaintiff not having served a written consent. The majority of this divided Court rejects plaintiff’s argument that the motion had to be denied on the ground that it was premature. “In our view, the five-day window is a time limit on the plaintiff only, and the defendant is not required to refrain from doing anything during that period. Instead, the limits placed on a defendant under CPLR 511(b) – other than the 15-day limit to move for change of venue – are contingent on whatever response the plaintiff may provide, rather than a five-day time period.” Thus, “any motion filed within the five-day window essentially causes no harm, no foul. Moreover, if the plaintiff does not file a written consent within the required time frame, it is irrelevant when within the 15-day limit the defendant filed a motion.” Finally, “although the last sentence of CPLR 511(b) – addressing where the motion may be filed – is not at issue here, we will quickly address it because it contains wording similar to the preceding sentence. The language in the latter sentence can be read in the same way as the language in the sentence at issue.” For, the language of the last sentence of the provision “does not require the defendant to wait five days to move for a change of venue. If the defendant moves within that early time frame in the county where the action was commenced, the court can simply address the merits of the motion, with the benefit of the information from the affidavit. If, however, the defendant moves in his or her preferred county within that early time frame and the plaintiff thereafter files the required affidavit, the defendant should withdraw the motion. Even absent a withdrawal, the motion would simply be denied because the

chosen county does not have jurisdiction to consider that motion.” The dissenter argued that the statutory language places “the defendant’s obligation and ability to make a motion on hold during the five-day window for response.” For, “in effect, whether a motion needs to be made, and where a motion can be made, is determined by a plaintiff’s response during the five-day period,”

Janis v. Janson Supermarkets LLC, 161 A D 3d 480 (1st Dept. 2018) – “Wakefern, a foreign corporation, submitted a copy of its application for authorization to conduct business filed with the Secretary of State, in which it identified New York County as ‘the county within this state where its office is to be located’ [citation omitted]. Wakefern’s designation of New York County in its application is controlling for venue purposes, even if it does not actually have an office in New York County.”

Arthur v. Liberty Mutual Auto and Home Services LLC, 169 A D 3d 554 (1st Dept. 2019) – “Transfer of venue may be granted when plaintiff voluntarily discontinues the action against the party that served as the basis for venue.”

G&G Supply Co., Inc. v. Comer, 61 Misc 3d 363 (Civ.Ct. Queens Co. 2018)(Golia, J.) – The venue rules in the Civil Court of the City of New York are contained in the Civil Court Act, and *not* in the CPLR. And Section 301 of that Act “provides that in an action commenced in civil court for money damages which does not arise out of a consumer credit transaction, venue is proper in any ‘county in which one of the parties resides’ [citation omitted]. Where no party resides within the City of New York, venue is proper in any ‘county in which one of the parties has regular employment or a place for the regular transaction of business’ [citation omitted]. If no party lives, works, or has a place of business in the City of New York, venue is proper ‘in the county in which the cause of action arose; or if none of the foregoing are applicable, in any county.’” Moreover, “for venue purposes, a ‘corporation shall be deemed a resident of any county wherein it transacts business, keeps an office, has an agency or is established by law.’”

Matter of Bistrrian Land Corp. v. Lynch, 170 A D 3d 1168 (2d Dept. 2019) – Plaintiff commenced this hybrid Article 78 proceeding/declaratory judgment action in Nassau County against the Suffolk County Town of East Hampton, with regard to real property located in the Town. CPLR 506(b) provides that actions against a Town must be brought in “the judicial district where the respondent made the determination complained of.” Nassau County is in the same Judicial District as Suffolk County. CPLR 507 provides that actions that would affect “the title to, or possession, use or enjoyment of” real property must be brought “in the county in which any part of the subject of the action is situated.” The Court notes that “‘where mandatory provisions are in conflict, other factors, such as where the action was first commenced, and discretionary grounds for a change in or retention of venue, may be considered’ [citations omitted]. ‘Courts are often pragmatic in ascertaining what constitutes a proper county for venue purposes.’” Here,

“since the subject property, the Town respondents, and the petitioners’ principal place of business all were located in Suffolk County, and the alleged acts and omissions on which the petitioners’ claims were based occurred in Suffolk County, the Supreme Court providently exercised its discretion in granting the motion to change venue to Suffolk County.”

Wallach v. Greenhouses Hotel, N.Y.L.J., 1544438305 (Sup.Ct. N.Y.Co. 2018)(Engoron, J.) – A motion to change venue based upon a forum selection clause is made pursuant to CPLR 501, not CPLR 511. Therefore the timing rules with respect to challenging venue placed in an “improper” county do not apply. The motion need only be made within a reasonable time. Moreover, a forum selection clause covering any claims “arising under or in connection with this Agreement,” include tort claims of fraudulent misrepresentation with respect to the agreement, and of infliction of emotional distress caused by breach of the agreement.

Fensterman v. Joseph, 162 A D 3d 855 (2d Dept. 2018) – “It is undisputed that, pursuant to CPLR 503(a), venue of the Ulster County Action is properly in Ulster County, where Bacci, one of the Ulster plaintiffs, resided at the time the action was commenced [citation omitted]. A motion to change venue on discretionary grounds, unlike motion made as of right, must be made in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county.” Since “Ulster County and Nassau County are not contiguous, and Nassau County is not in the 3rd Judicial District, the Fensterman parties’ motion to change venue pursuant to CPLR 510(3) based on discretionary grounds was improperly made in the Supreme Court, Nassau County.”

Guinnip v. Maresca, N.Y.L.J., 1537264260 (Sup.Ct. Kings Co. 2018)(Edwards, J.) – “Where venue is properly designated based upon a party’s residence, a discretionary change of venue may be granted for the convenience of material witnesses only after a detailed evidentiary showing that the convenience of nonparty witnesses would, in fact, be served by granting such relief [citations omitted]. Even where a party administrator’s residence is the only nexus between the case and the county, the party moving for a discretionary change of venue has the burden of demonstrating that the convenience of material witnesses and the ends of justice would be promoted by the change [citations omitted]. In arguing for the convenience of material witnesses, movants must disclose (1) the names, addresses, and occupations of the material witnesses; (2) the facts to which those witnesses will testify at trial; (3) a showing that those witnesses are willing to testify at trial; and (4) a showing that those material witnesses will be inconvenienced if a change of venue is not granted [citations omitted]. The convenience of the parties, their employees, and members of their families are excluded from consideration in determining a motion pursuant to CPLR 510(3) [citations omitted]. The convenience of witnesses residing outside the respective counties [where the action is pending and where movant seeks transfer] are also not considered [citation omitted]. The mere fact that the

witnesses would be required to travel a significant distance does not establish, without more, that requiring their testimony would impose an undue burden on them [citation omitted]. Finally, affording the litigants a speedier trial in a county that has relatively less calendar congestion is an ends of justice consideration [citation omitted]. However, an assertion that a discretionary change of venue will promote the ends of justice still requires a showing that the convenience of the material witnesses will be best accomplished by the change in venue.”

Rowland v. Slayton, 169 A D 3d 1474 (4th Dept. 2019) – “Although defendant provided the names, addresses, and occupations of the prospective witnesses; a statement of the witnesses’ expected testimony that is sufficiently specific to allow the court to determine whether the witnesses are material; and a basis for concluding that the witnesses would be available and willing to testify [citations omitted], defendant failed to establish that the prospective witnesses would be inconvenienced if the change of venue were not granted [citation omitted]. Furthermore, plaintiff offered to conduct all depositions of the witnesses in Steuben County [where they resided] and to limit the time of the depositions in an effort to minimize any hardship on the witnesses. We therefore conclude that ‘the court did not abuse its discretion in denying the motion [to change venue] inasmuch as defendant failed to meet his burden of proving that the convenience of material witnesses and the ends of justice would be promoted by the change.’”

SUBJECT MATTER JURISDICTION

Sokolow v. Neumann-Werth, N.Y.L.J., 1543208195 (App.Term 2d Dept. 2018) – “Where a lease does not deem attorney’s fees to be additional rent, a court entertaining a summary proceeding lacks subject matter jurisdiction to entertain a landlord’s claim for attorney’s fees.”

Levine v. Sarig, N.Y.L.J., 1544438354 (Civ.Ct. N.Y.Co. 2018)(Nock, J.) – “Derivative claims are equitable in nature; and, as such, cannot be adjudicated by the Civil Court or other courts inferior to the Supreme Court [citations omitted]. A derivative claim, of course, is a claim that seeks to redress what is essentially a harm to an entity – and is classically associated with corporate entities.” However, the Appellate Division has held that “the notion of derivative litigation commonly associated with claims brought by corporate shareholders applies with equal force to claims brought by LLC members.” And, plaintiff’s “comingling” of “ostensible individual claims with definite derivative claims cannot salvage, piecemeal, possible portions of the overall claims that might be characterized as individual claims.” It would be “judicially imprudent for the Civil Court to retain jurisdiction, in piecemeal fashion, over a portion of the claims that might be cast as individual claims, leaving the parties to litigate their EBEG-related dispute in separate courts.”

728 Fulton Street LLC v. Perch, 63 Misc 3d 602 (Civ.Ct. Kings Co. 2019)(Wang, J.) – At issue is whether the Housing Part of Civil Court has subject matter jurisdiction over a landlord’s claim against an erstwhile tenant for expenses incurred in seeking to enforce a stipulation entered into between the parties to settle a landlord-tenant dispute.

“Notwithstanding the lack of equitable powers conferred to this court, awarding respondents a money judgment in this instance comports with the well-established principle that courts retain jurisdiction to enforce the terms of stipulations without the parties having to resort to commencing a plenary action to enforce those stipulations.”

Kreiten v. Scott, 61 Misc 3d 528 (Civ.Ct. Bronx Co. 2018)(Gomez, J.) – “The small claims Part of the Civil Court does not have the requisite subject matter jurisdiction” to hear a claim based upon a consumer credit transaction. A “Consumer Credit Transaction,” as defined by Civil Court Act §2101(g) is not the same as a Commercial Claim, or a Consumer Transaction, as defined by Civil Court Act §1803-A(a), and “cannot be initiated in the Small Claims Part of the Civil Court.”

Hart v. New York City Housing Authority, 161 A D 3d 724 (2d Dept. 2018) – “A motion to remove an action from the Civil Court to the Supreme Court pursuant to CPLR 325(b) must be accompanied by a request for leave to amend the *ad damnum* clause of the complaint pursuant to CPLR 3025(b) [citation omitted]. Here, the amount stated in the *ad damnum* clause was within the jurisdictional limits of the Civil Court, and no request for leave to amend the *ad damnum* clause was made. In the absence of an application to increase the *ad damnum* clause, the plaintiff’s motion to remove the action to the Supreme Court should have been denied.”

COMMENCING THE ACTION

Abreu v. Casey, 157 A D 3d 442 (1st Dept. 2018) – A previous year’s “Update” reported on *Wesco Insurance Company v. Vinson*, 137 A D 3d 1114 (2d Dept. 2016) and *Maddux v. Schur*, 139 A D 3d 1281 (3d Dept. 2016), in which the Courts emphasized that, while CPLR 2001 allows the Court to be forgiving of errors in the method of filing, it does not give discretion to overlook errors in what is filed. Thus, complete failure to file a summons with notice, summons and complaint, or petition, is a jurisdictional defect in the commencement of an action or proceeding. Last year’s “Update” reported on *Bayridge Prince, LLC v. City of New York*, 56 Misc 3d 684 (Sup.Ct. Kings Co. 2017), in which the Court held that “plaintiff brought forth its order to show cause on March 29, 2016. However, at the time, due to what appears to be a clerical oversight, there was no underlying pleading filed with the Clerk of the Court.” The Court “does not doubt, based on the assignment of the index number and the acceptance for filing of the order to show cause, that plaintiff’s counsel had a good faith basis to believe that the summons and complaint had been accepted for filing with the Clerk of the Court at the time this action

was commenced. Furthermore this court has no reason to doubt plaintiff's counsel's assertion that the clerk in the *ex parte* motions office insisted that the office would not accept an order to show cause for filing unless the action was commenced via the filing of a summons pursuant to CPLR 304. It is clear that plaintiff's counsel operated under his good faith assumption that this action was properly commenced. However, all of these circumstances cannot change the fact that no underlying pleading was filed at the time plaintiff commenced this action. This court has no discretion to waive such a defect. 'Complete failure to file the initial papers necessary to institute an action is not the type of error that falls within the court's discretion to correct under CPLR 2001.'" Last year's "Update" also reported on *DiSilvio v. Romanelli*, 150 A D 3d 1078 (2d Dept. 2017), in which the Court held that "under CPLR 304(a), an action in Supreme Court is ordinarily commenced 'by filing a summons and complaint or summons with notice.' The failure to file the initial papers necessary to commence an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity [citation omitted]. Here, the appellant undertook no steps to commence a third-party action, despite his unilateral amendment of the caption of the action in his motion papers to include the nonparty respondents as 'third-party defendants.' Consequently, the jurisdiction of the court was never invoked and the purported third-party action was a nullity [citation omitted]. As a result, all relief sought by the appellant against the nonparty-respondents was properly denied." Here, in *Abreu*, plaintiff moved to amend the complaint to add a new party defendant, but failed to file the amended pleadings "as a separate docket entry" prior to service on the new defendant. This "is not fatal to his maintaining the action against defendant, because the amended pleadings were timely filed with the Clerk of the Court after being served upon defendant [citation omitted], and defendant has not shown any prejudice [citation omitted]. Further, CPLR 2001 authorizes the court to direct plaintiff to correct this type of filing mistake."

Schwartz v. Chan, 162 A D 3d 408 (1st Dept. 2018) – "As plaintiff's claims were already time-barred under the statute of limitations for libel and slander actions [citation omitted] when he filed the summons, CPLR 306-b is unavailable to him to extend his time to serve the complaint."

DeMartino v. Harris, 167 A D 3d 568 (2d Dept. 2018) – "While CPLR 306-b permits a court, in the exercise of its discretion, to extend the time to serve process upon good cause shown or in the interest of justice [citation omitted], the plaintiffs did not move for, or otherwise request an extension in the Supreme Court." Thus, no *sua sponte* extension would have been appropriate.

Estate of Fernandez v. Wyckoff Heights Medical Center, 162 A D 3d 742 (2d Dept. 2018) – "An attempt at service that later proves defective cannot be the basis for a 'good cause' extension of time to serve process pursuant to CPLR 306-b [citations omitted]. However, the more flexible 'interest of justice' standard accommodates late service that might be

due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant [citation omitted]. Indeed, the court may consider diligence or lack thereof, along with any other relevant factor, in making its determination, including expiration of the statute of limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant."

Furze v. Stapen, 161 A D 3d 827 (2d Dept. 2018) – "The plaintiff's cross motion pursuant to CPLR 306-b to extend the time to serve Nayak with the summons and complaint was properly granted in the interest of justice." For, "here, the record established that the plaintiff exercised diligence in timely filing, and in attempting to serve Nayak and notify Nayak and her insurance carrier of the summons and complaint, within the 120-day period following the filing of the summons and complaint, although the attempt to serve Nayak was ultimately deemed defective [citation omitted]. While the action was timely commenced, the statute of limitations had expired when the plaintiff cross-moved for relief, the plaintiff promptly cross-moved for an extension of time to serve Nayak, and there was no identifiable prejudice to Nayak attributable to the delay in service."

Darko v. Guerrino, 169 A D 3d 768 (2d Dept. 2019) – "We agree with the Supreme Court's determination granting, in the interest of justice, that branch of the plaintiff's motion, which was pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant. The statutory 120-day period for service of process commenced in November 2016 [citation omitted]. In December 2016, the plaintiff attempted service on the defendant on multiple occasions. Moreover, she promptly moved, *inter alia*, for an extension of time to serve the summons and complaint after the defendant challenged the service on the ground that it was defective [citation omitted]. The statute of limitations had expired at the time the plaintiff made her motion, and there was no demonstrable prejudice to the defendant."

Toyota Motor Credit Corporation v. Adorno, 62 Misc 3d 944 (Civ.Ct. Bronx Co. 2019) (Gomez, J.) – The "prejudice" to the defendant that would defeat a plaintiff's application to extend the time to serve process pursuant to CPLR 306-b "is the impairment of defendant's ability to defend an action on the merits [citations omitted]; it does not result from the loss of a procedural or technical advantage [citations omitted]. Significantly, the expiration of the statute of limitations, does not, by itself, constitute prejudice."

Holbeck v. Berrios, 161 A D 3d 957 (2d Dept. 2018) – "The plaintiff failed to demonstrate 'good cause' for an extension of time, as he did not show that he exercised reasonable diligence in attempting to effect service [citations omitted]. The plaintiff resorted to affix and mail service after only two attempts to deliver the summons and complaint on a weekday, at approximately the same time of day, when the defendant

reasonably could have been expected to be at work [citations omitted]. Further, the affirmation of the plaintiff's counsel does not indicate that he made any effort to verify that the defendant still resided at the address listed on the three-year-old police report, particularly after efforts to deliver the summons and complaint were unsuccessful." And, "the Supreme Court did not improvidently exercise its discretion in declining to grant the plaintiff an extension of time in the interest of justice." For, "here, as a result of the plaintiff's lack of diligence in serving the defendant, the defendant did not receive the summons and complaint until approximately 3 months and 3 weeks after expiration of the 120-day period for service, and approximately 7 1/2 months after expiration of the statute of limitations. Significantly, there is no evidence that the defendant had any notice of the action until that time. Further, the plaintiff did not adduce evidence tending to show a lack of prejudice to the defendant, and there was no showing of merit to the plaintiff's claim of having sustained a serious injury, including even a recitation of the injuries he suffered."

Encarnacion v. Ogunro, 162 A D 3d 981 (2d Dept. 2018) – Plaintiff was injured in April, 2009, and commenced this action in January, 2010. In February, 2010, plaintiff "purportedly" served defendant by "nail and mail." Defendant failed to appear, and plaintiff obtained a default judgment in December, 2014. In October, 2015, defendant moved to vacate the judgment for lack of jurisdiction based on improper service of process. In June, 2016, plaintiff cross-moved for an extension of time to make proper service. The Appellate Division reverses the granting of that cross-motion. "The plaintiff failed to demonstrate good cause. The attempt to serve the defendant pursuant to CPLR 308(4) was ineffective as a matter of law because the place where process was affixed was not the defendant's 'actual place of business, dwelling place or usual place of abode' [citations omitted]. The plaintiff also failed to establish her entitlement to an extension of time for service of the summons and complaint in the interest of justice in view of the extreme lack of diligence in attempting to effect service, the more than six-year delay between the filing of the summons and complaint and the time the cross motion was made, the plaintiff's failure to move for an extension of time until more than eight months after the defendant moved to vacate the default judgment, the four-year delay between the expiration of the statute of limitations and the defendant's receipt of notice of this action, and the inference of substantial prejudice due to the lack of notice of the plaintiff's causes of action until more than six years after their accrual."

Matter of Rimler v. City of New York, 172 A D 3d 868 (2d Dept. 2019) – A prior year's "Update" reported on the Supreme Court decision in this proceeding [N.Y.L.J., 1202762401324 (Sup.Ct. Kings Co. 2016)]. Supreme Court held that "CPLR 306-b prescribes that in an action or proceeding when the applicable Statute of Limitations is four months or less, service shall be made not later than fifteen (15) days after the expiration date of the applicable Statute of Limitations. Challenges to government action under SEQRA must be resolved in a special proceeding under CPLR Article 78, which

provides for a four (4) month Statute of Limitations. When a government action is subject to review under both SEQRA and ULURP, the Statute of Limitations for any SEQRA claims begins to commence upon the completion of the ULURP process which in this case was the City Council approval date of December 16, 2015.” Thus, “this Court finds that the four (4) month Statute of Limitations expired on April 16, 2016 and the fifteen (15) day service deadline under CPLR 306-b expired on May 2, 2016.” However, “Petitioners did not serve any of the Respondents on or prior to May 2, 2016.” Thus, “none of the Respondents were timely served.” Supreme Court found no basis for a good cause or interest of justice extension of petitioners’ time to serve, and dismissed the proceeding. Good cause was lacking because of a lack of “reasonable diligence” to timely serve, since “Respondents are public and private entities which can be readily served during business hours at their known addresses.” And, as to interest of justice extension, “Petitioners did not complete service until thirty-seven (37) days after the expiration of the Statute of Limitations which is more than twice the fifteen (15) days provided pursuant to CPLR 306-b. As a result, this Court finds that this delay is both significant and prejudicial in the context of an Article 78 proceeding which is subject to an abbreviated four (4) month Statute of Limitations in recognition of the strong public policy that the operation of governmental agencies should not be unnecessarily clouded by potential litigation.” The Appellate Division has affirmed, noting that “the ‘interest of justice standard’ requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. A plaintiff need not establish reasonably diligent efforts in service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant’ [citation omitted]. The Supreme Court did not improvidently exercise its discretion in declining to grant the petitioners an interest-of-justice extension for completion of service because, among other things, the petitioners failed to show sufficient merit to the proceeding.”

THE SUMMONS

Steuhl v. CRD Metalworks, LLC, 159 A D 3d 1182 (3d Dept. 2018) – Defendant was served with a “bare” summons – with neither notice nor a complaint. Accordingly, “the complaint must be dismissed due to a lack of personal jurisdiction.”

Chambers v. Prug, 162 A D 3d 974 (2d Dept. 2018) – “CPLR 305(c) authorizes the court, in its discretion, to ‘allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.’ Where the motion is to cure ‘a misnomer in the description of a party

defendant,’ it should be granted even after the statute of limitations has run where ‘(1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought’ [citations omitted]. ‘Such amendments are permitted where the correct party defendant has been served with process, but under a misnomer, and where the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact seeking to sue’ [citations omitted]. Here, the evidence established that the correct defendants, Patrick Prue and Weir Welding Company, Inc., misnamed in the original process as Patrick Prug and Weir Welding Co., Inc., were properly served with process within 120 days after the action was timely commenced and, thus, the Supreme Court obtained jurisdiction over them [citations omitted]. Moreover, there was no proof that the defendants would be prejudiced by allowing the caption to be amended to correct the misnomers.”

SERVICE OF PROCESS

SERVICE ON INDIVIDUALS

Milazzo v. Kim, 61 Misc 3d 570 (Dist.Ct. Nassau Co. 2018)(Fairgrieve, J.) – As a general rule, when service is being made upon an individual by personal delivery, pursuant to CPLR 308(1), service will only be valid if the process server in fact serves the intended defendant. “In general, representations made by an individual who accepts the service of process are not binding on the defendant in the absence of proof that the defendant himself knew of such representations.” Thus, for example, in *Caudle v. Adler*, 146 A D 2d 598 (2d Dept. 1989), the process server, seeking to serve Merwin Adler, was misled by Merwin’s son, Jeffrey, who falsely claimed to be his father. In the absence of proof that Merwin participated in the deception, service was held to be insufficient. Here, however, “respondent was present when Songyol Kim misrepresented himself to be [respondent] Kyung-Ah Kim while talking to the petitioner. This evidence allows the court to assume that the Respondent was aware of and participated in these misrepresentations despite the fact that she was not present for the misrepresentation to [process server] Michael Masone. Since Respondent did not object when Songyol Kim misrepresented himself as Kyung-Ah Kim to Petitioner, Respondent essentially consented to and allowed the misrepresentations of Michael Masone.”

Avis Rent A Car System, LLC v. Scaramellino, 161 A D 3d 572 (1st Dept. 2018) – Defendant rented a vehicle from plaintiff in California, and damaged it there. Plaintiff commenced an action against defendant in New York, and served him, presumably by leave and mail or nail and mail service, at the New York address listed on his driver’s license. Upon defendant’s default, judgment was awarded to plaintiff. Defendant now moves to vacate the default and dismiss the action, claiming that, prior to the time

process was served, he had relocated to Massachusetts. Plaintiff argues that defendant is estopped from claiming that the address was not his “actual residence,” since he failed to notify the Department of Motor Vehicles of his change of address, and plaintiff’s process server relied upon the address on file with the DMV. “Although, as plaintiff argues, a defendant may be estopped from challenging the propriety of service of process based on his failure to notify the Department of Motor Vehicles of a change of address [citations omitted], he cannot be estopped on that basis from asserting that he is not subject to the jurisdiction of the courts of a state in which he is not a resident.” Accordingly, the Appellate Division remanded for a hearing as to whether, in fact, defendant had relocated to Massachusetts prior to the time of service of process.

Itshaik v. Singh, 165 A D 3d 902 (2d Dept. 2018) – Ordinarily, the failure to keep a current address on file with the Department of Motor Vehicles will waive defendant’s claim that the address on file is not “actual” for purposes of CPLR 308(2) or (4) when that filing is relied upon by the process server. Here, however, “where the defendant did not provide the [stale] West End Avenue address at the time of the accident, where the record does not contain a DMV driver’s abstract for the defendant, and where the plaintiff identified the motor vehicle allegedly involved in this accident as belonging to a neighbor [at what defendant claimed was his actual address],” the Court concluded that defendant did not waive his challenge to service.

New York City Campaign Finance Board v. Testaverde, N.Y.L.J., 1544085715 (Sup.Ct. N.Y.Co. 2018)(Bluth, J.) – Candidates for public office who participate in the City’s campaign finance program are “required to inform plaintiff about any changes in address for the candidate, the campaign and the treasurer.” Here, defendant claims to have moved from the address on file with plaintiff before service was made at the address on file pursuant to CPLR 308(4). But “simply offering a conclusory statement that he no longer lives at an address is not sufficient to defeat a proper affidavit of service.” And “defendants failed to attach any evidence to their moving papers demonstrating that they informed plaintiff about a new address.” Service was therefore proper, and defendant’s motion to dismiss is denied.

Wang v. Li, 169 A D 3d 593 (1st Dept. 2019) – “Plaintiff established by a preponderance of the evidence that defendant Pui Yee Chan was properly served with the complaint at her actual place of business pursuant to CPLR 308(2), because she testified at the hearing that she had tenants in the building and would go to the property when they notified her that they had an issue, which established that she was regularly transacting business at the property.”

Chi v. Miller, 63 Misc 3d 354 (Sup.Ct. Queens Co. 2019)(Modica, J.) – “At the time of service in this case, T.W. [who was served as a person of suitable age and discretion under CPLR 308(2) for service on defendant, her father] was 13 years of age. In that

respect, there is some legislative support for the proposition that a person under the age of 14 is not old enough to be served with process. For example, in suits against individuals under the age of 18, the legislature has mandated that a person 14 years or older must be personally served with process. Even in that context, however, the legislature, obviously concerned that a person under the age of 18 would not be able to appreciate the significance of being served with a court document, mandated that an adult must also be served on behalf of an infant.” But, “there appears to be no “bright-line” age below which a child is not a suitable person for service of process, even though “at some point a person *should* be deemed by the court, as a matter of law, to be too young to have a valid status as deliverer”” [emphasis by the Court]. Given T.W.’s age, the Court directed a traverse hearing “to determine whether or not, on the date in question, she was ‘objectively of sufficient maturity, understanding and responsibility under the circumstances so as to be reasonably likely to convey the summons to the defendant.’”

Martino Auto Concepts v. Berberich, N.Y.L.J., 1548138266 (Sup.Ct. Nassau Co. 2019) (Driscoll, J.) – The “due diligence” requirement for service by affixing and mailing pursuant to CPLR 308(4) “‘must be strictly observed’ in light of the reduced likelihood that a summons served by this method will be received.” Here, “two of the process server’s four attempts at service – specifically, the attempted service on Thursday, June 28, 2018 at 4:56 p.m. and Monday, July 2, 2018 at 12:21 p.m. – were made during times ‘when it reasonably could have been expected that defendant was either working or in transit to work’ [citation omitted]. The final attempt at service where the Summons and Complaint was affixed similarly took place on Friday, July 6, 2018 at 5:23 p.m. [citation omitted]. Moreover, aside from questioning one neighbor, it does not appear that the process server made any genuine inquiries about the defendant’s employment address.” Accordingly, plaintiff’s motion for leave to enter a default judgment was denied.

Jean v. Csencsits, 171 A D 3d 1149 (2d Dept. 2019) – CPLR 308(5) “authorizes the court to direct alternative forms of service of process. CPLR 308(5) vests a court with the discretion to direct an alternative method of service of process when it has determined that the methods set forth in CPLR 308(1), (2) and (4), which provide for service by personal delivery, delivery and mail, and affixing and mailing, respectively, are impracticable [citations omitted]. The impracticability standard does not require the applicant to satisfy the more stringent standard of due diligence under CPLR 308(4) nor make an actual showing that service has been attempted pursuant to CPLR 308(1), (2) and (4).”

Alzaabi v. Jaskon, N.Y.L.J., 1541462124 (Sup.Ct. Queens Co. 2018)(McDonald, J.) – Plaintiff and defendant negotiated the sale of a Patek Phillippe watch from defendant to plaintiff for \$34,000. The agreement provided that plaintiff had 30 days to examine the watch after payment. During that 30-day period, plaintiff determined that the watch was a fake. Plaintiff’s process server also determined that the address given by defendant in

the sales agreement was a fake. But, “pursuant to CPLR 308(5) a court may direct the manner in which service can be made” when service under other methods is “impracticable.” And, “here it has been shown that it is impracticable to serve the defendant through traditional means prescribed for in the CPLR. However, the parties were able to communicate successfully via Whatsapp. Thus, this court finds that service should be made via Whatsapp and also a local Queens newspaper.”

Wimbledon Financing Master Fund, Ltd. v. Laslop, 169 A D 3d 550 (1st Dept. 2019) – Defendant was one of several directors of a corporation allegedly involved in a fraudulent scheme. All were sued, and were represented by the same counsel. After various attempts at service upon defendant failed, plaintiff sought an order directing an alternative means of service pursuant to CPLR 308(5). The Appellate Division affirms Supreme Court’s direction that service upon defendant be made via service upon counsel through the Court System’s NYSCEF e-filing system. “Plaintiff established that statutory methods of service were impracticable [citation omitted]. Moreover, since Laslop’s counsel received notices of filings in this action through NYSCEF, service by that alternative method comported with due process by being reasonably calculated to apprise Laslop of the pendency of the action.”

US Bank National Association v. McGown, 60 Misc 3d 808 (Sup.Ct. Kings Co. 2018) (Partnow, J.) – After securing a mortgage from plaintiff for a parcel of real property, defendant McGown transferred the property by deed to his few-months-old daughter. “This deed was duly recorded in the Offices of the New York City Registrar.” It did not identify the relationship between grantor and grantee, nor identify the grantee as a minor. Now, seeking to foreclose, plaintiff has served process on the registered owner pursuant to CPLR 308(2). The infant owner, by her legal guardian, moves to dismiss. CPLR 309(a) provides that personal service on an infant can only be made by service upon a parent or guardian within the State. The Court denies the motion to dismiss. “Even though the case law on CPLR 309 is sparse, it appears that this section infers or presumes that a plaintiff knows of the minor’s status in order to serve the proper party and be in compliance with this statute. In other words, a party seeking to serve a minor must have either actual or constructive notice that the party to be served is, in fact, a minor.” The burden was on McGown “to identify her on the deed as a minor in accordance with the Uniform Transfers to Minors Act, and by failing to do so he secreted her minor status from US Bank.”

Divito v. Fiandach, 160 A D 3d 1404 (4th Dept. 2018) – Plaintiff served defendant by proper leave and mail, but “plaintiff did not, however, file proof of service in the Monroe County Clerk’s Office within 20 days of the delivery or mailing [citation omitted], and he never applied to the court for leave to file a late proof of service [citation omitted]. As a result, plaintiff’s subsequent late filing of the proof of service was a nullity.” Thus, defendant’s time to appear did not begin to run at that time.

First Federal Savings & Loan Association of Charleston v. Tezzi, 164 A D 3d 758 (2d Dept. 2018) – Defendant was served with process pursuant to CPLR 308(4) on November 24, 2009. Although plaintiff claims to have mailed the affidavit of service to the County Clerk on December 7, it was marked received and filed by the Clerk on December 17. Accordingly, the proof of service was not timely filed within 20 days of service. On defendant’s motion to vacate the default judgment, Supreme Court deemed the affidavit of service timely filed, *nunc pro tunc*, and denied the motion. The Appellate Division modifies that order. “The ‘failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or *sua sponte* by the court in its discretion pursuant to CPLR 2004’ [citations omitted]. Thus, we agree with the Supreme Court’s determination to deem the affidavit of service timely filed, *sua sponte*, pursuant to CPLR 2004. In granting this relief, however, the court must do so upon such terms as may be just, and only where a substantial right of a party is not prejudiced [citations omitted]. The court may not make such relief retroactive, to the prejudice of the defendant, by placing the defendant in default as of a date prior to the order [citations omitted], ‘nor may a court give effect to a default judgment that, prior to the curing of the irregularity, was a nullity requiring vacatur’ [citations omitted]. Rather, the defendant must be afforded an additional 30 days to appear and answer after service upon her of a copy of the decision and order.”

Hall v. Bray, 61 Misc 3d 921 (Sup.Ct. Bronx Co. 2018)(Higgitt, J.) – When service is made pursuant to Vehicle and Traffic Law §253 – which permits service on a nonresident whose claimed liability results from driving a vehicle in New York by service on the Secretary of State and a mailing by registered or certified mail – an “affidavit of compliance” must be filed within 30 days of service. “It is well settled that a statute permitting service of process other than by personal service must be strictly complied with in order to confer jurisdiction over the defendant upon the court.” But “there is a difference between service and proof of service. One is a fact of which the other is evidence’ [citation omitted]. Thus, the failure to file proof of service is a procedural irregularity – not a jurisdictional defect – and the court, employing CPLR 2004, may extend a plaintiff’s time to file such proof [citations omitted]. The filing of the proof of service does have an important (but non-jurisdictional) consequence; it pertains to the time within which a defendant must answer or move against the complaint.” The Court concludes that “the affidavit of compliance called for by Vehicle and Traffic Law §253 is the equivalent of the affidavit of service required under CPLR 308(2) and (4). The affidavit of compliance, like the affidavit of service, is evidence of service, not service itself.”

SERVICE BY MAIL

Ultra Ortho Products v. North Carolina Farm Bureau Insurance Group, N.Y.L.J., 1542087229 (Civ.Ct. Kings Co. 2018)(Kennedy, J.) – CPLR 312-a permits personal

service by mail. The mailing must include copies of a statement of service and an “acknowledgment of receipt” form. Defendant “must” complete the form and return it within 30 days of receipt. But, if the defendant fails to do so, service has not been effectuated, and plaintiff must serve in “another manner permitted by law.” The penalty to defendant for failing to return the form is the taxing of the costs of alternative service. Here, defendant failed to return the form, and moves to dismiss the complaint for failure to properly complete service. Plaintiff “contends the process server’s affidavit of service constitutes *prima facie* proof of the method of service and creates a presumption of valid service which defendant could have but failed to rebut.” The Court rejects that argument. In the cases holding that an affidavit of service is *prima facie* evidence of proper service, “compliance with the method of service at issue was established through the affidavit of plaintiff’s process server, while in the case at bar, the validity of service is beyond the process server’s dominion.” For, “the effectiveness of alleged service pursuant to CPLR 312-a depends on defendant’s willingness to sign the ‘Acknowledgment of Receipt by Mail.’” And, “plaintiff’s process server cannot establish valid service without defendant’s cooperation.”

SERVICE IN A FOREIGN COUNTRY

Korea Deposit Insurance Corporation v. Jung, 59 Misc 3d 442 (Sup.Ct. N.Y.Co. 2017) (Billings, J.) – Back in 2001, the First Department, in *Sardanis v. Sumitomo Corporation*, 279 A D 2d 225 (1st Dept. 2001), held that Article 10(a) of the Hague Convention, which provides that the Convention “shall not interfere with” the “freedom to *send* judicial documents by postal channels, directly to persons abroad” [emphasis added], does not permit *service* of process by such “postal channels.” Relying upon a Third Department decision that that Court would later overrule [*Reynolds v. Koh*, 109 A D 2d 97 (3d Dept. 1985)], the Court concluded that “service” is a “term of art,” and not encompassed by the word “send.” *Sardanis* remained the law in the First Department even though all of the other Departments held to the contrary [*Fernandez v. Univan Leasing*, 15 A D 3d 343 (2d Dept. 2005); *New York State Thruway Authority v. French*, 94 A D 3d 17 (3d Dept. 2012)(overruling *Reynolds*); *Rissew v. Yamaha Motor Company*, 129 A D 2d 94 (4th Dept. 1987)]. Then, in *Mutual Benefits Offshore Fund v. Zeltser*, 140 A D 3d 444 (1st Dept. 2016), the First Department joined the other Departments, overruling *Sardanis*. “We now join our sister Departments and hold that service of process by mail ‘directly to persons abroad’ is authorized by article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361, TIAS No. 5568 [1969][Hague Convention]), so long as the destination state does not object to such service.” Last year’s “Update” reported on *Water Splash, Inc. v. Menon*, ___ U.S. ___, 137 S.Ct. 1504 (2017), in which the Supreme Court agreed with what is now all four Appellate Divisions. “The traditional tools of treaty interpretation unmistakably demonstrate that Article 10(a) encompasses service by mail. To be clear, this does not mean that the Convention affirmatively *authorizes* service by mail. Article

10(a) simply provides that, as long as the receiving state does not object, the Convention does not ‘interfere with the freedom’ to serve documents through postal channels. In other words, in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law” [emphasis by the Court]. When that “otherwise-applicable law” is New York’s, presumably service by mail, even in a country that has not objected to Article 10(a), will be limited to circumstances when it has been approved by the Court pursuant to CPLR 308(5) when other methods have proven “impracticable,” or subject to the other terms and conditions of, for example, CPLR 312-a, BCL 307, or VTL 253. Here, in *Korea Deposit Insurance Corporation*, the Court holds that the Hague Convention only becomes applicable when service of process must be made in a foreign country. Here, plaintiff served an agent of the Korean defendant in New York. Such service is incompatible with Korean law. However, “whether ‘recourse to the Convention’s means of service’ is mandatory,” is “dependent on the forum’s internal law.” Thus, “the internal law of the forum state, New York, determines whether the method of service requires transmittal of documents abroad and whether the Hague Convention applies [citation omitted]. A ‘method prescribed by the internal law of the receiving state,’ the Republic of Korea, or ‘compatible with that law’ [citation omitted], is required only when the Central Authority is to serve the documents in the Republic of Korea. In particular, where service on an agent in New York is valid and complete under state law and the Federal Constitution’s due process guarantees, the Hague Convention is not implicated.”

PROOF OF SERVICE

BAC Home Loans Servicing, LP v. Carrasco, 160 A D 3d 688 (2d Dept. 2018) – “A process server’s affidavit of service gives rise to a presumption of proper service [citations omitted]. ‘although a defendant’s sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server’s affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to “specific facts to rebut the statements in the process server’s affidavits”’ [citations omitted]. Here, the affidavit of the defendant Andres H. Carrasco, which was submitted in support of his motion, *inter alia*, to dismiss the complaint insofar as asserted against him, set forth that he did not receive the pleadings, but did not deny the specific facts contained in the process server’s affidavit [citations omitted]. Carrasco’s conclusory assertion was inadequate to rebut the presumption of proper service [citations omitted]. Accordingly, a hearing to determine the validity of service of process was not warranted under the circumstances of this case.”

APPEARANCE BY COUNSEL

Arrowhead Capital Finance, Ltd v. Cheyne Specialty Finance Fund L.P., 32 N Y 3d 645 (2019) – Last year’s “Update” reported on the Appellate Division decision in this matter [154 A D 3d 523 (1st Dept. 2017)], and a prior year’s “Update” reported on the Supreme Court decision [N.Y.L.J., 1202764119157 (Sup.Ct. N.Y.Co. 2016)]. Judiciary Law §470 requires that, to appear as counsel in New York, a nonresident of the State, who is a member of the New York bar, must maintain an “office for the transaction of law business” within the State. In *Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016), the Second Circuit, reversing the United States District Court for the Northern District of New York, held that the statute does not violate the Privileges and Immunities Clause of the United States Constitution. Last year’s “Update” reported on *Stegemann v. Rensselaer County Sheriff’s Office*, 153 A D 3d 1053 (3d Dept. 2017), in which the Court denied applications for “*nunc pro tunc* waivers of the law office requirement of Judiciary Law §470 to enable [applicant attorneys] to practice before this Court.” For “the Court of Appeals [has] held that, ‘by its plain terms, Judiciary Law §470 requires nonresident attorneys practicing in New York to maintain a physical law office here.’” And the requests for a waiver of the rule “‘finds no support in the wording of the provision and would require us to take the impermissible step of rewriting the statute’ [citation omitted]. In addition to holding that no statutory authority exists for granting the waivers, we also find that creating an avenue for nonresident attorneys to obtain a waiver of the law office requirement would amount to the type of rulemaking reserved for the Court of Appeals.” However, “we reject plaintiff’s contention that all of the work performed by [the out-of-state attorneys] in this action should be declared void from the beginning. In reaching this conclusion, we adopt the Second Department’s reasoning in *Elm Mgt. Corp. v. Sprung* (33 A D 3d 753 [2006]) that ‘the fact that a party has been represented by a person who was not authorized or admitted to practice law under the Judiciary Law does not create a “nullity” or render all prior proceedings void *per se.*’ [citations omitted], and we note our disagreement with the First Department’s cases holding to the contrary.” Here, in *Arrowhead*, as Supreme Court described the facts, Goldin, plaintiff’s attorney, “lists what he refers to as his ‘main office’ in Pennsylvania (PA Office). When he filed the summons and complaint in this action, on June 27, 2014, he listed his PA Office and its telephone and fax numbers, as well as an address at 240 Madison Avenue 3rd Floor, NY, NY 10016 (240 Madison).” Defendant’s attorney averred that at 240 Madison Avenue, there was “no visible sign for Goldin” outside or inside, or on the 3rd floor. Also, “Goldin’s stationery letterhead” only listed the PA Office. The Madison Avenue address was apparently the office of one of Goldin’s clients, that he “had use of” to receive “documents, packages and boxes.” Supreme Court noted that “numerous cases in the First Department have held, before the recent *Schoenefeld* rulings, that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office, as required by [Judiciary Law] §470.” And, “receiving mail and documents is insufficient to constitute maintenance of an office.” The action was therefore dismissed without prejudice. The Appellate

Division affirmed. “The record supports the court’s determination that plaintiff’s counsel failed to maintain an in-state office at the time he commenced this action, in violation of Judiciary Law §470 [citation omitted]. Plaintiff’s subsequent retention of co-counsel with an in-state office did not cure the violation, since the commencement of the action in violation of Judiciary Law §470 was a nullity.” The Court of Appeals has reversed the holding that the commencement of the action was “a nullity.” “Nonresident attorneys admitted in New York must maintain a physical office in the State in order to practice law in New York [citations omitted]. However, failure by a nonresident attorney to comply with this requirement at the time a complaint is filed does not render that filing a nullity and, therefore, dismissal of the action is not required.” For, “we agree with the Second and Third Departments that, given our holding in *Dunn* [*v. Eickhoff*, 35 N Y 2d 698 (1974)], it would be incongruous to conclude that unlike the acts of a disbarred attorney, actions taken by an attorney duly admitted to the New York bar who has not satisfied Judiciary Law §470’s office requirement are a nullity.” Thus, “the party may cure the section 470 violation with the appearance of compliant counsel or an application for admission *pro hac vice* by appropriate counsel.”

Law Office of Angela Barker LLC v. Broxton, 60 Misc 3d 6 (App.Term 1st Dept. 2018) – “Plaintiff’s counsel’s use of a ‘virtual office’ at a specified New York City address, instead of maintaining a physical office for the practice of law within New York at the time the action was commenced, was a violation of Judiciary Law §470.”

Marina District Development Company v. Toledano, N.Y.L.J., 1529972484 (Sup.Ct. N.Y.Co. 2018)(Nervo, J.), *rev’d*, 174 A D 3d 431 (1st Dept. 2019) – Supreme Court held that “plaintiff’s attorney, although admitted to practice in New York, does not maintain an office here within the meaning of Judiciary Law §470.” And, “the court rejects the attorney’s argument that his membership at a virtual law office at The New York City Bar [Association] qualifies as the office required by Judiciary Law §470, *supra*. By definition, a virtual office is not an actual office.” And the Court was not persuaded by an affidavit from a person affiliated with the City Bar describing the services – message taking, mail forwarding, and availability of meeting rooms – the Bar offers. Plaintiff’s attorney “does not assert that he has ever used the organization’s physical facilities for any purpose.” Since this motion was decided prior to the Court of Appeals decision in *Arrowhead Capital Finance, Ltd v. Cheyne Specialty Finance Fund L.P.*, 32 N Y 3d 645 (2019) discussed above, the Court dismissed the action for violation of Judiciary Law §470. The Appellate Division agreed with Supreme Court that counsel violated Judiciary Law §470. “To the extent that counsel uses the V[irtual] L[aw] O[ffice] P[rogram] only as a mailing address and an agent authorized to accept service of process, it is insufficient to meet the physical presence requirement of *Schoenefeld* [*v. State of New York*, 25 N Y 3d 22 (2015)]. While the additional services VLOP provides may well satisfy physical presence, an attorney needs to actually take advantage of those services to meet the requirements of Judiciary Law §470. At bar, counsel does not claim that he actually uses

the VLOP for anything but the delivery of mail and packages and for service of process. Although office space and conference rooms may be available to him, there is no claim that he actually uses those services.” However, in light of *Arrowhead*, the Court reversed the dismissal of the action and remanded “the matter to afford plaintiff an opportunity to cure the violation.”

Parvis v. Rakower Law PLLC, N.Y.L.J., 1562736575 (Sup.Ct. N.Y.Co. 2019)(Chan, J.) – Plaintiff’s attorney, a member of the Bars of New York and North Carolina, with an office only in North Carolina, seeks *pro hac vice* admission in this New York action. Relying upon the Court of Appeals *Arrowhead* decision discussed above, defendant argues “that allowing a lawyer who does not comply with the law office requirement of Judiciary Law §470 to apply for a *pro hac vice* admission would be inconsistent with *Arrowhead* [citation omitted]. Defendant argues that ‘if lawyers could cure their own abuses of Judiciary Law §470 simply by filing a *pro hac vice* motion, there would be no consequence for their violation of the statute.’” The Court rejects that argument, and grants the motion. For defendant’s argument “does not consider that a ‘trial court has discretion to consider any resulting prejudice and fashion an appropriate remedy and the individual attorney may face disciplinary action for failure to comply with the statute’” [citing *Arrowhead*]. Here, the attorney represented plaintiff in this action before relocating to North Carolina, and, in the exercise of discretion, the Court grants *pro hac vice* admission.

Park v. Song, 61 Misc 3d 1047 (Sup.Ct. N.Y.Co. 2018)(Schechter, J.) – “Whether a derivative plaintiff can maintain claims without being represented by counsel is a question of first impression under New York law. The answer is well settled in Delaware and in the Second Circuit; shareholders are required to have counsel [citations omitted]. The rationale underlying those courts’ determinations applies with equal force in New York State; therefore, plaintiffs must retain counsel to prosecute their derivative claims. In New York, as in Delaware, it ‘is black letter law that a stockholder has no individual cause of action against a person or entity that has injured the corporation’ [citations omitted]. Rather, if demand requirements have been satisfied (unless futile), a stockholder can assert a derivative claim ‘to recover for injury to the business entity’ [citation omitted]. Because a derivative plaintiff is really seeking to vindicate the rights of the corporation, and not simply its own rights, derivative claims are considered ‘to belong to the corporation itself.’”

DEFENDANT’S RESPONSE TO BEING SERVED

Clement v. Durban, 32 N Y 3d 337 (2018). Last year’s “Update” reported on the Appellate Division decision in this action [147 A D 3d 39 (2d Dept. 2017)]. As the Appellate Division put it, “this appeal raises a constitutional issue of first impression in

the appellate courts. CPLR 8501(a) and 8503 require nonresident plaintiffs maintaining lawsuits in New York courts to post security for the costs for which they would be liable if their lawsuits were unsuccessful. On this appeal, we are asked to determine whether this requirement violates the Privileges and Immunities Clause of the United States Constitution (US Const, art IV, §2). We hold that the statutes, insofar as they are challenged, do not deprive nonresident plaintiffs of reasonable and adequate access to New York courts, and thus, do not violate the Privileges and Immunities Clause.” That clause does not mandate “that state citizenship or residency may never be used by a State to distinguish among persons [citations omitted]. ‘Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do’ [citations omitted]. ‘Rather, the Privileges and Immunities Clause protects only those privileges and immunities that are “fundamental.”’” And, here, “the challenged statutory provisions do not deprive noncitizens of New York of reasonable and adequate access to New York courts. The requirement that a nonresident plaintiff who has not been granted permission to proceed as a poor person post the modest sum of \$500 as security for costs is reasonable to deter frivolous or harassing lawsuits and to prevent a defendant from having to resort to a foreign jurisdiction to enforce a costs judgment.” The Court of Appeals has affirmed. “New York’s longstanding security for costs provisions treat resident and nonresident litigants differently. This appeal calls for us to decide whether, as a result of this different treatment, CPLR 8501(a) and 8503 violate the Privileges and Immunities Clause set forth in article IV, section 2 of the United States Constitution (Privileges and Immunities Clause). We conclude that they do not.” For, those provisions do not deny nonresidents ““access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights they may have.”” And, “neither the Supreme Court nor this Court have insisted on equal treatment for nonresidents ‘to a drily logical extreme.’” These provisions reasonably “obviate the danger of the property being placed beyond reach of a court’s process by a plaintiff, who has been ordered to pay the costs of litigation.”

Bittinger v. Erie Insurance Company, 169 A D 3d 1359 (4th Dept. 2019) – “It is well settled that, ‘to avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012(b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action’ [citations omitted]. Here, even assuming, *arguendo*, that plaintiffs showed a meritorious cause of action, we conclude that they failed to provide any excuse for the delay in serving their complaint, and thus dismissal of the action is required [citations omitted]. Plaintiffs’ contention that defendant has not been prejudiced or harmed by the delay is irrelevant. ‘The absence of any reasonable excuse for plaintiffs’ delay is determinative; there is no requisite that prejudice be shown before a motion to dismiss is granted in a case of this nature.’”

U.S. Bank National Association v. Pepe, 161 A D 3d 811 (2d Dept. 2018) – “The filing of a notice of appearance in an action by a party’s counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction [citations omitted]. Here, the defendant’s counsel filed a notice of appearance dated September 4, 2012. The record does not show that the defendant asserted lack of personal jurisdiction in a responsive pleading. Moreover, the defendant did not move to dismiss the complaint for lack of personal jurisdiction until almost three years after appearing in the action, after the judgment of foreclosure and sale had been issued. Under those circumstances, the defendant waived any claim that the court lacked personal jurisdiction over him in this action.”

The Board of Managers of 50 West 127th Street Condominium v. Kidd, 169 A D 3d 432 (1st Dept. 2019) – “Defendant did not waive the defense of lack of jurisdiction. Before her incoming counsel filed a notice of appearance without mentioning the defense, she had already presented an order to show cause seeking to vacate the judgment based on lack of personal jurisdiction, and she moved to vacate based on improper service shortly after new counsel appeared. In contrast, in the cases relied on by plaintiff and City West, the defendant’s counsel filed a notice of appearance without preserving any objection to jurisdiction after the time to move or answer had elapsed, and did not move to vacate for years afterwards, indicating an intentional abandonment of the defense.”

HSBC Bank USA, N.A. v. Taub, 170 A D 3d 1128 (2d Dept. 2019) – “A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss’ [citations omitted]. Here, by opposing the plaintiff’s motions, including its motion for a judgment of foreclosure and sale, and cross-moving for sanctions against the plaintiff, the defendant engaged in significant activity after his statutory time to answer had expired, which amounted to an informal appearance [citation omitted]. The record indicates that the defendant’s counsel appeared in court on at least 11 occasions without raising the jurisdictional objection. Therefore, the defendant waived any objection on the ground of lack of personal jurisdiction.”

Kuper v. Bravo, 61 Misc 3d 274 (Civ.Ct. Queens Co. 2018)(Lansden, J.) – “Generally, if a counterclaim is asserted which does not rise from the initial petition, then a jurisdictional defense is considered to be waived. In the original petition, petitioner asserts a claim not only for the apartment, but also use and occupancy, as well as attorney’s fees. In his answer, respondent asserts defenses of (1) lack of jurisdiction due to defective service; (2) lack of good faith; (3) breach of warranty of habitability; and (4) retaliation. Respondent then asserts counterclaims seeking an injunction to force repairs to the apartment, damages for breach of warranty of habitability, correction of housing code violations, attorney’s fees, and a claim for wrongful eviction. The issue of wrongful

eviction is clearly related to and arising out of the current proceeding. Similarly, the claim for fees not only comes out of the cost of defending the current proceeding, but also flows from the provisions of Real Property Law §234 [citation omitted]. Finally, as the petition seeks use and occupancy, respondents can seek to have this offset through their action for breach of warranty of habitability. Thus, the warranty of habitability claim flows from the original petition as well. This leaves us with two counterclaims that, ostensibly, are not related to the current proceeding at all.” But, “while the two remaining counterclaims are not directly related to the petition by the petitioner, they are related to the defenses raised by the respondents. Thus, should the respondents fail to raise them at this point, as Professor Siegel notes, they would likely find themselves barred from raising these issues in a later suit due to collateral estoppel.” Thus, here, assertion of the counterclaims does not waive the challenge to jurisdiction.

Furnished Dwellings LLC v. Households Headed by Women, Inc., 62 Misc 3d 864 (Civ.Ct. N.Y.Co. 2018)(Marton, J.) – “A claim for attorney’s fees pursuant to Real Property Law §234 need not be sought as a counterclaim; the claim may be asserted independently.” Thus, “respondents’ claim for attorney’s fees is ‘unrelated’ to the defense of the instant proceeding, i.e., need not be asserted here to avoid ‘the spectre of collateral estoppel and the risk of later preclusion’ [citation omitted]. Accordingly, the court holds that respondents’ interposition of the counterclaim waived their defense that personal jurisdiction had not been secured.”

Eastern Savings Bank, FSB v. Campbell, 167 A D 3d 712 (2d Dept. 2018) – “Where personal jurisdiction has not been obtained by proper service of process, a ‘defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of jurisdiction in an answer or pre-answer motion to dismiss’ [citations omitted]. A defendant appears formally in an action ‘by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer’ [citation omitted]. A defendant ‘may appear informally by actively litigating the action before the court’[citation omitted]. ‘When a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court’s jurisdiction over the action, and by appearing informally in this manner, the defendant confers *in personam* jurisdiction on the court’ [citation omitted]. Here, [defendant] Parker presented papers *pro se* in 2012 in the form of a motion, by order to show cause, for a stay of the foreclosure sale. However, Parker abandoned this *pro se* attempt to obtain a stay even before he obtained a signature on the order to show cause or a return date. We agree with the Supreme Court’s determination that, under these circumstances, Parker did not, merely by presenting papers, participate in the action and thereby waive the defense of lack of personal jurisdiction.” However, as to a co-defendant, “by settling the deficiency judgment, Campbell clearly submitted to the court’s jurisdiction and acknowledged the validity of the judgment.” That latter ruling drew a dissent, the dissenting Justice arguing that “the record on this appeal is completely

devoid of a writing subscribed by Campbell or her attorney or reduced to the form of an order and entered. The majority relies on an email exchange that does not meet the requirements of CPLR 2104 [citation omitted]. Further, I disagree that the record establishes a payment of the deficiency judgment under circumstances establishing a settlement agreement and Campbell's waiver of any jurisdictional objection to the default judgment obtained against her."

STATUTE OF LIMITATIONS

CALCULATING THE STATUTORY PERIOD

Zayed v. New York City Department of Design and Construction, 157 A D 3d 410 (1st Dept. 2018) – A Court may not grant an extension of the time within which to file a notice of claim after the statute of limitations has expired. "CPLR 2004 cannot be used to extend the statute of limitations."

PROFESSIONAL MALPRACTICE

King Tower Realty Corp. v. G&G Funding Corp., 163 A D 3d 541 (2d Dept. 2018) – "A legal malpractice claim accrues "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court" [citations omitted]. "In most cases, this accrual time is measured from the day an actionable injury occurs, "even if the aggrieved party is then ignorant of the wrong or injury" [citations omitted]. "A cause of action to recover damages for legal malpractice accrues when the malpractice is committed, not when it is discovered" [citations omitted]. The continuous representation doctrine serves to toll the statute of limitations and render timely an otherwise time-barred cause of action for legal malpractice, but "only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim."

Encalada v. McCarthy, Chachanover & Rosado, LLP, 160 A D 3d 475 (1st Dept. 2018) – The continuous representation doctrine "is limited 'to the course of representation concerning a specific legal matter,' and is not applicable to the client's 'continuing general relationship with a lawyer involving only routine contact for miscellaneous legal representation unrelated to the matter upon which the allegations of malpractice are predicated.'"

Lemle v. Regen, Benz & MacKenzie, C.P.A.'s, P.C., 165 A D 3d 414 (1st Dept. 2018) – "On plaintiff's 2012 tax returns, defendants [accountants] characterized a certain set of transactions relating to interests in real estate as a 'sale.' In December 2015 (within the statutory limitations period), plaintiff received a letter from the New York State Department of Taxation and Finance (DTF) informing her that her 2013 tax return, also

prepared by defendants, was going to be audited, and seeking an explanation of why she continued to claim expenses incurred in connection with the real estate that her 2012 return listed as ‘sold.’ Plaintiff forwarded the letter to defendants, and defendants prepared and submitted a response to DTF. Ultimately, DTF assessed millions of dollars in additional taxes against plaintiff as a result of the 2012 characterization. Without any new engagement by plaintiff, defendants undertook to respond to DTF’s audit letter, defending or at least explaining the treatment given the properties on the 2012 return. This service is sufficiently related to the specific subject matter of the alleged malpractice – the characterization of the transaction as a sale in 2012 – to support application of the continuous representation doctrine.”

Jeffrey Berman Architect v. Kodsi, 169 A D 3d 1019 (2d Dept. 2019) – In an architect’s malpractice action, “the law recognizes that the supposed completion of the contemplated work does not preclude application of the continuous representation toll if inadequacies or other problems with the contemplated work timely manifest themselves after that date and the parties continue the professional relationship to remedy those problems’ [citations omitted]. Under the circumstances, the evidence of continuing communications between the parties and evidence of the plaintiff’s efforts to remedy the alleged errors or deficiencies in the architectural plans supported the denial of the plaintiff’s motion for summary judgment dismissing defendant’s counterclaim alleging professional malpractice.”

Schrull v. Weis, 166 A D 3d 829 (2d Dept. 2018) – Plaintiff retained defendant attorney to commence a product liability action in September 2008. Over the next several years, plaintiff reached out to defendant regularly to learn the progress of the lawsuit, only to be told to “put the case on the back burner as it was going to take a long time to resolve.” Finally, in July 2014, when plaintiff again reached out, defendant told him that he had “no case,” and that defendant thought that plaintiff “had disappeared.” The Court holds that the plaintiff adequately demonstrated that the continuous representation doctrine tolled the running of the statute of limitations until July 2014. For, “upon entering into the retainer agreement, the plaintiff and the defendants reasonably intended that their professional relationship of trust and confidence, focused upon the personal injury claim, would continue. The complaint adequately alleged that the defendants were, ‘in fact, actively addressing his legal needs’ until that date.”

Boesky v. Levine, N.Y.L.J., 1546502899 (Sup.Ct. N.Y.Co. 2018)(Bransten, J.) – “The law recognizes that the supposed completion of the contemplated work does not preclude application of the continuous representation toll if inadequacies or other problems with the contemplated work timely manifest themselves after that date and the parties continue the professional relationship to remedy those problems’ [citations omitted]. ‘In this regard, a motion to dismiss pursuant to CPLR 3211(a)(5) will be denied unless the facts establish that a gap between the provision of professional services on the particular

matter is so great that the representation cannot be deemed continuous as a matter of law’ [citation omitted]. Here, the complaint alleges that plaintiffs received counsel from Levine between 2002 to 2004 regarding the tax strategy. However, it was not until three years later, in 2007, that Levine began to counsel them on the same subject matter – i.e., how to handle the IRS’s and NYSDTF’s challenges to the strategy. This three-year gap between the provision of Levine’s services on this matter is so great that the representation cannot be deemed continuous.”

Knobel v. Wei Group, LLP, 160 A D 3d 409 (1st Dept. 2018) – In this legal malpractice action, the Court concludes that the defendant’s continuous representation of plaintiff ended on May 12, 2012, when plaintiff sent defendant “an email directing Wei ‘to cease all work’” and “shortly thereafter, Knobel sent an email to the court indicating his desire to appear *pro se*. Contrary to plaintiffs’ contention, there is no indication of ‘an ongoing, continuous, developing and dependent relationship between the client and the attorney’ of a ‘mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim’ after March 12, 2012.” This conclusion was not altered by the fact that, after that date, defendant sent invoices to plaintiff “for work pertaining to communications with the court, client, and subsequent counsel,” for those invoices do not indicate “any substantive legal work” or “legal advice on the matters which plaintiffs allege defendants committed malpractice.”

MEDICAL MALPRACTICE

Forbes v. Caris Life Sciences, Inc., 159 A D 3d 1569 (4th Dept. 2018) – Effective January 31, 2018, and applicable to all “acts, omissions or failures occurring on or after” that date, the Legislature has amended CPLR 214-a to provide that in a claim for “negligent failure to diagnose cancer or a malignant tumor,” the applicable statute of limitations shall be two years and six months from the *later* of (1) the date of last treatment when there is continuous treatment or (2) “when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury,” with a seven year cap running from the date of the malpractice. To be clear, the seven year cap is *only* applicable to the discovery option, *not* to the continuous treatment option. Here, in *Forbes*, the Court holds that, “although the legislature recently amended CPLR 214-a to provide, as relevant here, that an action based upon the alleged negligent failure to diagnose cancer may be commenced within 2 1/2 years of when the plaintiff knew or reasonably should have known of the alleged negligent act or omission [citation omitted], the amendment is not effective for the dates of the alleged negligent acts and omissions in this case [citation omitted]. Plaintiff was thus required to commence her medical malpractice action within 2 1/2 years of defendants’ act or omission in misdiagnosing decedent’s cancer in the October 4, 2010 dermatopathology report following their diagnostic examination of the first biopsy.”

Phillips v. Buffalo Heart Group, LLP, 160 A D 3d 1495 (4th Dept. 2018) – Plaintiff claims that defendant was negligent in prescribing the drug Pradaxa in combination with plaintiff’s use of nonsteroidal anti-inflammatory drugs (“NSAIDs”), and for failure to properly monitor his use of the drugs and to diagnose and treat the subsequent gastric bleeding. Defendant claims that, since the Pradaxa was prescribed more than 2 1/2 years prior to the commencement of this action, the action is time-barred. The Court holds that the action is timely. “Initially, we conclude that plaintiff’s claims that defendants were negligent on January 2, 2013 [less than 2 1/2 years before the action was commenced] in failing to monitor plaintiff’s use of Pradaxa in combination with NSAIDs and in failing to diagnose and treat the alleged existence of gastric bleeding at that particular visit are not time-barred. It is well settled that a physician has a duty to monitor a patient’s use of medications prescribed by the physician [citation omitted]. Thus, the claims based on allegations of negligent treating during the January 2, 2013 office visit have an independent viability regardless of whether any prior alleged negligence is time-barred.”

MEDICAL MALPRACTICE VS. NEGLIGENCE

Jeter v. New York Presbyterian Hospital, 172 A D 3d 1338 (2d Dept. 2019) – After surgery at defendant hospital, plaintiff suffered memory loss and made many threats to leave the hospital. As a result, a psychiatrist recommended placing plaintiff under one-on-one supervision, or in a “cluster room.” She then “went missing” from the hospital and was found five days later after suffering injuries. The Court concludes that this action for those injuries sounds in medical malpractice rather than negligence. “The critical factor to be decided here is the nature of the duty owed to the plaintiff that the hospital is alleged to have breached. A hospital or medical facility has a general duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his or her own safety [citations omitted]/ ‘The distinction between ordinary negligence and malpractice turns on whether the acts of omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of facts’ [citations omitted]. Generally, a cause of action will be deemed to sound in medical malpractice ‘when the challenged conduct “constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician”’ [citations omitted]. Thus, when the complaint challenges the medical facility’s performance of functions that are ‘an integral part of the process of rendering medical treatment’ and diagnosis to a patient, such as taking a medical history and determining the need for restraints, it sounds in medical malpractice.” Here, “the allegations at issue essentially challenged the hospital’s assessment of the plaintiff’s supervisory and treatment needs [citation omitted]. Thus, the conduct at issue derived from the duty owed to the plaintiff as a result of a physician-patient relationship and was substantially related to her medical treatment.”

Lang-Salgado v. The Mount Sinai Medical Center, Inc., 157 A D 3d 532 (1st Dept. 2018) – “Plaintiff seeks to recover damages for injuries she allegedly sustained on July 5, 2012, as a result of her fall from a hospital stretcher while she was being positioned by an X-ray technician for a chest X-ray. As described by plaintiff in her affidavit, the technician’s conduct in placing plaintiff’s body in a certain position, so as to obtain accurate imaging in an X-ray directed by a physician at defendant hospital, bore a ‘substantial relationship to the rendition of medical treatment by a licensed physician’ [citations omitted]. Accordingly, plaintiff’s complaint sounds in medical malpractice and was correctly dismissed as untimely [citation omitted]. The cases relied on by plaintiff are inapposite since the accidents therein did not occur in the course of rendering medical treatment, but involved simple common sense and judgment.” Moreover, “the proposed claim of failing to follow protocol, stated ‘upon information and belief,’ implicates questions of medical competence or judgment linked to the treatment of plaintiff and sounds in medical malpractice. Hence, it is time-barred for the same reasons for which the original complaint was dismissed.”

Kim v. New York Presbyterian, 170 A D 3d 624 (1st Dept. 2019) – “Plaintiff alleges that defendants failed to properly assess her condition and the degree of her supervisory needs in the restroom, a claim sounding in medical malpractice, and her action, brought three years after her injuries, is therefore untimely [citations omitted]. Because the loss of consortium claim is derivative of the injured plaintiff’s claim, that cause of action must also be dismissed as untimely.”

THE FOREIGN OBJECT RULE

Livsey v. Nyack Hospital, 167 A D 3d 591 (2d Dept. 2018) – “Where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery.” Here, “the plaintiff failed to raise a triable issue of fact as to whether the ureteral stent/catheter allegedly inserted in his body was a ‘foreign object’ such that the discovery rule should apply. According to the parties’ experts, a ureteral stent/catheter is a tube that bridges the kidney to the bladder, and is inserted and intentionally left in a patient for up to six months to assist in the draining of the kidney when the ureter is obstructed or when damage to the ureter was repaired and it is healing. The parties’ experts agree that if a ureteral stent/catheter was inserted in the plaintiff’s body during the 1993 procedure, then it was intentionally left in the body for the purpose of assisting in the draining of the kidney. Thus, the device was retained in the plaintiff’s body (if inserted at all) for ‘post-surgery healing purposes’ and was not ‘analogous to tangible items’ or ‘surgical paraphernalia,’ such as clamps, scalpels, sponges, and drains, ‘introduced into a patient’s body solely to carry out or facilitate a surgical procedure.’”

CONTINUOUS TREATMENT

Yanez v. Watkins, 164 A D 3d 547 (2d Dept. 2018) – “The mere statement on the decedent’s transfer summary that the decedent should ‘follow-up’ with ‘Dr. Watkins’ clinic’ as an outpatient in two or three months did not evince a continued course of treatment where no follow-up appointment was actually scheduled, and the decedent thereafter received treatment at other hospitals.”

Clifford v. Kates, 169 A D 3d 1375 (4th Dept. 2019) – “Although plaintiff requested her medical records and consulted with attorneys in 2010, the mere consultation with an attorney to explore a potential malpractice claim does not, by itself, terminate a course of treatment” for purposes of the continuous treatment doctrine.

PRODUCT LIABILITY

Haynes v. Williams, 162 A D 3d 1377 (3d Dept. 2018) – When a personal injury claim “is premised upon damages ‘caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property,’ the three-year statute of limitations runs ‘from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.’” And “discovery of the injury” means “discovery of the physical condition and not the more complex concept of discovery of both the condition and the nonorganic etiology of that condition.” In this lead-paint ingestion case, the record, including the deposition of the 24-year-old plaintiff, “demonstrated that plaintiff was exposed to lead as a child. Notably, according to one record, plaintiff was diagnosed with lead poisoning when he was three years old. Another record shows that plaintiff’s elevated blood lead level was first recorded in 1992, when he was two years old, and ongoing follow-up testing showed that his blood level remained elevated through 1996.” These submissions “were sufficient to demonstrate that plaintiff was cognizant of his claimed injuries, or, at a minimum, reasonably should have been, such that the action is barred by the statute of limitations.” The Court rejected plaintiff’s argument that the statute did not begin to run until 2013 “when, after receiving a solicitation letter from his attorney, he became aware of his exposure to lead as a young child.”

O’Brien v. County of Nassau, 164 A D 3d 684 (2d Dept. 2018) – “Generally, an action to recover damages for personal injuries caused by the latent effects of exposure to any substance or combination of substances must be commenced within three years of the date of discovery of the injury by the plaintiff or from the date when, through the exercise of reasonable diligence, such injury should have been discovered by the plaintiff, whichever is earlier [citations omitted]. ‘For purposes of CPLR 214-c, discovery occurs when, based upon an objective level of awareness of the dangers and consequences of the particular substance, “the injured party discovers the primary condition on which the

claim is based” [citations omitted]. Where, as here, a claim is asserted against a municipality, the statute of limitations as to the claim against the municipality is 1 year and 90 days and is measured from the date of discovery of the injury or from the date when, through the exercise of reasonable diligence, the injury should have been discovered, whichever is earlier.” Here, plaintiff was long aware of the presence of asbestos at his workplace, had filed an application for Workers’ Compensation relief, and filed a notice of claim, all “more than three years prior to the commencement of the instant action.” Therefore, “plaintiff had an objective level of awareness of the dangers and consequences of asbestos exposure sufficient to place him on notice of the primary condition on which his claims were based.”

FRAUD

Pugni v. Giannini, 163 A D 3d 1018 (2d Dept. 2018) – “A cause of action sounding in fraud is duplicative of a breach of contract cause of action if it is based on identical circumstances, and does not allege that the misrepresentation resulted in any loss independent of the damages allegedly incurred for breach of contract [citation omitted]. Here, the third cause of action is based on the identical circumstances as the second cause of action, and the plaintiff does not allege in the third cause of action that the alleged misrepresentations resulted in any loss independent of the damages allegedly incurred for breach of contract [citation omitted]. In any event, general allegations that a defendant entered into a contract while lacking the intent to perform are insufficient to support a fraud cause of action.”

OHM NYC LLC v. Times Square Associates LLC, 170 A D 3d 534 (1st Dept. 2019) – “The complaint alleges multiple instances of defendants misrepresenting to plaintiff that the Bridge, a portion of the ground floor of a building, would be included in the leased premises. These misrepresentations, which the complaint alleges were made to induce plaintiff into entering into the lease, were not promises of future performance, but misrepresentations of a then present fact. Thus, the complaint states a cause of action for fraudulent inducement that is not duplicative of the breach of contract claim.”

Boesky v. Levine, N.Y.L.J., 1546502899 (Sup.Ct. N.Y.Co. 2018)(Bransten, J.) – “Where a fraud claim is asserted in connection with charges of professional malpractice, it is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations – that is, something more egregious than mere concealment or failure to disclose one’s own malpractice – which have caused additional damages, separate and distinct from those generated by the alleged malpractice’ [citations omitted]. Where the ‘plaintiffs have not shown that their reliance upon the alleged misrepresentations subjected them to any damages beyond those resulting from the purported malpractice alone, their fraud claim is not maintainable.”

BREACH OF CONTRACT

County of Suffolk v. Suburban Housing Development & Research, Inc., 160 A D 3d 607 (2d Dept. 2018) – The agreement between the parties provided that defendant would provide emergency housing services to plaintiff, and that defendant would submit monthly claims for compensation which would be paid upon approval by the County Comptroller. The agreement further provided that all such payments were “subject to audit by the Suffolk County Comptroller.” Defendant was required to “maintain full and complete records of services for a period of seven (7) years, which shall be available for audit and inspection” by the Comptroller. And, in the event “such an audit disclosed overpayments by the County to Suburban,” Suburban “shall repay the amount of such overpayment within 30 days after the issuance of the ‘official audit report.’” The Comptroller issued an audit report on July 1, 2011, disclosing overpayments of some \$885,000 for the years 2003-2007. Upon defendant’s failure to pay, the County commenced this action on April 18, 2012. The Court rejects defendant’s argument that the action was untimely for overpayments made earlier than April 18, 2006. For, ruled the Court, the breach did not occur upon each overpayment, but “on August 1, 2011, when Suburban allegedly failed to comply with the repayment provisions of the agreements.” However, since the agreement only required Suburban to maintain records for seven years, the County “had no contractual right to conduct an audit with respect to payments for services that were provided more than seven years prior to the issuance of the comptroller’s official audit report.” Thus, the Court dismissed “so much of the first cause of action as sought to recover alleged overpayments made on or before July 1, 2004.”

Garron v. Bristol House, Inc., 162 A D 3d 857 (2d Dept. 2018) – Plaintiff, an owner of a residential cooperative apartment, claims that renovations performed in 2004 caused structural damage to his apartment, “which persist and have not been remedied.” This action was commenced in 2016. In opposition to defendant’s motion to dismiss, “the plaintiff raised a question of fact as to whether the continuing wrong doctrine rendered a portion of the subject causes of action timely. The continuing wrong doctrine ‘is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act’ [citations omitted]. ‘In contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party’ [citation omitted]. Here, the plaintiff alleged that the damage to his unit persisted and had not been repaired, and that such breach constituted a continuing breach of the defendants’ contractual duty to keep the building in good repair and to provide habitable premises [citations omitted]. However, where, as here, the sole remedy sought for the alleged continuing contractual breaches is monetary damages, the plaintiff’s recovery must be limited to damages incurred within the six years prior to commencement of the action.”

Wilmington Savings Fund Society, FSB v. Gustafson, 160 A D 3d 1409 (4th Dept. 2018) – “Although another entity purported to accelerate defendants’ entire debt in 2010 and 2012, that entity was not the holder or assignee of the mortgage and did not hold or own the note. Thus, the entity’s purported attempts to accelerate the entire debt were a nullity, and the six-year statute of limitations did not begin to run on the entire debt.”

Bank of America, N.A. v. Gulnick, 170 A D 3d 1365 (3d Dept. 2019) – In this action to foreclose a reverse mortgage, both the note and mortgage provided that “lender *may* require immediate payment in full if a borrower dies and the property is not the principal residence of at least one surviving borrower” [emphasis by the Court]. Defendant urged that “the cause of action arose upon decedent’s death, when plaintiff had the right to demand payment in full.” Plaintiff argued “that because ‘may’ is ordinarily read as permissive language [citation omitted], it had no obligation to demand payment in full and argues, therefore, that no cause of action accrues until payment is demanded.” The Court dismissed the complaint. “Where the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the party making the claim possesses a legal right to demand payment. In other words, the statute of limitations is triggered when the party that was owed money had the right to demand payment, not when it actually made the demand.”

Wilmington Savings Fund Society, FSB v. Fernandez, 62 Misc 3d 622 (Sup.Ct. Onondaga Co. 2018)(Karalunas, J.) – “While the unique facts of this matter appear to be a case of first impression in New York, other jurisdictions have encountered a similar factual scenario and have held that a discharge in bankruptcy does not accelerate the [mortgage] debt, and the statute of limitations on an *in rem* foreclosure action begins to run when the holder of the secured interest in the mortgaged property demands payment or commences an action to foreclose.” For, “even after the debtor’s personal obligations have been extinguished by a bankruptcy discharge, the mortgage holder still retains a right to payment in the form of its right to the proceeds from the sale of the debtor’s property because a bankruptcy discharge extinguishes only one mode of enforcing a claim – namely, an action against the debtor *in personam* – while leaving intact another – namely, an action against the debtor *in rem*. The creditor still holds a right to payment because a discharge does not constitute payment or satisfaction of the debt.”

US Bank NA v. Ahmed, N.Y.L.J., 1533628842 (Sup.Ct. Suffolk Co. 2018)(Mayer, J.) – “While a lender may revoke its prior election to accelerate the mortgage, such revocation can only be accomplished through an affirmative act by the lender, provided such revocation is made within the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action, and provided there is no change in the borrower’s position in reliance thereon.” Moreover, “to be effective in resetting the statute of limitations clock, such revocation or deceleration must satisfy a five (5)-prong test: (1) the revocation must be evidenced by an affirmative act; (2) the affirmative act

must be clear and unequivocal; (3) the affirmative act must give actual notice to the borrower that the acceleration has been revoked; (4) the affirmative act must occur before the expiration of the six (6)-year statute of limitations period; and (5) the borrower must not have changed his or her position in reliance on the acceleration.” Here, “this Court finds that the mere voluntary discontinuance of a foreclosure action, standing alone and without further proof expressing plaintiff’s intent, does not constitute an affirmative act revoking the acceleration of the mortgage debt.”

Milone v. US Bank National Association, 145 A D 3d 145 (2d Dept. 2018) – Given the “occasion” to do so, the Second Department weighs in on several issues dealing with acceleration and de-acceleration of “note obligations underlying residential mortgage foreclosure actions.” First, as to acceleration, the Court, “respectfully disagree[ing]” with the First Department, holds that a letter from a lender, stating that “if a stated amount of delinquency and fees was not paid within 30 days, the circumstances ‘will result in the acceleration of your Mortgage Note,’” does *not* suffice to accelerate the debt when the borrower fails to pay within the time prescribed. For, “the notice to the plaintiff was not clear and unequivocal, as future intentions may always be changed in the interim.” As to de-acceleration, the Court holds that language in the agreement specifically providing the lender with the right to de-accelerate is not required. “Since the plain language setting forth the contractual right of the lender to accelerate the entire debt is discretionary rather than mandatory, U.S. Bank maintained the right to later revoke the acceleration.” But, as with acceleration, the notice de-accelerating, which must be given before the statute of limitations expires, must be “clear and unambiguous to be valid and enforceable.” A Court will not enforce an attempted de-acceleration which is merely pretextual, and for the purpose of avoiding the statute of limitations. “A de-acceleration letter is not pretextual if, as here, it ‘contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or, is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration [citations omitted]. In contrast, a ‘bare’ and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations.” Finally, “we hold for the first time in the Appellate Division, Second Department, that just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well.”

North Shore Investors Realty Group, LLC v. Traina, 170 A D 3d 737 (2d Dept. 2019) – A letter from lender to borrower, stating that if borrower failed to pay the outstanding arrears within 30 days, the loan “shall be accelerated effective the first day following expiration of the thirty day period,” is insufficient to accelerate the debt. The letter ““was

nothing more than a letter discussing acceleration as a possible future event, which does not constitute an exercise of the mortgage’s optional acceleration clause.”

Sterling National Bank v. Manheimer, N.Y.L.J., 1558281203 (Sup.Ct. Kings Co. 2019) (Dear, J.) – “The Second Department has held that a valid notice of de-acceleration must be clear, unambiguous, and not pretextual. A notice is not pretextual if it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration.” Thus, “a clearly non-pretextual de-acceleration letter gives notice to a borrower that the lender is waiving its right to accelerate based on the original default. A lender may do so by allowing the borrower to return to making monthly payments, as this is a genuine benefit that protects the borrower against a subsequent foreclosure action unless the borrower defaults again on the new payments. Where the lender only allows the borrower to pay arrears, the borrower would remain in the prior default and the lender could, at any time, re-accelerate based on that default.”

U.S. Bank National Association v. Papanikolaw, 62 Misc 3d 1207(A) (Sup.Ct. Rockland Co. 2019)(Marx, J.) – Here, “the de-acceleration letter is facially invalid as a mere pretext to avoid the six-year limitation period to collect on defendants’ mortgage debt that plaintiff itself triggered” by commencing its first foreclosure action. For, at the same time that plaintiff sent the letter, purportedly de-accelerating the debt, it was actively pursuing an appeal from the order which dismissed the first foreclosure action. Thus, “for months, plaintiff purported to de-accelerate defendants’ mortgage debt while also seeking collection of such debt in its entirety.” Moreover, “nothing in plaintiff’s de-acceleration letter demanded monthly payment, or referred to any attached copies of invoices or any other evidence that the lender was ‘truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration’ [citation omitted]. For instance, the letter did not suggest much less offer a workout or refer to the then-pending First Action and offer to discontinue it, or reasonably suggest any other non-pretextual purpose whatsoever. To the contrary, the de-acceleration letter explicitly recognized that ‘it is possible legal action may resume in the future,’ an assertion that appears to be the only substantive meaning fairly attributable to plaintiff’s letter.”

Nationstar Mortgage, LLC v. Huang, N.Y.L.J., 1550997196 (Sup.Ct. Queens Co. 2019) (Kerrigan, J.) – The plaintiff’s execution of a stipulation of discontinuance of the prior foreclosure action “did not, in itself, constitute an affirmative act to revoke its election to accelerate, since, *inter alia*, the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant.” For, “in order to revoke its election to

accelerate the loan, or to ‘de-accelerate’ it, plaintiff must not only, as a matter of course, discontinue its foreclosure action seeking payment of the entire principal balance, but must also reinstate the mortgage and resume sending the borrower bill statements for the payment of the loan in the installments of principal and interest set for in the mortgage. Plaintiff did not do so.”

Bank of New York Mellon v. Craig, 169 A D 3d 627 (2d Dept. 2019) – Plaintiff mortgagee’s “execution of the stipulation of discontinuance [of its original foreclosure action] did not, by itself, constitute an affirmative act to revoke its election to accelerate, since the stipulation was silent on the issue of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant.”

Deutsche Bank National Trust Company v. Ajibola, 61 Misc 3d 291 (Sup.Ct. Queens Co. 2018)(Brown, J.) – While the previous foreclosure action was pending, the defendant died. Without a substitution of a representative for the deceased defendant, plaintiff moved to discontinue the action on the ground that “plaintiff may have accepted payments post acceleration without a written agreement.” The application was granted. Within 6 years of that discontinuance, but more than 6 years after the previous foreclosure action was commenced, plaintiff commenced the instant action against the administrator of the deceased defendant’s estate. The Court grants the motion to dismiss the action. Because of the death of the defendant, the discontinuance without substitution of a representative in that action “is null and is not deemed a proper revocation of the acceleration of the mortgage default.” Accordingly, the statute of limitations on the entire debt continued to run, and the present action is time-barred.

Your New Home LLC v. JPMorgan Chase Bank, 62 Misc 3d 1046 (Sup.Ct. Westchester Co. 2019)(Ruderman, J.) – The mortgagor died before the initial foreclosure action was commenced. While that rendered the proceeding a nullity, the acceleration triggered by its commencement was effective. “The lender’s filing of the 2008 summons and complaint in itself accelerated the debt, although the borrower was not alive at the time so that the action could not be sustained.”

Persaud v. U.S. Bank National, 62 Misc 3d 193 (Sup.Ct. Queens Co. 2018)(Modica, J.) – Last year’s “Update” reported on *Nationstar Mortgage, LLC v. MacPherson*, 56 Misc 3d 339 (Sup.Ct. Suffolk Co. 2017), in which the Court emphasized that the “notice to the borrower to accelerate the entire amount of the mortgage debt must be ‘clear and unequivocal.’” In *MacPherson*, according to that decision, “the parties did not choose to use the statutory form of acceleration set forth in Real Property Law §258, schedule M or N.” Instead, “the lender bargained away its right to demand payment in full simply upon a default in an installment payment or the commencement of an action and has afforded the borrower greater protections than that set forth in the statutory form of an acceleration

clause.” For, “under the express wording of the mortgage document, plaintiff has no right to reject the borrower’s payment of arrears in order to reinstate the mortgage, until a judgment is entered.” Thus, “under the contract terms at issue, plaintiff does not have a legal right to require payment in full with the simple filing of a foreclosure action. The borrower could pay the unpaid installments and the payment of same would destroy the option to accelerate.” It is “a judgment that triggers the acceleration in full of the entire mortgage debt.” Thus, the commencement of a prior foreclosure action did not amount to an acceleration commencing the statute of limitations on the entire debt, and plaintiff may have recovery of “those unpaid installments which accrued after September 17, 2008, that is, the six-year period immediately preceding the commencement of this action.” Here in *Persaud*, the Court specifically disagrees with the holding in *MacPherson*. Interpreting an identical provision, the Court holds that “*MacPherson* is contrary to Appellate Division, Second Department precedents.” It therefore rejects defendant’s argument that it is only the foreclosure *judgment* that triggers the acceleration of the entire mortgage debt. “In the court’s view, the subject language simply provides borrowers with the opportunity to avoid foreclosure. It cannot be reasonably interpreted as empowering a lender with the ability of avoiding the protection afforded to borrowers by RPAPL 1501(4). As noted, the mortgage note, in no way, limited U.S. Bank’s ability to elect to accelerate the instant debt. The provision simply prevented the defendant from succeeding on its election to accelerate. In that respect, paragraph 19 imposed heavy hurdles on the plaintiff before she could prevent the defendant from foreclosing on her property. Given this important distinction, the court finds that there is no reason to give paragraph 19 the strained interpretation proposed by U.S. Bank.”

Sharova v. Wells Fargo Bank, National Association, 62 Misc 3d 925 (Sup.Ct. Kings Co. 2019)(Silber, J.) – Here, too, as in *Persaud*, directly above, “the court declines to follow the *MacPherson* case,” For, “it is now, in the Second Department, unequivocal that unless the terms of the mortgage provide otherwise, the filing of the summons and complaint in a foreclosure action is sufficient to accelerate the mortgage.”

HSBC Bank, USA, N.A. v. Margineanu, 61 Misc 3d 973 (Sup.Ct. Suffolk Co. 2018) (Whalen, J.) – Relying in part on its prior decision in *MacPherson*, discussed above, the Court “holds that under the optional acceleration clause [of the instant mortgage], the statute of limitations does not offer a defense to future monthly installment payments that are due and owing, until the entry of a judgment of foreclosure.” Moreover, the Court holds that the commencing of a foreclosure action by means of an unverified complaint, which would be insufficient to support a default judgment, “should not be used to trigger the acceleration of the mortgage debt for purposes of the commencement of the running of the statute of limitations.” And, even when acceleration was properly accomplished by the commencement of a foreclosure action by a verified complaint, the voluntary discontinuance of that action, without more, is “an affirmative act of revocation” of the acceleration.

Bank of New York Mellon v. Dieudonne, 171 A D 3d 34 (2d Dept. 2019) – The issue raised by *MacPherson* and the cases cited above that rejected it, “presents an issue of first impression in this Court.” And the Appellate Division, agreeing with the holdings in *Sharova* and *Persaud* reported on above, concludes “that the reinstatement provision contained in the subject mortgage was not a condition precedent to the acceleration of the mortgage and did not prevent the plaintiff from validly exercising its option to accelerate. Accordingly, the statute of limitations started to run when the plaintiff exercised its option to accelerate.” For, “contrary to the plaintiff’s contention, the reinstatement provision in paragraph 19 of the mortgage did not prevent it from validly accelerating the mortgage debt. That provision effectively gives the borrower the contractual option to de-accelerate the mortgage when certain conditions are met. The plaintiff argues that because its right to accelerate the entire outstanding debt was subject to the defendant’s right, under certain circumstances, to de-accelerate that portion of the debt, the plaintiff’s right to accelerate the debt was subject to a condition precedent and the statute of limitations did not begin to run until the defendant’s right to de-accelerate was extinguished in accordance with the terms of the mortgage.” But “paragraph 22 of the subject mortgage unequivocally set forth the conditions that had to be satisfied before the plaintiff was contractually entitled to exercise its right to accelerate the entire outstanding debt. The language of the mortgage makes clear that the plaintiff is entitled to exercise its option to accelerate ‘if all of those conditions are met.’ The reinstatement provision in paragraph 19 of the mortgage was not referenced in, or included among, those conditions listed in paragraph 22. Nor does the reinstatement provision in paragraph 19 of the mortgage include any language indicating that it serves as a condition precedent to the plaintiff’s right to accelerate the outstanding debt. To the contrary, the language of paragraph 19 indicates that the plaintiff’s right to accelerate the entire debt may be exercised *before* the defendant’s rights under the reinstatement provision in paragraph 19 are exercised or extinguished” [emphasis by the Court].

Deutsche Bank National Trust Company v. Flagstar Capital Markets Corporation, 32 N Y 3d 139 (2018) – A prior year’s “Update” reported on *ACE Securities Corporation v. DB Structured Products, Inc.*, 25 N Y 3d 581 (2015), an action for breach of a contractual obligation “to repurchase certain non-conforming loans that were pooled, deposited into a trust, securitized, and sold to investors.” The parties’ agreement contained many warranties and representations by defendant, and provided that defendant would cure any breach of a representation within 60 days of notice, or repurchase the affected loan. The Court of Appeals held that “where, as in this case, representations and warranties concern the characteristics of their subject as of the date they are made, they are breached, if at all, on that date; DBSP’s refusal to repurchase the allegedly defective mortgages did not give rise to a separate cause of action.” For, defendant “represented and warranted certain facts about the loans’ characteristics as of March 28, 2006, when the MLPA and PSA were executed, and expressly stated that those representations and warranties did not survive the closing date. DBSP’s cure or repurchase obligation was the Trust’s remedy

for a breach of *those* representations and warranties, not a promise of the loans' future performance" [emphasis by the Court]. Last year's "Update" reported on the Appellate Division decision in this action [143 A D 3d 15 (1st Dept. 2016)], in which the facts were similar to those in *ACE Securities Corporation*, except that the agreement between the parties, as the Appellate Division put it, further "included a provision that purported to delay the accrual of a breach of contract claim until three conditions were met. The accrual provision specified that any cause of action against defendant relating to a breach of representations and warranties 'shall accrue as to any Mortgage Loan upon (i) discovery of such breach by the Purchaser or notice thereof by the Seller to the Purchaser, (ii) failure by the Seller to cure, repurchase or substitute and (iii) demand upon the Seller by the Purchaser for compliance with this Agreement.'" The Appellate Division found this provision unenforceable. "Statutes of limitation not only save litigants from defending stale claims, but also "express a societal interest or public policy of giving repose to human affairs"" [citations omitted]. "Because of the combined private and public interests involved, individual parties are not entirely free to waive or modify the statutory defense" [citation omitted]. Although parties may agree *after* a cause of action has accrued to extend the statute of limitations, an "agreement to extend the Statute of Limitations that is made at the inception of liability will be unenforceable because a party cannot "in advance, make a valid promise that a statute founded in public policy shall be inoperative." Moreover, enforcing this provision "would contravene the principle that 'New York does not apply the "discovery" rule to statutes of limitations in contract actions [citation omitted; emphasis by the Court]. The accrual provision's set of conditions creates an imprecisely ascertainable accrual date – possibly occurring decades in the future, since some of the loans extend for 30 years – which the Court of Appeals has 'repeatedly rejected in favor of a bright line approach.'" Finally, "the accrual provision's requirement that plaintiff make a demand on defendant for performance of the agreement does not constitute a substantive condition precedent that could delay accrual of the breach of contract action. As in *ACE*, plaintiff overlooks the significant distinction between substantive and procedural demand requirements [citation omitted]. A demand 'that is a condition to a party's *performance*' is a substantive condition precedent, which can delay accrual of a claim, whereas 'a demand that seeks a remedy for a preexisting wrong' is a procedural prerequisite to suit, which cannot" [emphasis by the Court]. A divided Court of Appeals has affirmed the Appellate Division's decision. First, "we disagree with plaintiff's position that by using the phrase 'shall accrue,' the parties intended to define a breach of contract as defendant's failure to comply with the remedial provisions after discovery or notice of a violation of the representations and warranties and plaintiff's demand for compliance." For "plaintiff's argument that the accrual clause creates a substantive condition precedent therefore fails for the same reason as in *ACE*: plaintiff 'ignores the difference between a demand that is a condition to a party's *performance*, and a demand that seeks a remedy for a preexisting wrong'" [emphasis by the Court]. And, "assuming for the sake of argument that plaintiff's

alternative interpretation is correct, the accrual clause cannot be enforced in that manner because it conflicts with New York law and public policy.” For, “although contracting parties may therefore agree to a shorter limitations period, public policy restricts their ability to make an agreement extending the statutory period before a claim accrues.” The majority rejected plaintiff’s argument that “the accrual clause is valid because it does not ‘extend’ the statute of limitations, inasmuch as the statutory period remains at six years from the contractually-chosen accrual date.” For, “the public policy represented by the statute of limitations becomes pertinent where the contract not to plead the statute is in form or effect a contract to extend the period as provided by statute *or to postpone the time from which the period of limitation is to be computed*” [emphasis by the Court]. One dissenting Judge argued that the majority “departs from our long-standing recognition of the freedom to contract.” And, “ACE did not set a hard and fast rule that cannot be replaced by agreement of the parties.” For, the concerns of the statute of limitations “are not implicated when parties uncoerced and voluntarily enter an arm’s length transaction that sets forth the elements and point of accrual of a cause of action for breach of the promise to cure upon demand at issue here.” The other dissenter argued that, “ACE is wrong. We should abandon it.”

INTENTIONAL TORTS

Dray v. Staten Island University Hospital, 160 A D 3d 614 (2d Dept. 2018) – Although defendant doctors insisted that delivery by c-section was necessary, plaintiff insisted upon a vaginal birth. Defendants overrode her objections and performed a c-section, during which they lacerated her bladder but repaired it. Plaintiff sues for the performance of the c-section without her consent, and for the failure to summon the hospital’s patient advocate and bioethics department to assist her. Her claim for the performance of the c-section is subject to the one-year statute of limitations pursuant to CPLR 215(3). “The plaintiff’s allegation that the defendants performed an unauthorized procedure upon her is an allegation of intentional conduct rather than conduct that can be construed as a deviation from a reasonable standard of care.” However, the allegations that defendants “failed to provide the plaintiff with the assistance of the patient advocate group and bioethics panel are not a duplication of the allegations sounding in battery because they are not based on intentional conduct, but on negligence.”

McCarthy v. Shah, 162 A D 3d 1727 (4th Dept. 2018) – “It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided “no consent at all.”” Here, plaintiff consented only to a flexible sigmoidoscopy, but defendants performed a colonoscopy, causing rectal bleeding. The claim sounded in battery.

Rosado v. Estime, 60 Misc 3d 443 (Sup.Ct. Kings Co. 2018)(Silber, J.) – CPLR 213-b provides that, notwithstanding other time limitations, a “crime victim” may commence an action for damages against the defendant “convicted of a crime which is the subject of

such action” up to 7 years from the commission of the crime. Here, the Court holds that CPLR 213-b applies to a claim for personal injury and wrongful death resulting from an automobile accident for which defendant was convicted of leaving the scene of an accident resulting in death [Vehicle and Traffic Law §§600(2)(a), 600(2)(c)(ii)]. The Court rejects defendant’s argument that the injury and death sued upon here “did not result from the crime Estime was convicted of, leaving the scene of the accident, but from the accident itself, and that, therefore the crime is not the ‘subject of the action’ as is required by the statutes.” The Court “finds there is the requisite ‘causal connection’ here, that is, the plaintiff’s action for personal injuries and wrongful death does arise from the same event or occurrence as the criminal conviction.” For, “this civil action is clearly based on the same conduct as the crime, and the victim of the crime, Rosado, is the same party as the plaintiff in the tort action.” However as to the co-defendant owner of the car Estime drove, the Court finds CPLR 213-b inapplicable. “The statutory extensions of the statute of limitations for crime victims do not extend to a party whose liability is purely vicarious.”

Biro v. Condé Nast, 171 A D 3d 463 (1st Dept. 2019) – While the statute of limitations for claims of libel is one year from the first publication, when the libel is “republished” – that is, published in a different format, which might appeal to new and different readers – the statutory period runs anew. Here, “contrary to plaintiff’s contention, the email sent by defendant to New Yorker magazine subscribers in April 2017 containing a hyperlink to an article published in the magazine in July 2010 does not constitute republication of the article [citations omitted]. The article was unmodified and had been continuously archived on the same website since the printed version was first published. Moreover, it is not alleged that the 2017 email, which included the link to the article in controversy, contained any defamatory statements about plaintiff. A reference to an article that does not restate the defamatory material is not a republication of the material.”

WRONGFUL DEATH

Graves v. Brookdale University Hospital & Medical Center, N.Y.L.J., 1535476249 (Sup.Ct. Bronx Co. 2018)(Capella, J.) – Section 5-4.1 of the Estates Powers and Trusts Law provides that a wrongful death action may be maintained “against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such action must be commenced within two years after the decedent’s death.” Defendant “would have been liable” only if the decedent’s claim based on the underlying injury was still viable, *i.e.*, not time-barred, at the time of death. Thus, “a wrongful death action commenced within two years of a patient’s death that is based on a claim of medical malpractice is considered timely if, at the time of death, the medical malpractice claim was not time-barred. So the mere fact that the instant wrongful death claim was commenced within two years of decedent’s death does not cure the fact that the medical malpractice claim was already time-barred.”

LIABILITY CREATED BY STATUTE

People ex rel. Schneiderman v. Credit Suisse Securities (USA) LLC, 31 N Y 3d 622 (2018) – Last year’s “Update” reported on the Appellate Division decision in this action [145 A D 3d 533 (1st Dept. 2016)], and a prior year’s “Update” reported on the Supreme Court decision [N.Y.L.J., 1202717344324 (Sup.Ct. N.Y.Co. 2014)]. This is an action seeking injunctive relief and damages on a claim that defendant violated the Martin Act [General Business Law §352 *et seq.*] by having “committed fraudulent and deceptive acts in connection with the creation and sale of residential mortgage-backed securities.” Defendant claims that the 3-year statute of limitations provided by CPLR 214(2) governs, as the action seeks to recover on a liability created by statute. Plaintiff argues that the 6-year fraud statute of limitations, provided by CPLR 213(8) applies. Supreme Court held that, “it is well settled that ‘CPLR 214(2) does not automatically apply to all causes of action in which a statutory remedy is sought, but only where liability “would not exist but for a statute”’ [citations omitted]. Where the statute codifies or implements liabilities existing at common law, ‘the Statute of Limitations for the statutory claim is that for the common-law cause of action.’” And, “as the Court of Appeals has made clear, where a statute does not ‘make unlawful the alleged fraudulent practices, but only provides standing in the Attorney-General to seek redress and additional remedies for recognized wrongs which pre-existed the statute,’ such a statute does ‘not create or impose new obligations.’” Defendant argues that, here, the Martin Act claims are “substantially different from claims cognizable at common-law,” since, under the statute, plaintiff “need not plead two of the ‘hallmark’ elements of common-law fraud – namely, scienter and reliance.” But “the cases do not hold that liability is imposed by statute, and that application of CPLR 214(2) is required, whenever there is a divergence between the elements of a common-law claim and the elements of the statutory claim.” Instead, “a court must look to the essence of the claim, and not to the form in which it is pleaded, to determine whether a liability was recognized by the common-law or is imposed by statute.” Here, “the essence of plaintiff’s claims” is “that defendants made false representations in order to induce investors to purchase their securities. These claims thus seek to impose liability on defendants based on the classic, longstanding common-law tort of investor fraud.” Supreme Court accordingly held that, “even in the absence of allegations of scienter, the claims are subject to the six year statute of limitations.” A narrowly-divided Appellate Division affirmed. The majority held that the statutes at issue do not “encompass a significantly wider range of fraudulent activities than were legally cognizable before the section’s enactment,” and that “the conduct at issue in this action was, in fact, always subject to granting of relief under the courts’ equitable powers.” For, the statutes “target wrongs that existed before the statutes’ enactment, as opposed to targeting wrongs that were not legally cognizable before enactment.” Moreover, “contrary to the dissent’s conclusion, the complaint sets forth the elements of common-law fraud, including scienter or intent, reliance, and damages. The allegations in the complaint describe a specific scheme whereby Credit Suisse ‘benefited itself at the

expense of investors.’ As the trial court correctly found, ‘these claims seek to impose liability on Credit Suisse based on the classic, longstanding common-law tort of investor fraud,’ thus invoking a six-year statute of limitations.” The dissenters argued that the claims “as pleaded, fall within the category of claims that would not exist but for the statutes, creating a new basis for liability, not a new remedy, and the three year statute of limitations of CPLR 214(2) applies.” For, “none of the allegations of the complaint accuses defendants of knowingly or recklessly misrepresenting a fact to an investor in order to deceive that investor.” Thus, “the claim would not exist at common-law because it makes ‘actionable conduct that does not necessarily rise to the level of fraud.’” A divided Court of Appeals has reversed. “Because the Martin Act expands liability for ‘fraudulent practices’ beyond that recognized under the common law, we conclude that CPLR 214(2) – covering ‘actions to recover upon a liability, penalty or forfeiture created or imposed by statute’ – controls.” For, “the Attorney General need not prove scienter or intentional fraud in a Martin Act enforcement proceeding.” And, “it is undisputed that the Attorney General need not prove reliance on the part of any investor.” Thus, “the Martin Act covers some fraudulent practices not prohibited elsewhere in statutory or common law.” It “expands upon, rather than codifies, the common law of fraud.” Two of the five Judges who participated in the decision concurred “on constraint of our precedents.” The dissenting Judge argued that, in this case, “the defendants here are alleged to have engaged in just such practices [as constitute common law fraud], knowingly misleading investors in ways that caused tremendous harm to our financial system and the public at large.”

Effective August 26, 2019, the Court of Appeals decision in *People ex rel. Schneiderman v. Credit Suisse Securities (USA) LLC*, 31 N Y 3d 622 (2018), reported on directly above, has been legislatively overruled. CPLR 213 has been amended to add a subdivision 9, which provides: “An action by the attorney general pursuant to article twenty-three-A of the general business law or subdivision twelve of section sixty-three of the executive law” is subject to a six-year statute of limitations.

High Definition MRI PC v. Kemper Corp., N.Y.L.J., 1552994090 (Sup.Ct. N.Y.Co. 2019) (Kelly Levy, J.) – This is an action by a medical imaging company to recover against insurers for various no-fault MRI claims. “Defendants assert that the claims should be dismissed as they are regulatory in nature and subject to a three-year statute of limitations based on CPLR 214(2), while plaintiff argues that the applicable statute of limitations is for breach of contract, which is six (6) years based on CPLR 213.” The Court holds that the six-year statute applies. “A no-fault claimant’s right (or that of his or her assignee) to recover first-party benefits derives primarily from the terms of the relevant contract of insurance [citation omitted]. Inclusion of terms in an insurance contract, which may be mandated by statutes or regulations, does not necessarily alter the fundamentally contractual nature of the dispute between the insured (or his or her assignee) on the one hand, and his or her no-fault insurer, on the other.” Thus, “although the terms of the

automobile insurance policies may be required by the no-fault regulations, this does not change the fact that the dispute is fundamentally contractual in nature and not a creature of statute.”

DECLARATORY JUDGMENT ACTIONS

Village of Islandia v. County of Suffolk, 162 A D 3d 715 (2d Dept. 2018) – “While no period of limitation is specifically prescribed for a declaratory judgment action, the six-year catch-all limitation period of CPLR 213(1) does not necessarily apply to all such actions. Rather, in order to determine the statute of limitations applicable to an action for a declaratory judgment, a court must examine the substance of the action. Where it is determined that the parties’ dispute can be, or could have been, resolved in an action or proceeding for which a specific limitations period is statutorily required, that limitation period governs.”

Lakeview Outlets, Inc. v. Town of Malta, 166 A D 3d 1445 (3d Dept. 2018) – “Although declaratory judgment actions are typically governed by a six-year statute of limitations, a court must look to the underlying claim and the nature of the relief sought and determine whether such claim could have been properly made in another form’ [citations omitted]. ‘If that examination reveals that the rights of the parties sought to be stabilized in the action for declaratory relief are, or have been, open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action.’”

ACCRUAL AND LIMITATION PERIODS

In re Opioid Litigation, N.Y.L.J., 1532587908 (Sup.Ct. Suffolk Co. 2018)(Garguilo, J.) – “While a claim for breach of contract accrues on the date of the breach, irrespective of the plaintiff’s awareness of the breach [citation omitted], a tort claim accrues only when it becomes enforceable, that is, when all the elements of the tort can be truthfully alleged in the complaint [citation omitted]. When damage is an essential element of the tort, the claim is not enforceable until damages are sustained [citation omitted]. Actual damages are an essential element of a negligence claim [citation omitted]. A cause of action sounding in negligence, therefore, accrues not at the time of the alleged breach but only when the claimed negligence causes a plaintiff to sustain damages.”

U.S. Bank National Association v. Salem, 164 A D 3d 1289 (2d Dept. 2018) – “A cause of action seeking to establish a lien pursuant to the doctrine of equitable subrogation is governed by a six-year statute of limitations, which begins to run upon the occurrence of the wrongful act giving rise to a duty of restitution.” And, “a cause of action alleging unjust enrichment is also governed by the six-year statute of limitations of CPLR 213(1) and begins to run upon the occurrence of the alleged wrongful act giving rise to the duty of restitution.”

EPK Properties, LLC v. Pfohl Brothers Landfill Site Steering Committee, 159 A D 3d 1567 (4th Dept. 2018) – ““An action to recover damages for injury to property must be commenced within three years of the date of the injury’ [citations omitted], and ‘the cause of action accrues “when the damage is apparent.””” Here, defendants, in the course of wetland remedial action, caused a continuous flow of water onto plaintiff’s property. “Plaintiff contends that, because the water flows continually onto its property, the torts are continuous in nature and, as a result, plaintiff’s causes of action for nuisance and trespass are not time-barred. We reject that contention. Courts will apply the continuing wrong doctrine in cases of ‘nuisance or continuing trespass where the harm sustained by the complaining party *is not exclusively traced to the day when the original objectionable act was committed*’ [citations omitted; emphasis by the Court]. Here, plaintiff’s allegations establish that its damages may be traced to a specific, objectionable act, i.e., the implementation of the remedial plan. Where, as here, there is an original, objectionable act, ‘the accrual date does not change as a result of continuing consequential damages.’”

New York Yacht Club v. Lehodey, 171 A D 3d 487 (1st Dept. 2019) – Plaintiff claims “that defendants failed to give it the requisite notice of their plans to build [a 30-story building adjacent to plaintiff’s own, shorter, building] and failed to extend the chimneys and flues of its building as required by Administrative Code of City of New York §27-860.” The Court concludes that the cause of action accrued at the time of completion of construction, and is therefore time-barred. “Plaintiff’s argument that defendants’ noncompliance with section 27-860 represents a continuing wrong is unavailing. There has been no continuing wrongful conduct, only the continuing effects of the earlier alleged wrongful conduct.”

CONTRACTUAL LIMITATIONS PERIOD

D&S Restoration, Inc. v. Wenger Construction Co., Inc., 160 A D 3d 924 (2d Dept. 2018) – Last year’s “Update” reported on the Supreme Court decision in this action [54 Misc 3d 763 (Sup.Ct. Nassau Co. 2016)]. Plaintiff was a subcontractor, and defendant the general contractor, on a construction project for the New York City School Construction Authority (“SCA”). No payment was due to plaintiff until SCA finally approved the project. But, the contract between the parties also provided that “no action or proceeding shall lie or shall be maintained by Subcontractor against Contractor, CM or Owner unless such action shall be commenced within one (1) year after Substantial Completion of Subcontractor’s work herein.” Plaintiff last furnished labor or material on June 11, 2012. The SCA certified the project as substantially complete as of October 5, 2012. The SCA signed off on the completed work in December 2012. But it did not sign off on the credits until June 24, 2016. Thus, payment did not become due to plaintiff until that date. Supreme Court rejected plaintiff’s argument that, under the circumstances, the contractual statute of limitations was unreasonable and unenforceable. For, “what is

dispositive is that plaintiff was aware, or should have been aware, meaning it was foreseeable, that final negotiations in public projects such as the one at issue here, can and typically do take an extended period of time after the certification of substantial completion.” Since these conditions “were simply not unforeseeable or unanticipated,” the “doctrine of impossibility simply cannot be applied here.” The Appellate Division has reversed. “There is nothing inherently unreasonable about the one-year period of limitation, to which the parties here freely agreed [citations omitted]. ‘The problem with the limitation period in this case is not its duration, but its accrual date’ [citation omitted]. It is neither fair nor reasonable to require that an action be commenced within one year from the date of the plaintiff’s substantial completion of its work on the project, while imposing a condition precedent to the action that was not within the plaintiff’s control and which was not met within the limitations period. ‘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’ [citation omitted]. The limitation period in the subcontract conflicts with the conditions precedent to payment becoming due to the plaintiff, which, under the circumstances of this case, acted to nullify any claim the plaintiff might have for breach of the subcontract. Therefore, interpreting the subcontract against the defendant, which drafted the agreement [citations omitted], we find that the one-year limitation period is unenforceable under the circumstances here.”

AWI Security and Investigations, Inc. v. Whitestone Construction Corp., 164 A D 3d 43 (1st Dept. 2018) – On similar facts, the First Department agrees with, and cites with approval, the Second Department decision in *D&S Restoration*, reported on directly above. Here, the agreement between the parties provided that no claim on the contract would be timely “unless such action is commenced no later than six (6) months after either: [a] the cause of action accrued, [b] the termination or conclusion of the contract, or [c] the last day AWI performed any physical work at the project site, whichever of the proceeding [*sic*] events shall occur first.” This provision is “unenforceable because it enables the scenario where, even though a claim has not accrued at the time six months have passed since the last time physical work was performed, it is still time-barred.” Thus, it subjects plaintiff to a “‘catch-22’ of having to file a lawsuit to toll the statute of limitations where the claim was not yet ripe for adjudication.”

Mercedes-Benz Financial Services USA, LLC v. Allstate Insurance Company, 162 A D 3d 1183 (3d Dept. 2018) – “While the statute of limitations period applicable to a breach of contract claim is ordinarily six years [citation omitted], parties to an insurance contract may agree in writing to shorten the period of time in which to commence an action against an insurer for the nonpayment of claims [citations omitted]. Here, there is no dispute that the insurance policy [covering the theft of an automobile] shortened the period of time within which plaintiff had to commence this action” to “one year after *the date of loss*” [emphasis by the Court]. However, “the term ‘date of loss’ is not defined in the policy.” Plaintiff “contends that the ‘date of loss’ is the date on which defendant

denied the insurance claim, thereby giving rise to its breach of contract claim. In contrast, defendant asserts that the ‘date of loss’ is the date on which the vehicle was stolen. We agree with plaintiff. Generally, the statute of limitations on a breach of contract claim begins to run at the time that the breach occurs [citations omitted], which, in this case, would be the date on which defendant disclaimed coverage. Naturally, parties to an insurance contract may depart from the general rule and stipulate that the occurrence of the underlying catastrophe starts the clock for the applicable limitations period, but the agreement must include ‘distinct language’ demonstrating that such departure was intended by the parties [citations omitted]. In our view, the generic ‘date of loss’ language employed here, in the context of the policy as a whole, does not evince an unmistakable intention that the one-year limitations period be measured from the occurrence of the underlying event.” Moreover, “although ‘date of loss’ could be reasonably interpreted to mean the date of theft, as defendant contends, ambiguities in an insurance policy must be construed against the insurer.”

Anderson v. Allstate Insurance Company, 171 A D 3d 1331 (3d Dept. 2019) – “Allstate’s insurance policy specifically provides, in relevant part that ‘no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless commenced within 24 months next after inception of the loss.’ Such ‘inception of the loss’ language has generally been interpreted to mean the date of the underlying loss.”

ACKNOWLEDGEMENT AND PART PAYMENT

U.S. Bank National Association v. Balderston, 163 A D 3d 1482 (4th Dept. 2018) – “The prior foreclosure actions commenced in 2007 and 2008 were settled by a modification agreement between plaintiff and the borrower whereby payments on the mortgage resumed. That evidence ‘establishes that the statute of limitations was tolled by demonstrating “that partial payment was paid to and accepted by plaintiff as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder.”’”

ESTOPPEL

D’Onofrio v. The Mother of God with Eternal Life, 60 Misc 3d 910 (Sup.Ct. Westchester Co. 2018)(Ruderman, J.) – A defendant is estopped from relying upon the statute of limitations when that defendant has prevented plaintiff from commencing an action by means of “duress.” And, “duress is established where the evidence shows that ‘the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will’ [citation omitted]. To be wrongful, a threat of action must be one from which the person sought to be influenced is entitled to be free [citation omitted]. A threat that evil spirits will take action against one is not the type of wrongful threat contemplated by these requirements.”

Schrull v. Weis, 166 A D 3d 829 (2d Dept. 2018) – “The plaintiff’s argument that the doctrine of equitable estoppel should be invoked primarily relied upon allegations in the complaint regarding the defendants’ statements and conduct that formed the basis of the legal malpractice cause of action. In order for the doctrine of equitable estoppel to apply, ‘a plaintiff may not rely on the same act that forms the basis for the claim – the later fraudulent misrepresentation must be for the purpose of concealing the former tort.’”

THE RELATION BACK DOCTRINE

Lang-Salgado v. The Mount Sinai Medical Center, Inc., 157 A D 3d 532 (1st Dept. 2018) – Under CPLR 203(f), “the relation-back doctrine,” a plaintiff may interpose a claim or cause of action which would otherwise be time-barred, where the allegations of the original complaint “give notice of the transactions or occurrences” to be proven and the cause of action would have been timely interposed if asserted in the original complaint. The original claim in this medical malpractice action was that defendant hospital’s X-ray technician negligently caused plaintiff to fall from a stretcher while positioning her for a chest X-ray. After the running of the statute of limitations, plaintiff seeks to amend the complaint to add claims of negligent hiring and “failure to promulgate rules and regulations.” The denial of that motion is affirmed. Those claims “arise from different facts and implicate different duties based on conduct preceding, and separate and different from, the alleged negligence of the X-ray technician on that date. Thus, the relation back doctrine is inapplicable because the facts alleged in the original complaint failed to give notice of the facts necessary to support the amended pleading.”

U.S. Bank National Association v. DLJ Mortgage Capital, Inc., 33 N Y 3d 84 (2019) – CPLR 203(f) provides that “a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” Back in 1977, the Court of Appeals, in *Goldberg v. Camp Mikan-Recro*, 42 N Y 2d 1029 (1977), held that CPLR 203(f) does not apply to save an otherwise stale cause of action sought to be pleaded as an amendment to a pending claim, when the pending claim is invalid. In *Goldberg*, the original action, claiming wrongful death, was commenced by the decedent’s father in his own name before the father had been named administrator of the estate. He was named administrator after the statute of limitations had run, and unsuccessfully sought to amend the complaint in the still pending action to state a claim in his representative capacity. Because he lacked capacity to bring the original action, “there was no pre-existing action to which [the proposed amendment] could relate.” Later, in *George v. Mt. Sinai Hospital*, 47 N Y 2d 170 (1979), the Court held that when, in similar circumstances, the original action had been dismissed for lack of capacity, and a new action, correctly captioned, was commenced within six months of that dismissal, CPLR 205(a), the “do over” statute, applied, saving the new, otherwise time-barred,

claim. *George* was re-affirmed by the Court in *Carrick v. Central General Hospital*, 51 N Y 2d 242 (1980). At least one Appellate Division held that, although they dealt with different statutes, *George* and *Carrick* had overruled *Goldberg* [*Snay v. Cohoes Memorial Hospital*, 110 A D 2d 1021 (3d Dept. 1985)]. Here, in *U.S. Bank*, in which the claim is predicated upon alleged violations of representations and warranties in securitization trust agreements, the original action was brought by certificate holders. Now that the statute of limitations has run, and recognizing that the certificate holders lack standing, the trustee of the trusts seeks to amend the original complaint to add a claim in its representative capacity, urging, *inter alia*, that *Goldberg* does not preclude relation-back. The Court rejects that argument. “Contrary to the trustee’s suggestion, *Carrick* did not overrule *Goldberg*, but rather reaffirmed *Goldberg* by distinguishing it from *George*.”

D’Angelo v. Kujawski, 164 A D 3d 648 (2d Dept. 2018) – Plaintiff, who was already administrator of the estate of defendants’ client, commenced this legal malpractice action in her individual capacity. In response to defendants’ motion to dismiss for lack of standing, cross-moved to substitute herself in her representative capacity. “An amendment which would shift a claim from a party without standing to another party who could have asserted that claim in the first instance is proper since such an amendment, by its nature, does not result in surprise or prejudice to the defendants who had prior knowledge of the claim and an opportunity to prepare a proper defense.” And, “the appellants’ contention that they would be prejudiced by the amendment because the applicable statute of limitations had expired by the time the plaintiff sought leave to amend the complaint is without merit, since the original complaint was timely filed and gave the appellants notice of the transactions and occurrences pleaded in the amended complaint.”

DeLuca v. PSCH, Inc., 170 A D 3d 800 (2d Dept. 2019) – An action for the underlying injuries gives adequate notice of a subsequent, otherwise time-barred, claim for wrongful death. Thus CPLR 203(f) permits relation-back and the amendment of the complaint to assert the wrongful death claim.

Vanyo v. Buffalo Police Benevolent Association, Inc., 159 A D 3d 1448 (4th Dept. 2018) – Plaintiff commenced an action by filing a summons and complaint, but never served defendants. Instead, three months later – and after the statute of limitations ran – plaintiff filed an “amended” summons and “amended” complaint, adding a cause of action to the original complaint, and made service of those documents. A majority of this closely-divided Court rejects application of the relation back doctrine. The majority held that since the original complaint was never served on defendants it “did not give defendants notice of the transactions or occurrences to be proved pursuant to the amended complaint.” The dissenters argued that “the amendment of a complaint to assert a new cause of action may be allowed, even where it would be time-barred standing alone, if the

new cause of action relates back to the facts, circumstances and proof underlying the original complaint.” And “defendants simply assume that the *commencement* of the action by the original filing disappeared or was somehow purged by the failure to serve the original summons and complaint and the filing and service of the amended complaint. While the complaint may have been superseded by the amended complaint, the *commencement* of the action was not and clearly could not have been superseded by the amended complaint. Defendants and the majority conflate the concepts of commencement by filing with obtaining personal jurisdiction by service of process. The legislative change from a commencement-by-service system to a commencement-by-filing system segregated these concepts and made them mutually exclusive. Under the new system, problems with service no longer prevent timely *commencement* of an action” [emphasis by the Court].

DEFENDANTS “UNITED IN INTEREST”

Uddin v. A.T.A. Construction Corp., 164 A D 3d 1400 (2d Dept. 2018) – The Courts have established a three-part test to determine if defendants are “united in interest,” thereby permitting timely commencement of an action against one to be timely against the other pursuant to CPLR 203(c). The test was first enunciated in *Brock v. Bua*, 83 A D 2d 61 (2d Dept. 1981), and adopted by the Court of Appeals in *Mondello v. New York Blood Center*, 80 N Y 2d 219 (1992). To be united in interest, the parties’ liability must arise out of the same conduct, the relationship between them must be such that neither has a defense the other lacks [in *Mondello*, the Court appeared to hold that this branch of the test is only met when the liability of one of the parties is vicarious], and, as modified by the Court of Appeals in *Buran v. Coupal*, 87 N Y 2d 173 (1995), the third test is that the late sued defendant knew or should have known that plaintiff only failed to timely sue it by “mistake.” In this personal injury action, plaintiff learned during discovery that it had sued the wrong corporation as owner of the premises where the accident occurred. Both the corporation mistakenly sued, and the actual owner, were owned by the same brothers. The Court held that the two corporations were united in interest, making the amendment to add the correct owner timely despite the running of the statute of limitations, because “the two entities ‘intentionally or not, often blurred the distinction between them [citations omitted]. Moreover, Flan [the actual owner] had notice of this action within the applicable limitations period, inasmuch as the Flancraichs jointly operated both Park Slope [the timely sued corporation] and Flan, and Flan was designated in the condominium declaration to receive service of process on behalf of Park Slope [citation omitted]. Finally, the plaintiff demonstrated that the initial failure to add Flan was not intentional, but was the result of an *excusable* mistake” [emphasis added].

Roco G.C. Corp. v. Bridge View Tower, LLC, 166 A D 3d 1031 (2d Dept. 2018) – “The original counterclaim asserted against the plaintiff [corporation] alleged that plaintiff

breached contractual obligations for which Tam – an officer of the corporation [who signed the contract on its behalf] was not individually liable [citation omitted]. ‘There is no legal theory of vicarious liability for breach of contract’ by ‘an agent of a disclosed principal’ [citation omitted]. Tam, when signing the contract in issue, did so as president of the plaintiff, and not individually. Therefore, the cross movants are not united in interest. Further, since Tam signed the contract, Bridge was aware of Tam’s identity at the time the original answer was served. Therefore, failure to join Tam cannot be attributable to a mistake as to the identity of the proper parties.”

NYAHS Services, Inc. v. People Care Incorporated, 167 A D 3d 1305 (3d Dept. 2018) – After timely counterclaiming against a trust, defendant seeks, after the statute of limitations has run, to add the individual trustees as defendants on the counterclaim. The Appellate Division reverses the denial of that motion. “There is nothing in the record before us demonstrating that defendant intentionally elected not to assert its counterclaims against the individual trustees and/or that it did so to obtain ‘a tactical advantage in the litigation’ [citation omitted]. A review of defendant’s pleadings demonstrates that it intended to sue the individual trustees. Although the specific names of the individual trustees could have been ascertained from certain documentation that the trust provided to defendant on an annual basis, ‘we need no longer consider whether such a mistake was excusable’ [citation omitted]. Rather, as the Court of Appeals has recognized, the primary question – and ‘the linchpin of the relation back doctrine’ – is whether the newly added party had actual notice of the claim [citations omitted]. As trustees of the trust, we find it implausible that the individual trustees were not aware of the trust’s commencement of this action and the counterclaims that defendants asserted against the trust – such knowledge being imputed to them as trustees.”

Makkos v. Braka, N.Y.L.J., 1560955435 (Sup.Ct. N.Y.Co. 2019)(Perry, J.) – Defendant lives in an apartment owned by the corporation of which he is President and CEO. Plaintiff lives in the apartment below. Plaintiff’s apartment suffered damage as the result of an improperly garden hose left running on defendant’s terrace. Now, after the statute of limitations has run, plaintiff seeks to add the corporation as a defendant. The Court readily concludes that the first and third prongs of the *Brock* test have been met. The issue is the second: whether the interests of the defendant and the corporation are so intertwined that they rise or fall together. The Court concludes that the second test is also met. Neither has a defense the other lacks. Nor has defendant established any prejudice from the delay in adding the corporation.

Ferrara v. Zisfein, 168 A D 3d 682 (2d Dept. 2019) – Plaintiff in this medical malpractice action timely sued Dr. DeBrady, an anesthesiologist, among other defendants. After the running of the statute of limitations, plaintiff learned that Atlantic Medical Anesthesia Associates was DeBrady’s employer, and successfully added it as a defendant as a party united in interest with DeBrady. Thereafter, DeBrady successfully

moved for summary judgment, but Supreme Court denied Atlantic's motion for summary judgment, finding that "a triable issue of fact exists as to Atlantic's liability for the acts of a nonparty, one Nicholas Cantalupo, another anesthesiologist employed by Atlantic. Cantalupo's involvement in the subject medical procedure was not indicated in the plaintiff's medical records, and was first discovered during the examinations before trial." The Appellate Division reverses the denial of Atlantic's motion. "Since Atlantic was made a party to the action after the expiration of the statute of limitations based solely on its unity of interest with DeBrady, who was timely served, Atlantic's liability in the instant action cannot be predicated upon vicarious liability for the alleged negligent acts of other employees of Atlantic who are not parties to this action." Thus, Atlantic was entitled to dismissal of the action against it upon dismissal of the action against DeBrady.

TOLLS GENERALLY

U.S. Bank National Association v. Joseph, 159 A D 3d 968 (2d Dept. 2018) – After plaintiff had obtained a judgment of foreclosure, defendant moved to vacate the judgment, claiming lack of jurisdiction, and obtained a temporary restraining order preventing sale of the property pending the motion. The motion to vacate was granted, and the action was dismissed. Plaintiff commenced a new action for foreclosure, arguing, in response to defendant's motion to dismiss on grounds that this second action was time-barred, that the period of time when the TRO was in effect should be a toll. The Court rejects that argument. "That order prevented the plaintiff from selling the property at auction, but only in the context of the first foreclosure action. The temporary restraining order did not prevent the plaintiff from discontinuing the first foreclosure action and commencing a new action."

HSBC Bank USA v. Kirschenbaum, 159 A D 3d 506 (1st Dept. 2018) – "We reject plaintiff's argument that the 90-day notice under Real Property Actions and Proceedings Law §1304 tolled the statute of limitations for 90 days. CPLR 204(a) authorizes tolling of a statute of limitations and provides that 'where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.' Proper service of the RPAPL 1304 notice is a condition precedent to the commencement of a foreclosure action [citation omitted]. A statutory prohibition and a condition precedent are separate concepts, and a plaintiff has complete control over the acts necessary to effectuate compliance with a condition precedent."

Kulon v. Liberty Fire District, 162 A D 3d 1178 (3d Dept. 2018) – "Because plaintiff's claims against defendants, if any, arise from the fire that occurred on February 18, 2014, he was therefore required to file and serve a notice of claim by May 19, 2014 and commence any subsequent tort action by May 19, 2015. Having failed to file and serve his notice of claim by May 19, 2014, plaintiff was permitted to, and did, commence a

special proceeding seeking leave to file a late notice of claim. While the applicable one year and 90-day statute of limitations began to run on February 18, 2014, upon plaintiff's commencement of the proceeding, the provisions of CPLR 204(a) operated to toll the remainder of the statute of limitations until the date that the court granted the requested relief, at which point the statute began to run once again."

Deutsche Bank National Trust Company v. DeGiorgio, 171 A D 3d 1267 (3d Dept. 2019) – "When Pasquale DeGiorgio filed for bankruptcy in October 2011, the statute of limitations period was tolled until September 2012 when his bankruptcy petition was dismissed, therefore ending that proceeding [citations omitted]. Thus, when plaintiff commenced the 2015 foreclosure action, it was timely." Moreover, "in light of the rules regarding stays of an action against a codebtor, plaintiff could not have proceeded independently against defendant Nicole DeGiorgio, despite the fact that she did not file a bankruptcy proceeding [citation omitted]. Therefore, the 2015 foreclosure action against her was also timely."

THE "INSANITY" TOLL

Estate of Smulewicz v. Meltzer, Lippe, Goldstein & Breitstone, LLP, 160 A D 3d 543 (1st Dept. 2018) – The Court rejects application of the insanity toll here because "there is no evidence that the decedent suffered from such disability at the time the claim accrued (CPLR 208), or that it rendered her 'unable to protect her legal rights because of an overall inability to function in society.'"

D'Onofrio v. The Mother of God with Eternal Life, 60 Misc 3d 910 (Sup.Ct. Westchester Co. 2018)(Ruderman, J.) – "CPLR 208 provides for the tolling of the statute of limitations if the plaintiff 'is under a disability because of infancy or insanity at the time the cause of action accrues.' 'The statute itself provides no definition of the term "insanity"' [citation omitted]. 'The legislative history of CPLR 208 indicates that the Legislature intended the toll for insanity to be narrowly interpreted' [citations omitted]. In *McCarthy [v. Volkswagen of America*, 55 N Y 2d 543 (1982)], the Court declined to employ the insanity toll where the plaintiff claimed that the cause of his belated commencement of his action against the manufacturer of his vehicle, which burst into flames when it struck a utility pole, was 'post traumatic neurosis' manifesting itself in an inability to confront the memory of his accident." And, "notably," the cases in which courts have found the toll applicable "include medical or psychiatric evidence. No case has been cited, or located by this court, in which a finding of insanity to toll the statute of limitations under CPLR 208 has been made without such support." Here, "plaintiff's bare assertion that she was hospitalized from August 19, 2017, through September 13, 2017, and that she has been receiving extensive psychiatric and psychological counseling, fails as a basis to establish grounds for tolling the statute of limitations on grounds of insanity, particularly since it does nothing to establish her condition during the period in which she seeks to toll the statute. Plaintiff is left relying entirely on her own assertions,

‘I was totally under Fontana’s control and evil spell in my weakened emotional, psychological and physical state and I was afraid of her and felt that I had to do whatever she demanded or else I would suffer evil spiritual consequences,’ to establish her mental status. However, asserting that you were convinced by another person’s claim of supernatural powers is not the equivalent of showing insanity.”

CPLR 205(A)

Karras v. Margaret Tietz Center for Nursing Care, N.Y.L.J., 1544738024 (Sup.Ct. Queens Co. 2018)(Modica, J.) – “The pre-existence of a qualified estate representative is essential to the commencement of a personal injury action or a wrongful death action.” And, “an initial failure of jurisdiction cannot be remedied by a Proposed Administratrix eventually gaining Letters of Administration from the Surrogate, and thus a capacity to sue. Plaintiff lacked the legal capacity from the inception of this action, and cannot cure that fundamental defect by obtaining letters after the action was commenced or by serving an amended complaint.” However, despite the required dismissal of this action, “plaintiff’s counsel may serve a new complaint, within the six month period provided and permitted by CPLR 205(a).” For, “like any condition precedent, the requirement of a qualified administrator in a wrongful death action, while essential to the maintenance of the suit, is in no way related to the merits of the underlying claim. Thus, a dismissal due to the omission of this requirement must be regarded as a tangential matter not affecting the validity of the claim itself. It follows that a disposition based solely upon the absence of a duly appointed administrator does not preclude reprosecution of the underlying claim through the mechanism of CPLR 205(a) once a qualified administrator has been appointed.”

U.S. Bank National Association v. DLJ Mortgage Capital, Inc., 33 N Y 3d 84 (2019) – An action for breach of representations and warranties with respect to securitization trust instruments was initially commenced by individual certificate holders, and was dismissed for lack of standing. Now, after the running of the statute of limitations, but within six months of that dismissal, the trustee of the trust re-commences that action. The Court holds that CPLR 205(a) is inapplicable, and does not save the stale claim. “The trustee was not a ‘plaintiff’ permitted to refile for purposes of CPLR 205(a) and therefore could not file a new action within that provision’s six-month savings clause.”

U.S. Bank National Association v. DLJ Mortgage Capital, Inc., 33 N Y 3d 72 (2019) – CPLR 205(a) applies to validate an otherwise time-barred claim when the original action by the plaintiff was dismissed for failure to comply with a contractual condition precedent.

U.S. Bank Trust, N.A. v. Moomey-Stevens, 168 A D 3d 1169 (3d Dept. 2019) – “Supreme Court’s dismissal of the prior mortgage foreclosure action was granted based upon abandonment pursuant to CPLR 3215(c) and not neglect to prosecute pursuant to CPLR

3216. Although Supreme Court’s prior order of dismissal noted that plaintiff had ‘completely failed to offer a reasonable excuse for the delay between May 30, 2013 and March 11, 2016’ in seeking entry of a default judgment, it did not otherwise ‘include any findings of specific conduct demonstrating “a general pattern of delay in proceeding with the litigation”’ [citations omitted]. In fact, it was only in response to plaintiff’s motion seeking to restore this action to Supreme Court’s calendar that defendants – who were otherwise in default – raised the issue of abandonment pursuant to CPLR 3215(c). Accordingly, under the circumstances, we find that Supreme Court did not err in allowing plaintiff to commence a new action pursuant to CPLR 205(a) and that this action was timely commenced within six months following the prior dismissal.”

THE BORROWING STATUTE

2138747 Ontario, Inc. v. Samsung C&T Corporation, 31 N Y 3d 372 (2018) – Last year’s “Update” reported on the Appellate Division decision in this action [144 A D 3d 122 (1st Dept. 2016)]. The Appellate Division noted that “on this appeal, we are called upon to decide whether a broadly drawn contractual choice-of-law provision, that provides for the agreement to be ‘governed by, construed and enforced’ in accordance with New York law, precludes the application of New York’s borrowing statute (CPLR 202). We find that it does not. Where, as here, the plaintiff is a nonresident, alleging an economic claim that took place outside of New York, the time limitations provisions in the borrowing statute apply, regardless of whether the parties’ contractual choice of law agreement can be broadly construed to include the application of New York’s procedural, as well as its substantive law.” For, “the borrowing statute is itself a part of New York’s procedural law and is a statute of limitations in its own right, existing as a separate procedural rule within the rules of our domestic civil practice, addressing limitations of time.” Thus, “applying the borrowing statute is perfectly consistent with a broad choice-of-law contract clause that requires New York procedural rules to apply to the parties’ disputes.” The Court noted that the agreement’s choice-of-law provision “does not expressly provide that the parties agree only to apply New York’s six-year statute of limitations to their contract-based disputes. In this regard, there is no need to resolve whether such a provision would be an unenforceable extension of the otherwise applicable statute of limitations.” Finally, the Court rejected application of the esoteric (indeed, perhaps metaphysical) concept of *renvoi*. Thus, “we also reject plaintiff’s alternative argument, that even if the New York borrowing statute applies, requiring application of Ontario law, Ontario law mandates application of New York’s six-year statute of limitations because the parties have chosen New York law. It does not require that we apply the borrowing statute of a foreign jurisdiction [citation omitted]. CPLR 202 only concerns statutes of limitations, it does not require that we consider the foreign jurisdiction’s borrowing law.” The Court of Appeals has affirmed. “Contractual ‘choice of law provisions typically apply to only substantive issues and statutes of limitations are considered “procedural” because they are deemed “as pertaining to the remedy rather

than the right” [citations omitted]. Here, however, the parties agree with the Appellate Division’s determination that the contract ‘should be interpreted as reflecting the parties’ intent to apply both the substantive and procedural law of New York State to their disputes.’” But, “CPLR 202 is an abiding part of New York’s procedural law.” Thus, “the mere addition of the word ‘enforced’ to the NDA’s choice-of-law provision does not demonstrate the intent of the contracting parties to apply solely New York’s six-year statute of limitations in CPLR 213(2) to the exclusion of CPLR 202. Rather, the parties have agreed that the use of the word ‘enforced’ evinces the parties’ intent to apply New York’s procedural law. CPLR 202 is part of that procedural law, and the statute therefore applies here.” Like the Appellate Division, the Court also notes that, because “the NDA did not expressly provide that disputes arising from the agreement would be governed by New York’s six-year statute of limitations, or otherwise include language that expressed a clear intent to preclude application of CPLR 202,” the Court has “no occasion to address whether enforcement of such a contractual provision would run afoul of CPLR 201 or General Obligations Law §17-103, or would otherwise violate New York’s public policy against contractual extensions of the statute of limitations before accrual of the cause of action.”

Soloway v. Kane Kessler, P.C., 168 A D 3d 407 (1st Dept. 2019) – Plaintiff, a New Jersey resident, sues defendant over defendant’s representation of him in various real estate transactions. New Jersey has a 6-year statute of limitations for malpractice; New York’s statute is 3 years. Since CPLR 202 requires that an action commenced by a non-resident be timely under *either* New York’s limitations period or that of the place where the cause of action accrued, the Court, applying New York’s shorter period, dismisses the action.

PARTIES TO AN ACTION

JOINDER

Velez v. New York State Department of Corrections and Community Supervision, 163 A D 3d 1210 (3d Dept. 2018) – “While respondent did not raise this issue in Supreme Court, it is well-established that “a court may always consider whether there has been a failure to join a necessary party,” including on its own motion, and for the first time on appeal’ [citations omitted]. As this Court ‘may not, on its own initiative, add or direct the addition of a party, the matter must be remitted to Supreme Court to order NYCDOC to be joined if it is subject to the jurisdiction of the court, and, if not, to permit its joinder by stipulation, motion or otherwise and, if joinder cannot be effectuated, the court must then determine whether the proceeding should be permitted to proceed in the absence of a necessary party.’”

In re Opioid Litigation, N.Y.L.J., 1532587908 (Sup.Ct. Suffolk Co. 2018)(Garguilo, J.) – “The plaintiffs allege that all of the defendants – the manufacturers, the distributors, and the individual physicians – cooperated in an integrated scheme promoting the use of prescription opioids for chronic pain that helped give rise to the current epidemic. They allege, in part, that the defendants engaged in deceptive marketing, geared to both the medical community and the public, about the dangers and benefits of long-term opioid therapy for the treatment of chronic pain, and that the distributor defendants assisted in the unbranded marketing portion of the scheme by providing funds to front groups. Such united efforts to increase the market for prescription opioids, the plaintiffs assert, make all defendants subject to liability under the concerted action theory. “The theory of concerted action “provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in a common plan or design to commit a tortious act” [citations omitted]. As explained in the Restatement (Second) of Torts §876, a defendant is liable for harm to a third person resulting from the tortious conduct of another if (1) it commits a tortious act in concert with or pursuant to a common design with the other, (2) it knows the other’s conduct constitutes a breach of duty and provides substantial assistance or encouragement to the other to commit such conduct, or (3) it gives substantial assistance to the other in achieving a tortious result and its own conduct, separately considered, constitutes a breach of a duty of care owed to the third person [citations omitted]. For liability to be imposed under a concerted action theory, it is essential that each defendant charged with acting in concert acted tortiously and that at least one of the defendants ‘committed an act in pursuance of the agreement which constituted a tort.’” Here, the allegations of the complaint are “sufficient for the plaintiffs to proceed against the distributor defendants for misrepresentations and deceptive marketing based on the theory of concerted action.”

Almah LLC v. AIG Employee Services, Inc., 159 A D 3d 532 (1st Dept. 2018) – The lease agreement between the parties provides that defendant/tenant would be liable for the “cost of making good any injury, damage or breakage to the Building or Premises done by *Tenant*” [emphasis by the Court]. Since, therefore, defendant would be liable for its own acts, and “it will not be liable for damage that Goldman Sachs [the prior tenant] may have caused during its earlier tenancy,” Goldman Sachs was not a necessary party to this action. Goldman Sachs will not “be inequitably affected by a judgment in this action,” nor will the outcome of this action “bind its rights or interests without it having had an opportunity to be heard.”

Sharova v. Wells Fargo Bank, National Association, 2019 WL 115557 (Sup.Ct. Kings Co. 2019)(Silber, J.) – A plaintiff’s co-borrower, is not a necessary party in an action to declare a mortgage unenforceable, pursuant to RPAPL §1501(4). For, “any person with an estate or interest in the property may maintain an action “to secure the cancellation and discharge of record of such encumbrance.””

Matter of Nemeth v. K-Tooling, 163 A D 3d 1143 (3d Dept. 2018) – Having correctly concluded that one Rosa Kuehn was a necessary party to this action, “Supreme Court improperly concluded that it did not have jurisdiction over her due to expiration of the applicable statute of limitations. To the contrary, the court had jurisdiction over her by virtue of her ownership of the subject property [citation omitted], and such jurisdiction was unaffected by her potential statute of limitations defense [citation omitted]. Therefore, the proper procedure was for the court to order Rosa Kuehn summoned and to allow Rosa Kuehn and the Kuehn respondents to raise any defenses that they might have.”

McCutchen v. 3 Princesses and A P Trust, N.Y.L.J., 1550835053 (Sup.Ct. Essex Co. 2019)(Muller, J.) – “CPLR 1001(a) provides that ‘persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment shall be made defendants.’ CPLR 1001(b) then provides that ‘when a person who should be joined has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned.’ Here, it is undisputed that Theanogran Realty Trust should be joined and, further, that it is subject to the jurisdiction of the court. As such, Theanogran Realty Trust must be joined – notwithstanding any delay on plaintiff’s part.”

Matter of Stephen & Mark 53 Associates LLC v. New York City Department of Environmental Protection, 168 A D 3d 440 (1st Dept. 2019) – “Petitioner’s failure to join as a party the condominium board, which installed the backflow prevention device in dispute, constitutes a failure to join a necessary party [citation omitted]. Since the applicable statutory period has expired and the condominium board can no longer be joined, and proceeding in its absence would potentially be highly prejudicial to it, the proper remedy is dismissal of the proceeding rather than joinder of the condominium board.”

CONSOLIDATION AND SEVERANCE

Vargas v. 207 Sherman Associates, N.Y.L.J., 1527125645 (Sup.Ct. Kings Co. 2018) (Rivera, J.) – “The Court of Appeals held long ago, in *Kelly v. Yannotti* [4 N Y 2d 603 (1958)], that an insurer disclaiming coverage as a third party defendant in a negligence case is entitled to severance, as it would ‘be subjected to *some* prejudice if both the main and third-party actions were to be tried before the *same* jury’” [emphasis by the Court].

Colin Clarke MD PC v. MVAIC, N.Y.L.J., 1559041592 (Civ.Ct. Kings Co. 2019)(Roper, J.) – Plaintiff health care provider commenced one action for six separate claims to recover No-Fault benefits against the same insurer under a uniform policy of insurance issued by that insurer. The Court denies defendant’s motion for a severance. “The exercise of judicial discretion in joinder or severance requires considerations of public policy, legislative history and intent as to judicial efficiency, judicial economy and cost

benefit analysis with proscribed due process constraints and limitations to ensure no denial of substantial rights to neither party. Pursuant to CPLR 1002(a), joinder of claims or causes of action is proper where claims arise out of a uniform contract of insurance and involve the interpretation of the same no-fault provisions of the Insurance Law.”

ADDITION OF PARTIES

Abreu v. Casey, 157 A D 3d 442 (1st Dept. 2018) – A plaintiff seeking to add a party defendant to an action need not give notice of that motion to the party sought to be added. Moreover, “plaintiff’s filing of the motion to amend and annexed proposed amended pleadings tolled the applicable statute of limitations” with respect to the party sought to be added.

Bossung v. Rebaco Realty Holding Company, N.V., 169 A D 3d 538 (1st Dept. 2019) – “Although plaintiffs sought leave to amend the complaint [to add a new defendant] before the applicable statute of limitations had expired [with respect to that new defendant], their motion did not toll the statute, because they failed to annex the supplemental summons to their papers.”

SUBSTITUTION OF PARTIES

Snipes v. Schmidt, 161 A D 3d 670 (1st Dept. 2018) – Plaintiff died while this action was pending, leaving no surviving relatives, but four beneficiaries in her will. Although a petition was filed in Surrogate’s Court seeking appointment of an executor, no appointment was made after four years. Defendants moved to dismiss the action with service made on the four beneficiaries, but none appeared. “Although the decedent’s former counsel appeared in opposition to the motion, his power to act on the decedent’s behalf had terminated upon her death, and he did not state the basis of his or his law firm’s authority to act in the matter [citation omitted]. Counsel indicated in his opposing papers that the firm had been retained in connection with the probate proceedings, but he did not state who had retained the firm and did not purport to appear on behalf of the estate or the interested persons. Accordingly, he had no standing to appeal from the order that dismissed the complaint pursuant to CPLR 1021.”

Medlock v. Dr. William O. Benenson Rehabilitation Pavilion, 167 A D 3d 994 (2d Dept. 2018) – After this action was stricken from the calendar, plaintiff moved to restore it, but died on July 22, 2009, before the motion was determined. The Surrogate issued letters to plaintiff’s daughter in August 2011. In March 2012, plaintiff’s counsel moved in Supreme Court, Kings County, to substitute the daughter as plaintiff. That motion was denied, because the action had been transferred to Supreme Court, Queens County. A motion to substitute was made in Queens County in October 2014. The Appellate Division affirms the denial of that motion, “given the failure to provide any detailed excuse for the delay in seeking substitution, the failure to include an affidavit of merit

demonstrating that the claim against Rehab was potentially meritorious, and the failure to rebut Rehab’s claim of prejudice stemming from the delay.” However, “the Supreme Court should not have directed dismissal of the action pursuant to CPLR 3404, as the order was issued after the plaintiff’s death and in the absence of any substitution of a legal representative.”

INTERVENTION

Roman Catholic Diocese of Brooklyn, New York v. Christ the King Regional High School, 164 A D 3d 1394 (2d Dept. 2018) – “Upon a timely motion, a person is permitted to intervene in an action as of right when, among other things, ‘the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment’ [citations omitted]. In addition, the court, in its discretion, may permit a person to intervene, *inter alia*, ‘when the person’s claim or defense and the main action have a common question of law or fact’ [citations omitted]. ‘However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance and that intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings’ [citations omitted]. ‘In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.’” Here, while the proposed intervenors, “MVP and CTKCE, as nonparties, would not be directly bound by a judgment in favor of the Diocese and against CTK, if the Diocese prevailed, CTK would be required to break its lease with CTKCE, which would in turn be forced to break its sublease with MVP. Under these circumstances, MVP and CTKCE should have been allowed to intervene.” And, the fact that 3 ½ years have passed since the action was commenced does not mandate denial of the motion, since “the matter had proceeded only to the summary judgment stage,” and “the Diocese failed to point to any substantial prejudice it would suffer if MVP and CTKCE were permitted to intervene.”

CLASS ACTIONS

Maddicks v. Big City Properties, LLC, 163 A D 3d 501 (1st Dept. 2018) – The majority of this closely-divided Court holds that a motion to dismiss this putative class action alleging that setting of improper rents for apartments was part of a systematic effort to avoid compliance with rent stabilization laws should have been denied as premature. “Pursuant to CPLR 902, a motion to determine whether a class action may be maintained is to be made within 60 days after the time to serve the responsive pleading has expired’ [citation omitted]. Because the time to make such a motion had not occurred, it was premature, in this case, for the court to engage in a detailed analysis of whether the requirements for class certification were met,” for, “generally, a detailed analysis of class certification status is inappropriate at the pleading stage.” Here, “although there may be some differences in the documents to be examined for each

apartment, whether individual issues will predominate over class concerns can be fleshed out once plaintiffs make a motion for class certification and defendants oppose it. We note, however, that the possibility that the damages might be different for individual plaintiffs is not a reason to deny class certification.” The dissenters argued that “the majority writes a new roadmap for the litigation of these types of disputes, turning every overcharge claim into a potential class action. This certainly has not been the approach taken with these cases until now – the majority cites no case in which a similar class has been certified or even held certifiable – and I see no reason for the change effected by today’s decision.”

Brownyard v. County of Suffolk, N.Y.L.J., 1532661861 (Sup.Ct. Suffolk Co. 2018) (Mayer, J.) – “Where governmental operations are involved, class actions are generally not superior to other available methods of adjudication [citation omitted]. It is generally supposed that in matters involving government operations, class action relief is not necessary because similarly situated persons will be adequately protected by the *stare decisis* effect of the decision if plaintiff is successful.” Moreover, “where, as here, a motion for class action status is supported merely by an attorney affirmation, the court properly exercises its discretion in denying such motion, since an attorney affirmation and exhibits annexed thereto are insufficient to sustain plaintiff’s burden of establishing compliance with the statutory requirements for class action certification [citations omitted]. Since plaintiffs’ motion is supported merely by an attorney’s affirmation, and since the plaintiffs’ pleadings are unverified by a party and consist of general and conclusory allegations, plaintiffs have failed to sustain the burden of establishing compliance with the statutory requirements for class action certification.”

Matter of Stewart v. Roberts, 163 A D 3d 89 (3d Dept. 2018) – “In opposition to petitioner’s motion for class certification, respondent relied primarily on the governmental operations rule, which provides that class actions are not a superior method for resolving multiple claims against administrative agencies because *stare decisis* will protect the potential class members by ensuring prospective applicants of a favorable judgment. Although that principle applies to prospective claims, petitioner also seeks retroactive benefits for prospective class members whose applications have already been denied. Where, as here, a class action provides the only mechanism available to secure retroactive benefits for potential class members, the governmental operations rule does not bar maintenance of a class action [citation omitted]. Moreover, class actions are deemed a superior method for adjudication of a controversy where, as here, the members of a proposed class are indigent individuals who seek modest benefits and for whom commencement of individual actions would be burdensome.”

Molina v. Two Brothers Scrap Metal, Inc., N.Y.L.J., 1528858088 (Sup.Ct. Nassau Co. 2018)(Brown, J.) – Defendant moves to dismiss plaintiffs’ unpaid overtime class action claims “on the grounds that the plaintiffs are unable to act as representatives for any

purported class” because they are undocumented aliens. The Court concludes that the immigration status of class representatives is not “a barrier to maintaining class claims.” For, “numerous New York state and federal district court cases have found that any laborer may maintain an action pursuant to New York’s Labor Law for unpaid wages, regardless of immigration status or the documentation relied on in obtaining employment.” And, “denying undocumented workers the protection of the FLSA [the federal analog to the Labor Law] would “permit abusive exploitation of workers” and “create an unacceptable economic incentive to hire undocumented workers by permitting employers to underpay them,” in violation of the spirit of IRCA.”

UNKNOWN PARTIES

Walker v. Glaxosmithkline, LLC, 161 A D 3d 1419 (3d Dept. 2018) – “A plaintiff who is unaware of the name or identity of a defendant may proceed against such defendant by designating so much of his or her name as is known (*see*, CPLR 1024) and must show that he or she made timely and diligent efforts to ascertain the identity of an unknown defendant prior to the expiration of the statute of limitations [citations omitted]. In the absence of evidence that a plaintiff made the requisite timely and diligent efforts to identify an unknown defendant, he or she may not take advantage of the procedural mechanism provided by CPLR 1024.” Here, “the only action that plaintiff took was retaining counsel on August 1, 2014, three days before the statute of limitations expired. Such fact, however, does not relieve him of his obligation to exercise diligent efforts. Indeed, we note that, upon retention, counsel immediately took action by sending an investigator to the accident scene. There is no explanation as to why plaintiff waited so long to retain counsel or any indication that he was somehow precluded from doing so prior to the expiration of the statute of limitations. Moreover, contrary to plaintiff’s assertion, preaction discovery under CPLR 3102(c) is not limited to those parties who appear with counsel. To that end, we reject plaintiff’s assertion that whether he exercised due diligence must be measured from the point when he retained counsel.”

ARTICLE 16

Campbell v. South Nassau Communities Hospital, N.Y.L.J., 1547121083 (Sup.Ct. Nassau Co. 2018)(Galasso, J.) – Plaintiff moves to voluntarily discontinue this medical malpractice action against one of the defendants, Hospital for Special Surgery. The Court allows the discontinuance, and notes that “inasmuch as the instant application is not the functional equivalent of a trial on the merits, the remaining defendants may seek to include any liability attributable to Hospital for Special Surgery as part of the total liability assigned to ‘all persons liable’ for purposes of CPLR Article 16.”

CONTRIBUTION AND INDEMNIFICATION

Board of Managers of Olive Park Condominium v. Maspeth Properties, LLC, 170 A D 3d 645 (2d Dept. 2019) – “The principle of common-law, or implied, indemnification

permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party’ [citations omitted]. ‘The party seeking indemnification “must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought,” and must not have committed actual wrongdoing itself’ [citations omitted]. ‘Common-law indemnification is warranted where a defendant’s role in causing the plaintiff’s injury is solely passive, and thus its liability is purely vicarious’ [citations omitted]. ‘Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine.’”

Ramirez v. Almah, LLC, 169 A D 3d 508 (1st Dept. 2019) – “The court properly granted the motion by Structure Tone and Plumb Door for summary judgment dismissing the common-law indemnification and contribution claims against them. ‘A party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence on its own part’ [citation omitted], and the only claims ever asserted against defendant sought to hold it liable for its own negligence rather than vicariously liable.”

GENERAL OBLIGATIONS LAW §15-108

McCarthy v. Kerrigan, 59 Misc 3d 872 (Sup.Ct. St. Lawrence Co. 2018)(Farley, J.) – In this medical malpractice action, one defendant – Witkop – entered into an agreement with plaintiff to discontinue the action against him, and, instead, arbitrate plaintiff’s claim against him. A remaining defendant commenced a third-party action against Witkop to “preserve his rights for common-law indemnity and contribution. Witkop moved to dismiss the third-party action, claiming that his agreement with plaintiff constituted a “release,” triggering General Obligations Law §15-108, and precluding a claim for contribution. The Court rejects that argument. GOL 15-108 applies only if “the plaintiff or claimant receives, as part of the agreement, *monetary consideration greater than one dollar*,” and, “the release or covenant *completely or substantially terminates the dispute* between the plaintiff or claimant and the person who was claimed to be liable” [emphasis by the Court]. Neither of those requirements were met here.

PLEADINGS

Edelman v. David Greuner M.C. PC, N.Y.L.J., 1557474037 (Sup.Ct. N.Y.Co. 2019) (Bluth, J.) – “Not every paragraph in a complaint must allege an element of a cause of action; otherwise complaints would be impossible to decipher. For instance, although plaintiff’s assertion that Movants used Groupon or Living Social vouchers to bring in customer is not necessarily essential to proving his retaliation claim, it does provide

defendants (and the Court) with helpful context about plaintiff’s case. The purpose of a complaint is to explain to defendants why they are being sued – it is plaintiff’s version of events. A plaintiff should not be forbidden from including an allegation simply because it may not be material to the case.”

In re Opioid Litigation, N.Y.L.J., 1532587908 (Sup.Ct. Suffolk Co. 2018)(Garguilo, J.) – “CPLR 3013 requires, in pertinent part, only that statements in a pleading ‘be sufficiently particular to give the court and parties notice’ of the transactions and occurrences to be proved. And although CPLR 3016(b) requires that a cause of action based in fraud ‘must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, the mandate of CPLR 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct [citation omitted]. Even in fraud, a plaintiff is not required to allege specific details of an individual defendant’s participation where those details are peculiarly within the defendant’s knowledge.” And, “contrary to the assertions by the distributor defendants, the strict pleading requirements imposed by CPLR 3016 are inapplicable to a cause of action premised on General Business Law §349.”

Epiphany Community Nursery School v. Levey, 171 A D 3d 1 (1st Dept. 2019) – A narrowly-divided Court concludes that plaintiff has adequately pled a claim for fraud. Plaintiff claims that defendant, one of its directors, made unauthorized transfers of funds from plaintiff to himself. The majority holds that the pleading requirement of CPLR 3016(b) “is satisfied when the facts suffice to permit a reasonable inference’ of the alleged misconduct’ [citations omitted]. Further, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud.” Here, plaintiff “alleges that it justifiably relied on Hugh’s ‘material misrepresentations and omissions based on his position as a director, his financial expertise, and the expectation that he would act solely in the interests of Epiphany, its students, and faculty, consistent with his fiduciary obligations.’ The allegations in the complaint are not bare legal conclusions. Nor are they inherently incredible.” The dissenters argued that the complaint states at best a time-barred claim for conversion, but not fraud. For, “absent from the complaint is any well-pleaded allegation that any faithful agent of plaintiff – whether officer, director or employee – actually read or heard, much less relied upon, a false representation made by Hugh.” And, “particularly noteworthy is the complaint’s failure to allege that Wendy – plaintiff’s founder and the director of its school – read or relied upon the alleged misrepresentations in plaintiff’s books and records and financial statements.” Indeed, in her affidavit, “Wendy does not say that she was misled about the transfers; she says that she was unaware of them.” In sum, says the dissent, “if plaintiff did, in fact, ‘justifiably rely’ on the alleged misrepresentations, the identity of the agent or agents through whom plaintiff placed such reliance is information peculiarly within plaintiff’s knowledge and must be pleaded with particularity under CPLR 3016(b).”

47-53 Chrystie Holdings LLC v. Thuan Tam Realty Corp., 167 A D 3d 405 (1st Dept. 2018) – “The complaint states a cause of action for fraud against the individual defendants. Contrary to defendants’ contention, the fact that it refers to the seller shareholders as the ‘Individual Defendants’ does not render the claim insufficiently particularized as to any of the individual defendants [citations omitted]. The term ‘Individual Defendants’ does not refer to a diverse group of defendants to whom entirely different acts giving rise to the action may be attributed; it refers to the eight shareholders of the single corporate defendant, each of whom is alleged to have made the same false representation, to wit, that no corporate documents existed. At this stage of the proceedings, it is reasonable to infer that the individual shareholders knew whether this closely held corporation maintained corporate documents and thus that they participated in the alleged wrongful conduct by representing that no documents existed.”

William Doyle Galleries, Inc. v. Stettner, 167 A D 3d 501 (1st Dept. 2018) – “A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance’ [citation omitted]. In turn, the elements of an underlying fraud are ‘a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.’” Here, “plaintiff sufficiently alleged the element of actual knowledge. ‘This Court has stated that actual knowledge need only be pleaded generally particularly at the pre-discovery stage, since a plaintiff lacks access to the very discovery materials which would illuminate a defendant’s state of mind. Participants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud.’”

Cohen & Lombardo, P.C. v. Connors, 169 A D 3d 1399 (4th Dept. 2019) – “It is well established that ‘a cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b)’ [citation omitted]. Nevertheless, ‘the basic test for sufficiency of a pleading still applies, requiring us to assume every fact alleged by plaintiff to be true, and liberally construe the pleading in plaintiff’s favor.’”

Wegner v. Town of Cheektowaga, 159 A D 3d 1348 (4th Dept. 2018) – CPLR 3016(a) requires that “in an action for libel or slander, the particular words complained of shall be set forth in the complaint.” The complaint here alleges that “defendants made false accusations that plaintiff engaged in ‘monetary waste, abuse and criminal actions in his deployment of manpower’ in his role as the Highway Superintendent of the Town of Cheektowaga.” The Appellate Division reverses the denial of defendants’ motion to dismiss the action. “Plaintiff did not set forth in the complaint ‘the particular words complained of,’ as required by CPLR 3016(a), and the complaint did not ‘state the “time, place and manner of the allegedly false statements and to whom such statements were made”’” as case law requires.

Choudhury v. Islam, N.Y.L.J., 1543896785 (Sup.Ct. Queens Co. 2018)(Leverett, J.) – “Pursuant to Civil Practice Law and Rules 3016(a), the particular words that are complained of as libel and/or slander, which constitutes defamation, must be specified in the pleadings.” Here, “plaintiff’s run for Congress puts him in the public eye and concerns as a public figure,” and “without the specific words, this Court cannot analyze whether the statements were malicious.” Thus, the complaint is dismissed.

Crescent Packing Corp. v. Tropical Market, Inc., 60 Misc 3d 32 (App.Term 2d Dept. 2018) – “Pursuant to CPLR 3016(f), if a plaintiff seeking payment for the sale and delivery of goods sets forth in a verified complaint the items of its claim and the reasonable value or agreed price of each, the defendant is obligated in the answer, to indicate specifically the items it disputes, and whether in respect of delivery, performance, reasonable value or agreed price [citations omitted]. A copy of a writing attached to the complaint may sufficiently itemize the claim [citations omitted]. The complaint must, however, list the goods with sufficient detail so that it may be readily examined and its correctness tested entry by entry.” Here, plaintiff apparently gave *too much* information in the exhibits attached to the verified complaint. “Since the itemized statement annexed to the complaint apparently included all the items plaintiff had sold to Tropical, and did not specify the items to which Tropical’s payments had been applied, it was insufficient to trigger an obligation under CPLR 3016(f) for Tropical to specify which items of plaintiff’s claim it disputed.”

Archer-Vail v. LHV Precast, Inc., 168 A D 3d 1257 (3d Dept. 2019) – Plaintiff’s decedent died as a result of injuries sustained during the course of his employment. “In a 98-page complaint containing 428 paragraphs, plaintiff – individually and as the administrator of decedent’s estate – commenced this action asserting various causes of action.” Defendants move to dismiss for failure to comply with the pleading requirements of CPLR 3013 and 3014. “We agree with Supreme Court that the complaint – although unnecessarily long and inartfully drafted – sets forth legally cognizable claims, including causes of action sounding in negligence and wrongful death, with sufficient particularity so as to provide defendants with notice of the claims asserted against them and the transactions and/or occurrences sought to be proven.”

US Bank National Association v. Nelson, 169 A D 3d 110 (2d Dept. 2019) – “The instant appeal presents the question of whether, in a mortgage foreclosure action in which the complaint alleges that the plaintiff is the owner and holder of the note and mortgage, the mere denial of that allegation in the answer, without more, is sufficient to assert that the plaintiff lacks standing, thereby preserving that issue for adjudication.” The majority of this divided Court holds that, “upon our review of relevant statutory and decisional law, and in clarification of our own concededly inconsistent decisions in this area, we conclude that this question must be answered in the negative.” CPLR 3018, “which governs responsive pleadings, draws a distinction between denials and affirmative

defenses. Denials generally relate to allegations setting forth the essential elements that must be proved in order to sustain the particular cause of action. Thus, a mere denial of one or more elements of the cause of action will suffice to place them in issue, and ‘there is no reason to additionally assert as an affirmative defense the opposite of what the pleading party is already required to prove’ [citations omitted]. Conversely, where the answering party wishes to interpose new matter in defense to the cause of action that goes beyond the essential elements of the cause of action, the statute indicates that the party must plead, as an affirmative defense, ‘all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading’ [citation omitted]. Accordingly, where a defendant seeks to inject into the litigation ‘matters that are not the plaintiff’s burden to prove as part of the cause of action,’ those matters must be affirmatively pleaded as defenses.” Here, “as a general matter, a plaintiff need not establish its standing.” Thus, “it is only where the plaintiff’s standing is placed in issue by the defendant that the plaintiff must shoulder the additional burden of establishing its standing to commence the action, a burden satisfied by evidence that it was the holder or assignee of the underlying note at the time the action was commenced.” And, since “standing is not an essential element of the cause of action, under CPLR 3018(b) a defendant must affirmatively plead lack of standing as an affirmative defense in the answer in order to properly raise the issue in its responsive pleading.” Thus, “the issue of standing is waived absent some affirmative statement on the part of a mortgage foreclosure defendant, which need not invoke magic words or strictly adhere to any ritualistic formulation, but which must clearly, unequivocally, and expressly place the defense of lack of standing in issue by expressly identifying it in the answer or in a pre-answer motion to dismiss.” Finally, “to the extent that some decisions of our Court have strayed from the foregoing principles by indicating that a mere denial in the answer of factual allegations set forth in the complaint will suffice to place standing in issue, thereby injecting uncertainty into this formerly settled area [citations omitted], they should no longer be followed.” The dissenter argued that, where, as here, “a plaintiff alleges in its complaint that it is the ‘owner and holder of the note and mortgage being foreclosed’ and that ‘the mortgage was subsequently assigned to the plaintiff by assignment’ or that the ‘plaintiff is in possession of the original note with a proper endorsement and/or allonge and is therefore, the holder of both the note and mortgage, which passes as incident to the note’ [citation omitted], a denial or DKI should suffice to put the plaintiff on notice as to the issue of standing. To hold otherwise renders meaningless the purpose of a denial.”

Gowen v. Helly Nahmad Gallery, Inc., 60 Misc 3d 963 (Sup.Ct. N.Y.Co. 2018)(Bransten, J.) – CPLR 3025(a) “provides that ‘a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it’ [emphasis by the Court]. CPLR 3025(a) has been interpreted to include the time to amend the complaint *as of right* where a defendant has made a CPLR 3211 motion to dismiss ‘since

the defendant’s motion to answer the complaint, also extended the plaintiff’s time to amend the complaint” [emphasis by the Court].

Frangiadakis v. 51 West 81st Street Corp., 161 A D 3d 478 (1st Dept. 2018) – “To support amending a personal injury complaint to add a cause of action for wrongful death, plaintiffs were required to submit ‘competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff.’”

Morand v. Farmers New Century Insurance Company, 171 A D 3d 1167 (2d Dept. 2019) – “Leave to amend pleadings ‘should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit’ [citations omitted]. ‘In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated and whether a reasonable excuse for the delay was offered’ [citations omitted]. ‘Where, however, an application for leave to amend is sought after a long delay and the case has been certified as ready for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious’ [citations omitted]. The court’s exercise of its broad discretion in determining whether to grant leave to amend pleadings will not be lightly disturbed.” Here, “the Supreme Court providently exercised its discretion in denying the plaintiffs’ motion for leave to amend the complaint. The case had already been certified as ready for trial and nearly two years had passed since the plaintiffs filed the original complaint. Additionally, the new damage claims were based on facts that the plaintiffs had been aware of since prior to commencement of the action, and the plaintiffs did not provide any excuse for their delay in seeking leave to amend the complaint to add these claims.”

Wojtalewski v. Central Square Central School District, 161 A D 3d 1560 (4th Dept. 2018) – “‘Mere lateness is not a barrier to the amendment [of a complaint]. It must be lateness coupled with significant prejudice to the other side’ [citations omitted]. Therefore, although plaintiff provided no excuse for her delay in seeking leave to amend, that is of no moment because, as noted above, defendants have not shown that they were prejudiced by the delay.”

Lakeview Outlets, Inc. v. Town of Malta, 166 A D 3d 1445 (3d Dept. 2018) – “Plaintiff claims that defendant’s nearly one-year delay in seeking to amend the answer to assert a statute of limitations defense, made following the completion of discovery and after plaintiff moved for summary judgment, caused it significant prejudice. Delay alone, however, does not warrant denial of a motion for leave to amend [citations omitted], and plaintiff’s contention that its expenditure of time and resources in preparation for the trial constitutes prejudice requiring denial of defendant’s motion is without merit. Prejudice in this context exists ‘where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading

contained the proposed amendment’ [citations omitted]. No such showing has been made by defendant here.”

Federal Insurance Company v. Lakeville Pace Mechanical, Inc., 159 A D 3d 469 (1st Dept. 2018) – “Defendant waited more than two years to move to amend its answer to include the statute of limitations defense, arguing that plaintiff’s construction negligence claim, with a three-year statute of limitations [citation omitted] was untimely. Moreover, defendant made its motion almost immediately after the expiration of the six-year limitations period (by defendant’s calculation) in which plaintiff could have brought the same action as a breach of contract, even though all of the facts relied upon by defendant were known to it at the time it filed its original answer. Plaintiff, relying on defendant’s waiver of any statute of limitations defense [citation omitted], was prejudiced by the loss of the opportunity to interpose a timely breach of contract claim, which it could have done ‘had the original pleading contained what the proposed amended one wants to add.’”

MOTION PRACTICE

MOTION PROCEDURE

People ex rel. Strong v. Griffin, 162 A D 3d 1061 (2d Dept. 2018) – “‘The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with’ [citations omitted]. Here, we agree with the Supreme Court’s determination to dismiss the proceeding for lack of personal jurisdiction due to the petitioner’s failure to follow the directive of the order to show cause to serve the respondent and the Attorney General with a copy of the papers upon which the order to show cause was based.”

Beer v. Village of New Paltz, 163 A D 3d 1215 (3d Dept. 2018) – “We reject petitioners’ assertion that respondents’ motions were defective because respondents failed to specifically cite to CPLR 3211, The notices of motion and supporting papers indicated that respondents intended to dismiss the petition on the basis that it was barred by the applicable statute of limitations. In opposition to the motions, petitioners responded to this argument and contended that the proceeding was timely commenced. Given that there was no misunderstanding as to respondents’ ground for seeking dismissal of the petition, nor did petitioners suffer any prejudice by any failure by respondents to cite to CPLR 3211, the motions to dismiss were not fatally defective.”

U.S. Bank National Association v. Langner, 168 A D 3d 1021 (2d Dept. 2019) – “‘Any person who, for religious or other reasons, wishes to use an affirmation as an alternative to a sworn statement may do so,’ but such affirmation ‘must be made before a notary

public or other authorized official,’ and the affirmant must ‘be answerable for the crime of perjury should he make a false statement.’”

Charnov v. New York City Board of Education, 171 A D 3d 409 (1st Dept. 2019) – “The motion court properly considered the out-of-state expert affidavit of Professional Engineer Duane R. Ferguson submitted by defendants in support of their summary judgment motion even though it lacked a certificate authenticating the authority of the notary who administered the oath, as required by CPLR 2309(c), because the absence of such a certificate is a mere irregularity and not a fatal defect, which could be disregarded by the motion court under CPLR 2001 given the fact that plaintiff has not alleged that she was prejudiced.”

Stahlman v. NYU Langone Health System, 63 Misc 3d 496 (Sup.Ct. Kings Co. 2019) (Rivera, J.) – “The requirement to annex the pleadings in a CPLR 3212 motion [for summary judgment] is statutorily mandated and the failure to do so provides a basis for denial of the motion without prejudice. However, if the pleadings are otherwise available to the court either electronically or in the opponent’s papers or in the movant’s reply papers, the Supreme Court has the discretion to disregard the error as a mere irregularity if there is no impairment of the rights of the opponent of the motion.”

Gelaj v. Gelaj, 164 A D 3d 878 (2d Dept. 2018) – “The purpose of a reply affidavit or affirmation is to respond to arguments made in opposition to the movant’s motion and not to introduce new arguments or grounds in support of the relief sought [citations omitted]. There are exceptions to this rule, including when evidence is submitted in response to allegations made for the first time in opposition, or when the other party is given an opportunity to respond to the reply papers [citations omitted]. Neither of these exceptions applies here. Accordingly, *nisi prius* erred in basing its determination upon the new material submitted in reply.

Molina v. Two Brothers Scrap Metal, Inc., N.Y.L.J., 1528858088 (Sup.Ct. Nassau Co. 2018)(Brown, J.) – “The defendant’s motion, returnable on April 27, 2018, was served on April 2, 2018 and contained the requisite 2214(b) notice for service of answering affidavits seven days before the return date, i.e., by April 20, 2018. As the cross-motion was electronically filed no earlier than the evening of April 21, 2018, it is untimely [citations omitted]. This does not preclude plaintiffs from making an appropriate motion on notice in the future, should the need arise.”

Zisholtz & Zisholtz, LLP v. Mandel, 165 A D 3d 1312 (2d Dept. 2018) – “The plaintiff served its motion by regular mail on March 17, 2016. In order to make effective its demand for seven days’ notice of answering papers or a cross motion [citation omitted], the plaintiff was required to have mailed its motion papers at least 21 days prior to the return date [citations omitted]. The plaintiff mailed its motion papers only 20 days before

the return date. Thus, the cross motion, which was served six days before the return date, was timely.”

Moran v. BAC Field Services Corporation, 164 A D 3d 494 (2d Dept. 2018) – The parties stipulated that defendant’s last day to answer or move with respect to the complaint was Friday, March 4, 2016. On that day, “BAC deposited a motion to dismiss the complaint insofar as asserted against it into the custody of Federal Express for weekday delivery to the plaintiff.” The Court reverses the granting of that motion. “CPLR 2103(b)(2) does not apply to render BAC’s motion timely since BAC did not attempt service of its motion by using ‘the post office or official depository under the exclusive care and custody of the United States Postal Service within the state’ [citation omitted]. Rather, BAC utilized Federal Express. CPLR 2103(b)(6) provides that ‘service by overnight delivery service shall be complete upon deposit of the paper into the custody of the overnight delivery service *for overnight delivery*’ [emphasis by the Court]. The record demonstrates that BAC failed to use Federal Express’s overnight delivery service, and instead deposited its papers with Federal Express on Friday for weekday delivery on Monday. Accordingly, the court should have denied BAC’s motion as untimely.”

W. Rogowski Farm, LLC v. County of Orange, 171 A D 3d 79 (2d Dept. 2019) – The obligation to comply with an order, and the time in which to notice an appeal from it, runs from service of a copy of the order with notice of entry. “This appeal provides our Court with an occasion to clarify the meaning of CPLR 5513(a). The 1996 amendment to CPLR 5513(a), effective January 1, 1997, requires that an order or judgment be served ‘by a party’ with written notice of entry in order to commence the time to undertake an appeal [citation omitted]. For reasons set forth below, we hold that service of the order or judgment with written notice of entry by any party upon the other parties to the action operates to commence the 30-day time to appeal with respect to not only the serving party, but all the parties to the action.” In this multi-party action, various parties served notice of entry of the appealed-from order on different days. At issue is “whether the plaintiffs’ time to file their notice of appeal runs separately from each individual defendant’s service of the order with written notice of entry, or, alternatively, whether their time to appeal runs from the first such proper service of the order by any party with written notice of entry.” First, the Court rehearses the general rules about notice of entry: “When the appellant self-serves a copy of the order or judgment with notice of entry, the appeal must be taken within 30 days of such service [citation omitted], but without benefit of a 5-day extension for mailing. If a party serves a copy of an order or judgment without specifying that it has been entered, the notice is ineffective [citation omitted]. If the order or judgment is served with notice of entry upon some, but not all, of the parties to an action or proceeding, the time to appeal does not begin to run as to the party not served.” And, since the 1996 amendment, “the language of CPLR 5513(a) as to who serves notice of entry is not limited to the ‘prevailing party,’ or to ‘the appealing party,’ or to ‘the party seeking to limit an adversary’s appellate time.’ Rather, ‘a’ party, which is

unrestricted, necessarily refers to ‘any’ party to an action. As a result, the service of an order or 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.” Moreover, “the requirement that a party take an appeal within 30 days from service of an order or judgment with notice of entry is nonwaivable and jurisdictional in nature.” While a bankruptcy stay would preclude actions taken against the bankrupt, it does not stay the bankrupt’s time in which to notice an appeal.

JBBNY, LLC v. Dedvukaj, ___ A D 3d ___, 2019 WL 1549512 (2d Dept. 2019) – “On August 11, 2015, the plaintiff served notice of entry of the June 2015 order [denying a motion to dismiss the complaint] on a defendant who is not a party to this appeal by mailing a copy of the same, via certified and regular mail, to the attorney for that defendant. On the same day, the plaintiff electronically filed the notice of entry of the June 2015 order and proof of mailing to that defendant’s attorney through the New York State Courts Electronic Filing System (hereinafter NYSCEF). A NYSCEF ‘confirmation notice’ was emailed to counsel for the Dedvukaj defendants or their attorney.” CPLR 3211(f) provides that the time for a defendant to answer is extended by the making of a motion to dismiss the complaint “until ten days after service of notice of entry of the order.” The Dedvukaj defendants served their answer on October 1, 2015, which plaintiff rejected as untimely. The Appellate Division reverses the order which denied the Dedvukaj defendants’ motion to compel plaintiff to accept the answer. 22 NYCRR 202.5-b(h)(2) provides that if service is made by hard copy “and a copy of the order or judgment and notice of its entry and proof of such hard copy service are thereafter filed with the NYSCEF site, transmission by NYSCEF of notification of receipt of those documents shall not constitute additional service of the notice of entry on the parties to whom the notification is sent.” The Court holds that “pursuant to the plain language of the rule, the transmission by NYSCEF of the confirmation notice of receipt of the documents showing that the plaintiff served another party with notice of entry did not constitute service upon the Dedvukaj defendants [citation omitted]. Since proper notice of entry of the June 2015 order was never served on the Dedvukaj defendants, ‘their time to answer never commenced running’ [citation omitted]. Accordingly, the Dedvukaj defendants did not default in serving their answer, and the Supreme Court should have granted that branch of their cross motion which was to compel the plaintiff to accept their answer.”

RENEWAL, REARGUMENT AND RESETTLEMENT

Serviss v. Incorporated Village of Floral Park, 164 A D 3d 512 (2d Dept. 2018) – “The Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion.”

Armstrong v. Armstrong, 162 A D 3d 621 (2d Dept. 2018) – “A motion for leave to renew must be based upon new facts, not offered on the original motion ‘that would

change the prior determination’ [citations omitted]. ‘The new or additional facts either must have not been known to the party seeking renewal or may, in the Supreme Court’s discretion, be based on facts known to the party seeking renewal at the time of the original motion’ [citations omitted]. ‘However, in either instance, a “reasonable justification” for the failure to present such facts on the original motion must be presented’ [citations omitted]. ‘The Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion.’”

Caronia v. Peluso, 170 A D 3d 649 (2d Dept. 2019) – “‘The requirement that a motion for renewal be based on new facts is a flexible one’ [citations omitted]. ‘The new or additional facts presented “either must have not been known to the party seeking renewal or may, in the Supreme Court’s discretion, be based on facts known to the party seeking renewal at the time of the original motion”” [citations omitted]. In either circumstance, however, the party seeking renewal must present ‘a reasonable excuse for the failure to present those facts on the prior motion’ [citations omitted]. ‘A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.’”

Madison Park Development Associates LLC v. Febraro, 159 A D 3d 569 (1st Dept. 2018) – “We have previously held that Supreme Court lacks discretion to grant leave to renew ‘where the moving party omitted a reasonable justification for failing to present the new facts on the original motion’ [citations omitted]. For this reason, Supreme Court should have refused to grant defendants leave to make the motion.”

Arthur v. Liberty Mutual Auto and Home Services LLC, 169 A D 3d 554 (1st Dept. 2019) – “Supreme Court providently exercised its discretion to relax the ‘vigorous requirements for renewal’ in the interest of substantial fairness.”

SANCTIONS

CONTEMPT

P.B. #7, LLC v. 231 Fourth Avenue Lyceum, LLC, 167 A D 3d 1028 (2d Dept. 2018) – “A motion to punish a party for civil contempt is addressed to the court’s sound discretion, and the moving party bears the burden of proving the contempt by clear and convincing evidence [citations omitted]. ‘To adjudicate a party in civil contempt, a court must find (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the party against whom contempt is sought disobeyed the order, (3) that the party who disobeyed the order had knowledge of its terms, and (4) that the movant was prejudiced by the offending conduct’ [citations omitted]. ‘It is not necessary

that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes, or prejudices the rights or remedies of a party.”

Matter of Koepfel v. Koepfel, 166 A D 3d 473 (1st Dept. 2018) – Criminal contempt was sustained here because “petitioners proved beyond a reasonable doubt that respondent willfully violated two so-ordered stipulations.” Respondent “argues that his attorney was not authorized to enter into the December 2012 stipulation. However, respondent’s attorney testified that he had the necessary authority. Even if the attorney lacked authority, respondent was not free to disregard the order.”

Brummer v. Wey, 166 A D 3d 475 (1st Dept. 2018) – “Regardless of the subject injunction’s constitutionality, defendants were not free to disobey an order within the jurisdiction of the issuing court, and not void on its face, until they had obtained judicial relief from it.”

Boucan NYC Café, LLC v. 467 Rogers LLC, 168 A D 3d 904 (2d Dept. 2019) – Supreme Court held defendant in contempt of an August 16, 2017 order directing defendant to provide plaintiff with keys to the premises at issue. The Appellate Division reverses. “We agree with the defendant’s contention that the service requirements set forth in the order to show cause dated August 9, 2017, were jurisdictional in nature. The plaintiff’s undisputed failure to comply with those requirements by serving the order to show cause pursuant to CPLR 308(4), instead of CPLR 311-a, deprived the Supreme Court of jurisdiction to entertain the plaintiff’s order to show cause in the order dated August 16, 2017 [citation omitted]. Contrary to the plaintiff’s contention, the defendant may challenge the validity of the order dated August 16, 2017, on the ground that the court was without jurisdiction to enter the order.”

Kozel v. Kozel, 161 A D 3d 700 (1st Dept. 2018) – The non-party witness “was properly served via email with plaintiff’s order to show cause. While a criminal contempt proceeding requires personal service on the contemnor [citation omitted], CPLR 308(5) permits a court to direct another manner of service if the methods set forth in the statute prove impracticable. Here, Inga [the contemnor] left the jurisdiction after the same court and Justice found her in contempt, and offers no evidence that she was at either her residence in London or Lithuania. Under these circumstances, the court properly directed that she be served via email [citation omitted]. Since Inga was properly served with the contempt motion, and had knowledge of the terms of the subject orders of which she was in violation, the court was empowered to find her in contempt without plaintiff commencing a special proceeding.”

Great Wall Medical, P.C. v. Levine, N.Y.L.J., 1534835742 (Sup.Ct. N.Y.Co. 2018) (Goetz, J.) – In this defamation action, based on a negative Yelp review, plaintiff and

defendant entered into a “so-ordered” stipulation agreeing that, pending the action, neither would publicly comment about the other. Plaintiff moves for both criminal and civil contempt, demonstrating that defendant had violated the stipulation. The Court denies the motion for criminal contempt, because the motion papers were not properly served. “A proceeding to punish for criminal contempt arising out of a civil action is considered separate from the civil action and must be properly commenced by personal service upon the alleged contemnor’ [citation omitted]. ‘Failure to personally serve the alleged contemnor constitutes a jurisdictional defect requiring dismissal’ [citation omitted]. Here, the order to show cause authorized service on counsel for defendant and on the return date counsel for plaintiffs did not submit an affidavit of personal service upon the defendant nor was one e-filed. Therefore, because defendant was not personally served with the order to show cause, plaintiff’s application to hold her in criminal contempt must be denied.” As for civil contempt, the Court concluded that defendant had disobeyed a “lawful order of the court, clearly expressing an unequivocal mandate,” that she had knowledge of the order, and that her conduct prejudiced “the rights of a party to the litigation.” For, “a ‘so-ordered’ stipulation qualifies as a lawful order of the court.” And, “if defendant no longer wished to be bound by the Order based on her theory that the order was conditional and plaintiffs were no longer complying then her remedy was to move pursuant to CPLR 2221(a) to vacate the Order, not ignore it.” The remedy is “for defendant to turn over to plaintiffs all the proceeds from her GoFundMe page (and delete the page) as well as pay plaintiffs costs, expenses and attorneys’ fees incurred in connection with bringing their contempt order to show cause. Defendant should not be permitted to profit from her disobedience of the Order.”

Town of Copake v. 13 Lackawanna Properties, LLC, 169 A D 3d 1178 (3d Dept. 2019) – “Under Judiciary Law §774(1), when the misconduct consists of the failure to perform a certain act, that act must be ‘in the power of the offender to perform.’ To that end, the contempt order ‘must contain three items: (1) a description of the acts which were committed or omitted by the party constituting the contempt; (2) a determination of what the party should do in order to purge himself or herself from contempt; and (3) an adjudication that the acts done or omitted impaired the rights of a party to the action’ [citation omitted]. ‘After a finding of contempt has been made, it is the contemnor’s burden to demonstrate by clear and convincing evidence that he or she has purged the contempt or that it is impossible for him or her to purge.’”

OTHER SANCTIONS

Burgund v. Verizon N.Y., Inc., N.Y.L.J., 1535617283 (Sup.Ct. N.Y.Co. 2018)(Kelly Levy, J.) – “CPLR 8303-a ‘imposes a duty on a party and its attorney to act in good faith to investigate a claim and promptly discontinue it where inquiry would reveal that the claim lacks a reasonable basis’ [citation omitted]. If the court determines that the behavior of a party, its attorney, or both is frivolous, CPLR 8303-a obligates the court to

impose sanctions [citation omitted]. Defined by the statute, frivolity is met whenever ‘an action is commenced or continued without any reasonable basis in law or fact, and without any good-faith argument for an extension, modification, or reversal of existing law’ [citation omitted]. Courts have adopted a ‘reasonable investigation’ standard to determine frivolity in the CPLR 8303-a context [citation omitted]. If a reasonable investigation by the plaintiff or his attorney would have revealed that the action against A&S Group was meritless, then failure to discontinue the action constitutes frivolous conduct.” And, here, “a reasonable investigation of the online state corporate database by plaintiff’s attorney would have revealed that A&S Group did not exist at the time of the alleged accident and that dozens of other entities in New York had the name ‘A&S.’ A&S Group’s attorney also sent three separate letters informing plaintiff and his counsel that there was no reasonable factual basis for continuing the action against A&S Group.” And, “CPLR 8303-a pertains not only to frivolous commencements of actions, but also to frivolous continuations of actions. Regardless of whether it originally brought this action in good faith, plaintiff’s repeated failure to voluntarily discontinue the action, despite three specific requests by A&S Group’s counsel, constituted a bad-faith, frivolous continuation that warrants sanctions under CPLR 8303-a.”

Divito v. Fiandach, 160 A D 3d 1404 (4th Dept. 2018) – “It is well established that a party’s abuse of the judicial process is frivolous conduct supporting an award of costs or the imposition of sanctions.” Here, “the court properly exercised its discretion in finding that service of the income execution was made for the purpose of harassing defendant and thus constituted frivolous conduct. There was no arguably legitimate basis for the income execution because defendant was not in default and no default judgment had been entered against him.”

Strauss v. Strauss, 171 A D 3d 596 (1st Dept. 2019) – “The record shows that defendant obtained access to plaintiff’s iPad and private text messages, falsely told her that he did not have the iPad and that it was lost, and provided the text messages to his counsel, who admittedly failed to disclose to opposing counsel or the court the fact that defendant was in possession of the iPad and text messages, until two years later when they disclosed that they intended to use the text messages at trial. Nor does defendant explain how or why he was legally permitted to retain plaintiff’s iPad without her knowledge, and to access and take possession of plaintiff’s personal data located on her iPad.” The Court concludes that “the foregoing frivolous conduct supports the imposition of sanctions (22 NYCRR 130-1.2).”

STAY OF PROCEEDINGS

Miller v. New York City Housing Authority, 171 A D 3d 507 (1st Dept. 2019) – Plaintiff claims that defendant’s failure to maintain a lock on the front entrance to plaintiff’s

residence permitted a stranger to enter the building and assault her. The Court affirms the denial of defendant’s motion for a stay of proceedings pending the criminal action against the perpetrator. “The court properly concluded that a stay was not warranted as this action is a negligence action, where plaintiff alleges that defendant knew the front-door lock at the premises was broken yet allowed the condition to continue without repair, thus creating a hazard for building residents and for her specifically. Such allegations are distinct from the question of whether the alleged assailant committed the crimes charged in the indictment, and defendant would not be prejudiced by proceeding with discovery.”

Tax Equity Now NY LLC v. City of New York, 173 A D 3d 464 (1st Dept. 2019) – “The court should not have granted the City defendants’ motion for a stay of the proceedings under CPLR 5519(a)(1). The filing of a notice of appeal of an order denying a motion to dismiss does not trigger the automatic stay with respect to litigation obligations provided for in the CPLR, such as the obligation to answer and comply with discovery requests. We disavow our decision in *Eastern Paralyzed Veterans Assn. v. Metropolitan Transp. Auth.* (79 A D 2d 516 [1st Dept. 1980]) to the extent it suggests otherwise. While the automatic stay applies to stay ‘proceedings to enforce the judgment or order appealed from pending the appeal,’ which include executory directions that command a person to do an act beyond what is required under the CPLR, the automatic stay does not extend to matters that are the ‘sequelae’ of granting or denying relief [citation omitted]. The inclusion in an order of affirmative directives on matters addressed in the CPLR does not trigger the stay as to the CPLR obligations. The court also should not have granted the State defendants a discretionary stay under CPLR 5519(c). As defendants are not entitled to an automatic stay of their CPLR obligations to answer and provide discovery pending appeal of the order denying the motion to dismiss, no discretionary stay is available under CPLR 5519(c), as the scope of the discretionary stay is ‘coextensive’ with the automatic stay, and applies only to provide non-governmental parties with the opportunity to stay proceedings to enforce the judgment or order appealed from pending the appeal [citation omitted]. However, we exercise our inherent authority to grant a discretionary stay of the proceeding pending appeal for the same substantive reasons given by the trial court in issuing the stay to the State defendants.”

SEALING THE FILE

Matter of Hayes, 59 Misc 3d 543 (Surr.Ct. Essex Co. 2018)(Meyer, J.) – In settling the estate’s wrongful death claim against General Motors, apparently resulting from an ignition switch defect, the petitioner administratrix seeks to seal the “confidential settlement agreement.” The grounds urged “rest upon the confidentiality agreement the administratrix executed with GM, two orders of the MDL court, and the assertions that sealing ‘is necessary to preserve Petitioner’s privacy and obligation of confidentiality,

and to facilitate the settlement of other claims against GM in connection with the ignition switch defect.” The Court denies the application. “The public interest in openness is particularly important on matters of public concern, even if the issues arise in the context of a private dispute [citation omitted], about which secrecy, then, may well provide the greater detriment to the public [citations omitted].” Due to the widespread public knowledge of the GM ignition switch defect, and the lack of compelling evidence of any harm or disadvantage to GM from disclosure of the settlement here, the presumption of openness of public court records has not been overcome.”

Frey v. Itzkowitz, N.Y.L.J., 1557892583 (Sup.Ct. N.Y.Co. 2019)(Silver, J.) – Plaintiff executor seeks to seal the file in this medical malpractice wrongful death action, essentially because “economic records” will be at issue, and “argued defendants may seek tax returns and other financial items she alleged were generally protected from disclosure, noting her husband’s status as a world-renowned member of The Eagles.” This motion was not about the relevance or discoverability of those records, but rather sought to seal the entire file. The Court denies the motion. “In this court’s view, the celebrity of the parties in a particular case should not entitle them to the presumption that their medical records or financial information will be sealed purely on account of their fame.”

PROVISIONAL REMEDIES

ATTACHMENT

Sipperley v. Rodriguez, N.Y.L.J., 1561019259 (Sup.Ct. Nassau Co. 2019)(Galasso, J.) – Plaintiff’s motion to confirm an *ex parte* motion of attachment is denied. “Pursuant to CPLR 6211(b), plaintiff must move to confirm the *ex parte* Order of Attachment within five days after levy [citation omitted]. A motion on notice is made when a notice of the motion or an order to show cause is served [citations omitted]. Pertaining to the requirement of five days within which to ‘move’ pursuant to CPLR 6211(b), ‘filing’ is not the equivalent of moving for purposes of CPLR 6211(b), which requires service of the motion papers as directed by the court; failure to make a timely motion to confirm is fatal under this section of the CPLR.”

PRELIMINARY INJUNCTION

Brummer v. Wey, 166 A D 3d 475 (1st Dept. 2018) – “Prior restraints on speech are ‘the most serious and the least tolerable infringement on First Amendment rights,’ and ‘any imposition of prior restraint, whatever the form, bears a heavy presumption against its constitutional validity’ [citations omitted]. ‘A party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition’ [citations omitted], and, to do so, must show that the speech sought to be restrained is

‘likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest’ [citations omitted]. While these principles would permit the restraint of speech that ‘communicates a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals’ [citation omitted], the speech at issue in this case – although highly offensive, repulsive and inflammatory – does not meet this exacting constitutional standard. Accordingly, the injunction under review must be vacated.”

Long Island Minimally Invasive Surgery, P.C. v. St. John’s Episcopal Hospital, 164 A D 3d 575 (2d Dept. 2018) – “‘Agreements restricting an individual’s right to work or compete are not favored and thus are strictly construed’ [citations omitted]. ‘A restrictive covenant will only be subject to specific enforcement [usually via preliminary injunction] to the extent that it is reasonable in time and area, necessary to protect the employer’s legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.’” Here, “the defendants made a *prima facie* showing that the provision of the covenant prohibiting Andrade for a period of two years from practicing surgery of any kind, within a 10-mile radius of all of the plaintiff’s offices and affiliated hospitals, even those at which he had never worked, was geographically unreasonable, because it effectively barred him from performing surgery, his chosen field of medicine, in the New York metropolitan area [citation omitted]. In opposition, the plaintiff failed to raise a triable issue of fact as to whether imposing such a broad geographical restriction was necessary to protect its interests.”

Harris v. Patients Medical, P.C., 169 A D 3d 433 (1st Dept. 2019) – “In cases between professionals, courts recognize the legitimate interest an employer has against unfair competition, but, to avoid broad restraints on competition, have limited such employer interests ‘to the protection against misappropriation of the employer’s trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary.’”

Delphi Hospitalist Services, LLC v. Patrick, 163 A D 3d 1441 (4th Dept. 2018) – In this action seeking to enjoin violation of a non-compete clause in an employment contract, the majority in the Appellate Division affirms the denial of the plaintiff-employer’s motion. “Plaintiff failed to establish, ‘through the tender of evidentiary proof’ [citation omitted], that ‘the harm to plaintiff from denial of the injunction as against the harm to defendant from granting it’ tips in plaintiff’s favor.” After detailing the harm to defendant if he was unable to work in the geographical area proscribed under the agreement, the majority noted that “plaintiff’s argument in support of its motion, however, refers to the effect on its business model in the event that the court ultimately rules in defendant’s favor concerning the enforceability of the restrictive covenant, not on the effect of allowing defendant to continue working at Ira Davenport during the pendency of the case.” Indeed, “we see no great harm to plaintiff in maintaining the status quo until the case is

resolved.” The dissenter argued that “the majority fails to appreciate the depth of the harm caused to plaintiff by our Court’s refusal to enforce the restrictive covenant by the only effective means available, i.e., a preliminary injunction. It is significant that the remedy of an injunction was specifically stipulated in the employment agreement as the only remedy available to plaintiff inasmuch as defendant admitted in that agreement that his breach of the restrictive covenant would cause ‘substantial and irreparable injury’ to plaintiff.” And, “the essential reason I agree with plaintiff that the decision not to enforce the restrictive covenant through a preliminary injunction is ‘dangerous precedent’ is that plaintiff has demonstrated that its business model is its most valuable asset and constitutes its ‘goodwill’ deserving of protection.”

Spectrum Stamford LLC v. 400 Atlantic Title, LLC, 162 A D 3d 615 (1st Dept. 2018) – Last year’s “Update” reported on *Rakosi v. Sidney Rubell Company, LLC*, 155 A D 3d 564 (1st Dept. 2017). There, in an action by owners of real property against the company managing the property, the Court affirmed the granting of a preliminary injunction which enforced their termination of defendant as managing agent. “Plaintiffs have shown irreparable injury to the extent the properties continue to be managed by an agent they do not desire [citations omitted]. Further, given that defendants have been on notice, since 2009, that, by the settlement agreements’ plain terms, their tenure as managing agent could expire as early as May 2016, and given they do not show why, if their termination by plaintiffs is ultimately deemed valid, they cannot seek management work elsewhere, the balance of equities weighs in plaintiffs’ favor.” Here, in *Spectrum Stamford*, the Court distinguishes *Rakosi* in denying a preliminary injunction on similar facts. Here, “there is no ‘imperative, urgent, or grave necessity’ that the current property manager be replaced with CBRE at this time.” For, unlike the situation in *Rakosi*, “plaintiff is merely an assignee of the lender and has solely an economic interest,” whereas the plaintiffs in *Rakosi* “were owners of the properties with concerns about title and entered directly into property management agreements with the defendants.” Moreover, since the relief requested “is primarily mandatory in nature,” by which “the movant would receive some form of the ultimate relief sought as a final judgment,” that relief is granted “only in ‘unusual’ situations, ‘where the granting of the relief is essential to maintain the *status quo* pending trial of the action.” For, “a mandatory injunction should not be granted, absent extraordinary circumstances, where the *status quo* would be disturbed and the plaintiff would receive the ultimate relief sought, *pendente lite*.”

Vassenelli v. City of Syracuse, 160 A D 3d 1412 (4th Dept. 2018) – “Plaintiff contends that the court erred in denying that part of his application seeking a waiver of the undertaking pursuant to CPLR 6312(b). We reject that contention. CPLR 6312(b) directs a court to fix an undertaking in an amount that will compensate a defendant for damages incurred by reason of the granting of a preliminary injunction in the event that it is finally determined that a plaintiff was not entitled to the injunction. Plaintiff, as the party herein who sought a preliminary injunction, was clearly and unequivocally required

to post an undertaking [citations omitted]. Contrary to plaintiff's contention, the court had 'no power to dispense with the undertaking required by CPLR 6312(b).'"

Slifka v. Slifka, 162 A D 3d 530 (1st Dept. 2018) – “The court erred in enjoining the sale of property at issue pending the decision by the Surrogate pursuant to a temporary restraining order, which does not require an undertaking [citation omitted]. The TRO is merely a provisional remedy pending a hearing on a motion for a preliminary injunction [citation omitted], and the court did not schedule a hearing on plaintiffs' motion. However, it issued the 'stay/TRO' after allowing both sides an opportunity to be heard. Thus, the relief is in fact a preliminary injunction, and plaintiffs are required to post an undertaking [citation omitted]. We remand to Supreme Court to fix the amount of the undertaking.”

159 MP Corp. v. Redbridge Bedford, LLC, ___ N Y 3d ___, 2019 WL 1995526 (2019) – Last year's “Update” reported on the Appellate Division decision in this action [160 A D 3d 176 (2d Dept. 2018)]. The Appellate Division, over a dissent, held that “the right to a declaratory judgment, inclusive of the *Yellowstone* relief sought here, is not so vaulted as to be incapable of self-alienation.” Thus, at least under the circumstances here, in which “the parties were sophisticated entities that negotiated at arm's length and entered into lengthy and detailed leases defining each party's rights and obligations with great apparent care and specificity,” the Appellate Division held that a tenant's waiver in a lease of the right to seek *Yellowstone* relief is enforceable, and not a violation of public policy. The dissenter argued that “a broad provision in a commercial lease providing that the tenant waives its right to seek declaratory relief with respect to any provision of the lease, or with respect to any notice sent pursuant to the provisions of the lease, violates public policy and is, therefore, unenforceable.” A narrowly-divided Court of Appeals has affirmed. The majority holds that “In New York, agreements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom to contract.” Of course, “the public policy favoring freedom of contract does not mandate that the language of an agreement be enforced in all circumstances. Contractual provisions entered unknowingly or under duress or coercion may not be enforced [citations omitted]. The doctrine of unconscionability also protects against ‘unjust enforcement of onerous contractual terms which one party is able to impose upon the other because of a significant disparity in bargaining power’ [citation omitted]. Plaintiffs raised none of these defenses.” Instead, “plaintiffs' contention is that the right to bring a declaratory judgment action is so central and critical to the public policy of this state that it cannot be waived by even the most well-counseled, knowledgeable or sophisticated commercial tenant. We are unpersuaded.” Further, “plaintiffs' inability in this case to obtain *Yellowstone* relief does not prevent them from raising defenses, in summary proceedings if commenced and thus vindicating their rights under the leases if the owners' allegations of default are baseless.” The dissenters argued that “the *Yellowstone* injunction expresses a public policy of this

state and is grounded in the legislature's century-old determination that New York's public policy broadly favors the availability of declaratory relief in preference to more protracted, costly and antagonistic litigation. After this decision, commercial building owners and landlords will undoubtedly include a waiver of declaratory and *Yellowstone* relief in their leases as a matter of course. Those clauses will enable them to terminate the leases based on a tenant's technical or dubious violation whenever rent values in the neighborhood have increased sufficiently to entice landlords to shirk their contractual obligations. The majority insists that its decision represents the application of the well-settled public policy supporting freedom of contract. That notion of the unlimited primacy of contractual rights is based on a jurisprudence discredited since the Great Depression. The majority's decision will alter the landscape of landlord-tenant law, and of neighborhoods, throughout the state for decades to come, absent legislative action." In the absence of a *Yellowstone* injunction, if, in the summary proceeding commenced by the landlord Civil Court determines "that MP is responsible for some or all of the alleged defaults, even if MP has all along been willing and able to cure those defaults, it will be too late: the leases will have terminated. That 'all or nothing result' [citation omitted] destabilizes contract relationships and neighborhoods, and effectively allows landlords who own buildings in gentrifying areas to terminate commercial leases at any time based on technical or minor violations. In other words, if a waiver of declaratory and *Yellowstone* relief is enforceable, it will be used by landlords as a mechanism to vitiate a lawful contract. That does not preserve the parties' benefit of their bargain, it destroys it."

Bliss World LLC v. 10 West 57th Street Realty LLC, 170 A D 3d 401 (1st Dept. 2019) – "A necessary linchpin of a *Yellowstone* injunction is that the claimed default is capable of cure. Where the claimed default is not capable of cure, there is no basis for a *Yellowstone* injunction [citations omitted]. Here, the claimed defaults are the tenant's failure to procure insurance and improper assignment of the lease. The tenant provides various steps that it will take to cure if it is ultimately found to be in material violation of the insurance provisions of the lease. None of these proposed cures involve any retroactive change in coverage, which means that the alleged defaults raised by the landlord are not susceptible to cure. With respect to the assignment of the lease, although the tenant has generally stated that it is willing to cure any assignment violation, it does not explain how it will undo the assignment or indicate whether it is willing or able to do so."

NOTICE OF PENDENCY

New Plant Energy Development, LLC v. MBC Contractors, Inc., 61 Misc 3d 635 (Sup.Ct. Rockland Co. 2018)(Marx, J.) – Plaintiffs seek to file a notice of pendency in New York with respect to an action pending in Illinois relating to ownership, use or possession of property located in New York. "CPLR 6501 provides as follows: 'A notice of pendency may be filed in any action *in a court of the state* or of the United States in which the

judgment demanded would affect the title to, or the possession, use or enjoyment of, real property” [emphasis by the Court]. Given the clear meaning, in various statutes of the term “the state,” the use of that language in CPLR 6501 can have “no other meaning” than New York State, and “the plain language of CPLR 6501 limits the availability of notices of pendency to actions pending in New York state court or federal court.”

25-35 Bridge Street LLC v. Excel Automotive Tech Center, N.Y.L.J., 1548644071 (Sup.Ct. Kings Co. 2019)(Levine, J.) – An amendment to the summons and complaint to reflect a new plaintiff as assignee of the original plaintiff does not permit defendant/counterclaimant to file a new notice of pendency after its original notice has lapsed. “The addition of or substitution of new parties to the same action is ‘more a change of form than of substance’ that does not warrant the filing of a successive notice of pendency.”

Bank of America, N.A. v. Kennedy, 171 A D 3d 1285 (3d Dept. 2019) – The initial mortgage foreclosure action, and its accompanying notice of pendency, were dismissed “without prejudice,” for plaintiff’s “failure to comply with ‘a number of court orders and mandates.’” Plaintiff then commenced a new foreclosure action, and filed a new notice of pendency. The Court rejects defendants’ claim “that plaintiff was prohibited by statute from filing a second notice of pendency – a condition precedent to judgment in a mortgage foreclosure action.” CPLR 6516(a), which creates the exception, in mortgage foreclosure actions, to the “no second chance” rule, provides that a second notice of pendency may be filed in such actions “notwithstanding that a previously filed notice of pendency in such action or in a previous foreclosure action has expired pursuant to CPLR 6513 or has become ineffective because service of a summons had not been completed within the time limited by CPLR 6512.” The Court holds that a successive notice of pendency is not limited to those two enumerated circumstances. “In our view, CPLR 6516(a) clearly and unambiguously creates a broad exception to the ‘no second chance’ rule codified by CPLR 6516(c), thereby allowing for the filing of successive notices of pendency in mortgage foreclosure actions, without limitation. Although CPLR 6516(a) specifically references circumstances under which successive notices of pendency may be filed, such as when a prior notice of pendency expires under CPLR 6513 or becomes ineffective for failure to comply with the time requirements of CPLR 6512, the Legislature, tellingly, did not include any limiting language that would indicate that those circumstances presented the only ones under which a successive notice of pendency could be filed [citation omitted]. Thus, based upon our plain reading of the statutory language, plaintiff was not prohibited, as defendants contend, from filing a second notice of pendency following the court-ordered cancellation of its prior notice of pendency.”

ACCELERATED JUDGMENT

CPLR 3211

Matter of Associated General Contractors of NYS, LLC v. New York State Thruway Authority, 159 A D 3d 1560 (4th Dept. 2018) – “Contrary to the [Supreme] Court’s determination, ‘a party’s lack of standing does not constitute a jurisdictional defect and does not warrant *sua sponte* dismissal of a complaint.’”

352 Legion Funding Associates v. 348 Riverdale, LLC, 164 A D 3d 551 (2d Dept. 2018) – “We agree with the plaintiff that the Supreme Court erred in *sua sponte* raising the affirmative defense of the statute of limitations and directing the dismissal of the complaint on that ground. The statute of limitations is an affirmative defense which is waived by a party unless it is raised either in a responsive pleading, or by motion prior to the submission of a responsive pleading [citations omitted]. ‘A court may not take “judicial notice,” *sua sponte*, of the applicability of a statute of limitations if that defense has not been raised.’”

Countrywide Home Loans, Inc. v. Campbell, 164 A D 3d 646 (2d Dept. 2018) – “The plaintiff’s alleged failure to satisfy a condition precedent in the mortgage by failing to provide the defendant with 30 days’ written notice of his default in making mortgage payments, even if true, did not deprive the court of jurisdiction to enter a judgment of foreclosure and sale.” Therefore, “the Supreme Court was not presented with any extraordinary circumstances warranting a *sua sponte* dismissal of the complaint.”

Chase Home Finance, LLC v. Plaut, 171 A D 3d 692 (2d Dept. 2019) – This foreclosure action was commenced on May 5, 2006. On February 5, 2007, Supreme Court granted plaintiff’s motion for an order of reference, directing that a copy be served on defendant within 20 days. Plaintiff, however, did not serve a copy until March 19, 2007. Plaintiff then moved to extend its time to serve the order, *nunc pro tunc*. Supreme Court, by order dated November 5, 2008, referred that motion to a Judicial Hearing Officer. On December 1, 2009, plaintiff moved to vacate that November 2008 order, and to restore its motion to the Court’s calendar. Plaintiff failed to appear on the return date of that motion, and, on May 5, 2010, the Court referred the matter to a JHO for a June 2010 hearing. “Although a status conference was held in February 2014, the record on appeal does not reflect that the plaintiff undertook any actions between June 2010 and February 2014 to obtain a determination of the extension of time motion or otherwise prosecute the matter.” Then, by motion dated August 15, 2014, plaintiff again moved to extend its time to serve the order of reference, *nunc pro tunc*. The Supreme Court “denied the second extension of time motion, and, *sua sponte*, directed the dismissal of the complaint as abandoned, noting, *inter alia*, that ‘the order of reference at issue was signed in 2007’ and the appointed referee was no longer on the fiduciary list.” The Appellate Division reverses. “The Supreme Court’s *sua sponte* determination to direct dismissal of the

complaint deprived the plaintiff of notice and opportunity to be heard and amounted to a denial of the plaintiff's due process rights.”

Cheng v. Salguero, 164 A D 3d 768 (2d Dept. 2018) – The real estate sale contract between the parties provided that buyer's sole remedy, in the event there were defects in seller's title, was “to accept such title as the defendants shall be able to deliver without abatement in the purchase price, or in the alternative, to cancel this agreement and receive a refund of the contract down payment made hereunder.” The Appellate Division grants dismissal of this fraud action by buyer. “An unambiguous contract provision may qualify as documentary evidence under CPLR 3211(a)(1)’ [citation omitted]. Here, the parties’ contract, which limited the plaintiff's remedies in the event that the defendants were unable to clear defects in title, established a complete defense as a matter of law.”

Elite Laser Hair, Inc. v. Perfect Body Image, LLC, 167 A D 3d 718 (2d Dept. 2018) – “The defendants assert that a sworn statement given by one of the proprietors of the plaintiffs to the police constituted documentary evidence within the meaning of CPLR 3211(a)(1) and conclusively established that the causes of action to recover damages for conversion and trespass to chattel were time-barred, thus warranting dismissal of those causes of action.” However, “neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)’ [citations omitted]. Here, the statement submitted by the defendants does not constitute documentary evidence within the meaning of CPLR 3211(a)(1).”

LVNV Funding, LLC v. Sengillo, 60 Misc 3d 571 (Sup.Ct. Monroe Co. 2018)(Stander, J.) – Whether by pre-answer motion to dismiss, or a post-answer for summary judgment, based on a claim of lack of standing “the burden is initially on the defendant to establish plaintiff's lack of standing, ‘rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied.’”

Jaber v. Elayyan, 168 A D 3d 693 (2d Dept. 2019) – “Under CPLR 3211(a)(4), a court has ‘broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same. It is not necessary that the precise legal theories presented in the first action also be presented in the second action as long as the relief is the same or substantially the same’ [citations omitted]. Similarly, while a complete identity of parties is not a necessity for dismissal under CPLR 3211(a)(4) [citations omitted], there must at least be a ‘substantial’ identify of parties, ‘which generally is present when at least one plaintiff and one defendant is common in each action.’”

American Home Buyers Consulting Services, Inc. v. Feican, N.Y.L.J., 1535013968 (Sup.Ct. Richmond Co. 2018)(Ozzi, J.) – On a motion to dismiss under CPLR 3211(a)(4)

on grounds of another action pending, “generally, New York courts follow the first-in-time rule, meaning 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.’” To warrant dismissal on these grounds, “the two actions must be ‘sufficiently similar’ and the relief sought must be ‘the same or substantially the same’ [citation omitted]. It is not necessary that the precise legal theories presented in the first proceeding be presented in the second proceeding [citation omitted]. The critical element is that both suits must ‘arise out of the same subject matter or series of alleged wrongs.’”

Garcia v. Polsky, Shouldice & Rosen, P.C., 161 A D 3d 828 (2d Dept. 2018) – Back in the mid-1970’s, the Court of Appeals decided two important – and perhaps contradictory – cases setting out the standards for the use of extrinsic material submitted on motions to dismiss for failure to state a cause of action under CPLR 3211(a)(7). In *Rovello v. Orofino Realty Co., Inc.*, 40 N Y 2d 633 (1976), the Court, split 5-2, held that, when a motion to dismiss is not converted into a summary judgment motion pursuant to CPLR 3211(c), “affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action. It seems that after the amendment of 1973 [adding CPLR 3211(c), and the opportunity to convert a motion to dismiss into a summary judgment motion], affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits *establish conclusively* that plaintiff has no cause of action” [emphasis added]. The dissenters characterized the majority as having “ruled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (sub. (a), par. 7), the trial court may not dismiss as long as the complaint and the plaintiff’s affidavit, if there be any, state all the elements of a cause of action, and that a defendant’s affidavit, clearly showing the absence of one of these essential elements, is of no avail. In essence, the majority has abrogated the statute and has revitalized the common law demurrer.” The following year, in *Guggenheimer v. Ginzburg*, 43 N Y 2d 268 (1977), the Court – now with both *Rovello* dissenters joining a unanimous decision – stated the test somewhat differently: “Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail [citations, which did *not* include *Rovello*, omitted]. When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that *no significant dispute exists* regarding it, again dismissal should not eventuate [citations, which again did *not* include *Rovello*, omitted; emphasis added].” Since those decisions, there has been much confusion in the lower Courts as to the proper use to which extrinsic evidence may be put in an unconverted motion to dismiss. Then, some 30 years later, in *Nonnon v. City of New York*, 9 N Y 3d 825 (2007), in the course of a brief Memorandum Opinion, the Court stated that, “while affidavits may be

considered, if the motion has not been converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims [citation omitted; emphasis added]. By contrast, a motion for summary judgment, which seeks a determination that there are no material issues of fact for trial, assumes a complete evidentiary record.” The Court cited *Rovello* for this proposition, but did not cite *Guggenheimer*. More recently, in *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N Y 3d 342 (2013), the Court of Appeals held that “Bally has moved to dismiss under CPLR 3211(a)(7), which limits us to an examination of the pleadings to determine whether they state a cause of action. Further, we must accept facts alleged as true and interpret them in the light most favorable to plaintiff; and, as Supreme Court observed, plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face [citing *Rovello*]. For, “this matter comes to us on a motion to dismiss, not a motion for summary judgment. As a result, the case is not currently in a posture to be resolved as a matter of law on the basis of the parties’ affidavits, and Miglino has at least pleaded a viable cause of action at common law.” In *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A D 3d 128 (1st Dept. 2014), the issue that divided the Court was the impact of *Miglino*. The majority held that “what the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading ‘will seldom if ever warrant the relief the defendant seeks *unless such evidence establishes conclusively that plaintiff has no cause of action*’ [citations omitted; emphasis by the Court].” And, “the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim [citations omitted]. When documentary evidence is submitted by a defendant ‘the standard morphs from whether the plaintiff stated a cause of action to whether it has one’ [citations omitted]. As alleged here, if the defendant’s evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate.” The concurring Justice argued that “CPLR 3211(a)(1) may be invoked where it is claimed that ‘documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law’ [citation omitted]. On the other hand, as recently stated by the Court of Appeals, a motion under CPLR 3211(a)(7) ‘limits us to an examination of the pleadings to determine whether they state a cause of action’ [citing *Miglino*]. Therefore, contrary to what the majority holds today, the disclaimers and disclosures in the offering circulars and other documents [defendant] relies upon are of no moment for purposes of this CPLR 3211(a)(7) motion. As [plaintiff] aptly argued below, there was no basis for the motion court to consider documents outside the complaint at this stage of the proceeding.” In *Liberty Affordable Housing, Inc. v. Maple Court Apartments*, 125 A D 3d 85 (4th Dept. 2015), the Court, agreeing with the First Department majority in *Basis Yield*, concluded that *Miglino* does *not* bar “the consideration of any evidentiary submissions outside the four corners of the complaint.”

For, “given its unqualified citation to *Rovello*, *Miglino* is properly understood as a straightforward application of *Rovello*’s longstanding framework. *Miglino* was ‘not currently in a posture to be resolved as a matter of law on the basis of the parties’ affidavits’ [citation omitted] because the evidentiary submissions were insufficiently conclusive, not because they were categorically inadmissible in the context of a CPLR 3211(a)(7) motion.” And, in *Clarke v. Laidlaw Transit, Inc.*, 125 A D 3d 920 (2d Dept. 2015), the Second Department also assessed the impact of *Miglino*. “The plaintiff ‘may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face’ [citations omitted]. The plaintiff may stand on his or her pleading alone to state all of the necessary elements of a cognizable cause of action, and, unless the motion to dismiss is converted by the court to a motion for summary judgment, the plaintiff will not be penalized because he or she has not made an evidentiary showing in support of the complaint [citation omitted]. In light of these standards, it is clear that the defendant’s motion should have been denied. The complaint stated a cause of action, and the defendant’s submissions did not ‘establish conclusively that the plaintiff has no cause of action.’” Here, in *Garcia*, the Court holds that, in opposition to a motion to dismiss pursuant to CPLR 3211(a)(7), “‘a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims’ [citations omitted]. ‘Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate’ [citations, including to *Guggenheimer*, omitted]. ‘Whether the complaint will later survive a motion for summary judgment or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of the pre-discovery CPLR 3211 motion to dismiss.’”

McCarthy v. Shah, 162 A D 3d 1727 (4th Dept. 2018) – “‘Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate’ [citations omitted]. Above all, the issue ‘whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.’”

Wells Fargo Bank, N.A. v. Cajas, 159 A D 3d 977 (2d Dept. 2018) – “The Supreme Court erred in *sua sponte* raising and considering the defense of lack of personal jurisdiction [based on improper service of process]. The homeowner waived this defense by failing to move to dismiss the complaint on this ground within 60 days of serving his answer,”

pursuant to CPLR 3211(e). “As the homeowner waived this defense, it was error for the court, *sua sponte*, to direct dismissal of the complaint on this basis.”

TIMING OF MOTIONS FOR SUMMARY JUDGMENT

Jarama v. 902 Liberty Avenue Housing Development Fund Corp., 161 A D 3d 691 (1st Dept. 2018) –In *Brill v. City of New York*, 2 N Y 3d 648 (2004), the Court of Appeals held that the Legislature meant what it said when it amended CPLR 3212(a) to provide a time limit for summary judgment motions. That statute provides that, unless the Court sets a different date (which may not be earlier than 30 days after Note of Issue is filed), the last date to make a dispositive motion is 120 days after filing of the Note of Issue, unless the Court extends the time “for good cause shown.” In *Brill*, the Court of Appeals held: “We conclude that ‘good cause’ in CPLR 3212(a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, non-prejudicial filings, however tardy.” Soon after, in *Miceli v. State Farm Mutual Automobile Insurance Company*, 3 N Y 3d 725 (2004) the Court re-affirmed its holding. “As we made clear in *Brill*, and underscore here, statutory time frames – like court-ordered time frames [citation omitted] – are not options, they are requirements, to be taken seriously by the parties.” A prior year’s “Update” reported on *Kershaw v. Hospital for Special Surgery*, 114 A D 3d 75 (1st Dept. 2013), in which the narrowly-divided Appellate Division disagreed about the application of the rule of *Brill* to a medical malpractice case in which plaintiff had sued two different hospitals that treated him at different times, claiming that both failed to advise and perform necessary surgery. One timely moved for summary judgment; the other belatedly “cross-moved” for summary judgment. The majority affirmed Supreme Court’s denial of the untimely “cross-motion,” rejecting the argument that “there is an exception to *Brill* for cases where a late motion or cross motion is essentially duplicative of a timely motion.” For, “the Court of Appeals intended no such exception, and to the extent this Court has created one, it did so, whether knowingly or unwittingly, by relying on precedents which predate *Brill* and which, if followed, will continue to perpetuate a culture of delay.” Thus, “it is true that since *Brill* was decided, this Court has held, on many occasions, that an untimely but correctly labeled cross motion may be considered at least as to the issues that are the same in both it and the motion, without needing to show good cause [citations omitted]. Some decisions also reason that because CPLR 3212(b) gives the court the power to search the record and grant summary judgment to any party without the necessity of a cross motion, the court may address an untimely cross motion at least as to the causes of action or issues that are the subject of the timely motion.” But in *Kershaw*, the “cross-motion,” in addition to being untimely, “is not a true cross motion.” A cross-motion, made pursuant to CPLR 2215, is “a motion by any party against the party who made the original motion, made returnable at the same time as the original motion.” But this “cross-motion” was directed at the complaint, as opposed to any cross claims, and was not made returnable the same day as the original motion. So,

“it was not a cross motion as defined in CPLR 2215.” And, “allowing movants to file untimely, mislabeled ‘cross motions’ without good cause shown for the delay, affords them an unfair and improper advantage. Were the motions properly labeled they would not be judicially considered without an explanation for the delay.” Finally, “we are concerned that the respect for court orders and statutory mandates and the authoritative voice of the Court of Appeals are undermined each time an untimely motion is considered simply by labeling it a ‘cross motion’ notwithstanding the absence of a reasonable explanation for its untimeliness.” The *Kershaw* dissenters agreed with the majority that the “cross-motion” was mislabeled a cross-motion, and was untimely pursuant to CPLR 2215. “But to reject the motion on that ground, under the facts herein, ignores the adverse consequences of imposing an overly restrictive rule, specifically, consequences that are especially adverse to the courts.” For, no prejudice was shown, and “the majority thereby dispenses with the salutary aspects of summary disposition acknowledged in *Brill* for no apparent purpose.” By contrast, that year’s “Update” also reported on *Derrick v. North Star Orthopedics, PLLC*, 121 A D 3d 741 (2d Dept. 2014), in which one defendant timely moved for summary judgment, and another defendant untimely “cross-moved” for summary judgment. The latter “was improperly designated a cross motion [citation omitted] and was, in fact, an untimely motion for summary judgment [citation omitted]. However, ‘an untimely motion or cross motion for summary judgment may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds.’” Later, in *Ezzard v. One East River Place Realty Company, LLC*, 129 A D 3d 159 (1st Dept. 2015), the First Department, despite its earlier holding in *Kershaw*, held that “although untimely, NYE&E’s motion should have been considered insofar as it presents nearly identical issues and proof as those raised by the owner and Solow in their joint summary judgment motion.” And in *Reutzel v. Hunter Yes, Inc.*, 135 A D 3d 1123 (3d Dept. 2016), the Third Department entered the fray, and held that, “a cross motion for summary judgment made after the expiration of the deadline for making dispositive motions may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion.” Last year’s “Update” reported on *Rubino v. 330 Madison Company, LLC*, 150 A D 3d 603 (1st Dept. 2017), in which the First Department, echoing *Kershaw*, held that “the court should have denied as untimely Waldorf’s cross motion for summary judgment dismissing appellants’ contractual indemnification claim against it without considering the merits, since the motion was filed after the applicable deadline and Waldorf failed to show good cause for the delay [citation omitted]. Waldorf’s purported cross motion against appellants, nonmoving parties, was not a true cross motion [citing *Kershaw*], and did not merely raise issues ‘nearly identical’ to those raised by plaintiffs and Mazzeo in their timely motions.” Here, in *Jarama*, the First Department swings back toward *Ezzard*, holding that “this Court may consider the merits of defendants’ untimely cross motion for summary judgment dismissing the complaint to the extent it sought dismissal of the

Labor Law §240(1) claim, because it is based on the same issues raised in plaintiff's motion [citation omitted]. However, the remainder of the motion, seeking dismissal of Labor Law §§241(6) and 200 and common-law negligence claims cannot be considered because it does not address issues nearly identical to those raised in the timely motion and defendants did not demonstrate good cause for the delay.”

Sikorjak v. City of New York, 168 A D 3d 778 (2d Dept. 2019) – “We agree with the Supreme Court’s determination to consider the motion of the City defendants and Conti, *inter alia*, for summary judgment dismissing the complaint insofar as asserted against them. An untimely motion or cross-motion for summary judgment may be considered by the court where a timely motion was made on nearly identical grounds.”

Cintron v. 1020 Third Avenue Associates, 61 Misc 3d 577 (Sup.Ct. Bronx Co. 2018) (Higgitt, J.) – Defendants seek an extension of the time within which to move for summary judgment, arguing, in counsel’s affirmation, that “plaintiff did not serve a 3101(d) expert exchange until on or about November 9, 2016, just days prior to the note of issue filing. The defendants have retained their own expert to respond in this regard, said expert now being necessary to any successful summary judgment motion,” and that “their expert could not prepare an affidavit in time to make a timely summary judgment motion.” The Court finds the excuse “unpersuasive,” and denies the requested extension. “First, as the party seeking summary judgment, defendants would have the burden of making a *prima facie* showing of entitlement to judgment as a matter of law [citation omitted]. To discharge that burden, defendants would have to make an affirmative showing of their entitlement to summary judgment with evidence in admissible form [citation omitted]; neither pointing to potential gaps in plaintiff’s evidence nor asserting that plaintiff would not be able to make out a *prima facie* case at trial is sufficient to discharge the summary judgment burden [citations omitted]. Therefore, defendants had to be prepared to muster their summary judgment proof (expert and otherwise) before the CPLR 3212(a) deadline regardless of whether plaintiff served his CPLR 3101(d)(1)(i) statement at or near the time of the filing of the note of issue.” And, “defendants’ assertion that their expert could not prepare an affidavit in time for them to make a timely summary judgment motion is supported only by their attorney’s affirmation. No affidavit from defendants’ expert was submitted explaining why he could not prepare an affidavit in time for defendants to make a timely summary judgment motion.”

Appleyard v. Tigges, 171 A D 3d 534 (1st Dept. 2019) – This action was initially assigned to a Justice whose rules permitted service of a summary judgment motion within 120 days of filing a note of issue. Under that Justice’s rules, the last day for such a motion would be April 17, 2017. But, on December 31, 2016, that Justice retired from the Bench, and the action was reassigned to a Justice whose rules required a summary judgment motion to be made within 60 days of the filing of a note of issue, which made that last date February 14, 2017. Defendants’ counsel avers that he did not learn about

the transfer until February 10, 2017. Defendant moved for summary judgment “and, ‘if necessary’ to extend the deadline,” on March 29, 2017. The Appellate Division affirms the rejection of that motion, Supreme Court having noted that “defendants were aware of the reassignment of the matter to the motion court prior to the February 14 deadline.” Defendants “waited 47 days after the expiration of Justice Guzman’s timeliness rule and 43 days after the expiration of her statutorily authorized 60-day filing period to seek leave of court for additional time to file their motions, rendering their motions untimely.”

Reeps v. BMW of North America, LLC, 160 A D 3d 603 (1st Dept. 2018) – “Prior court orders and stipulations between the parties show that the parties, with the court’s consent, charted a procedural course that deviated from the path established by the CPLR and allowed for defendants’ filing of this round of summary judgment motions more than 120 days after the filing of the note of issue [citation omitted]. Thus, the motions were timely, and we remand the matter to the motion court for a full consideration of their merits.”

Farias-Alvarez v. Interim Healthcare of Greater New York, 166 A D 3d 945 (2d Dept. 2018) – On the eve of trial, plaintiff moved, *in limine*, based on collateral estoppel, that the individual defendant’s guilty plea in a related criminal case “conclusively established as a matter of law that her negligence caused Alejandra’s injuries.” Affirming Supreme Court, the Appellate Division agreed “with the defendants’ contention that the plaintiff’s pretrial application, characterized as one for *in limine* relief, was the functional equivalent of an untimely motion for summary judgment on the issue of liability [citations omitted]. ‘A motion *in limine* is an inappropriate substitute for a motion for summary judgment’ [citation omitted]. Further, ‘in the absence of any showing of “good cause” for the late filing of such a motion [citation omitted], the Supreme Court should have denied the motion.’”

157 Milton LLC v. Sheydvesser, N.Y.L.J., 1535091580 (Sup.Ct. Kings Co. 2018)(Rivera, J.) – “The moment of joinder of issue continues to be the earliest time for the making of a motion for summary judgment on the claim involved. If the motion is made against the plaintiff’s cause of action, the service of the defendant’s answer marks the joinder of issue; if its subject is a counterclaim, the service of the plaintiff’s reply is the moment of joinder.” And, “the Supreme Court is powerless to grant summary judgment prior to joinder of issue.” Moreover, “a motion for summary judgment shall be supported by a copy of the pleadings [citation omitted]. ‘The pleadings’ means ‘a complete set of the pleadings.’” Here, plaintiff’s motion papers “are silent on whether any of the defendants have answered the complaint, and no copy of an answer is attached. Thus, either the motion is premature, or plaintiff has failed to supply “a copy of the pleadings.” In either event, “the motion should be denied on this basis alone.”

Cremona Food Company, LLC v. Amella, 164 A D 3d 1300 (2d Dept. 2018) – “A motion for summary judgment may only be made after joinder of issue [citation omitted]. Where, as here, it is conceded that the defendant had not served an answer before moving for summary judgment, issue was not joined and the defendant was precluded from obtaining summary judgment [citations omitted]. The requirement that a motion for summary judgment may not be made before issue is joined [citation omitted] ‘is strictly adhered to.’”

SUMMARY JUDGMENT

Philogene v. Duckett, 163 A D 3d 1015 (2d Dept. 2018) – “On a motion for summary judgment, the court is limited to the issues or defenses that are the subject of the motion before the court’ [citations omitted]. Here, since the defendant moved for summary judgment only on his counterclaim for the judicial dissolution of Verity, the Supreme Court should not have searched the record and awarded summary judgment to the defendant dismissing the complaint.”

Rodriguez v. Coca-Cola Refreshments USA, N.Y.L.J., 1539246650 (Sup.Ct. Queens Co. 2018)(Elliot, J.) – Last year’s “Update” reported on the Court of Appeals decision in *Rodriguez v. City of New York*, 31 N Y 3d 312 (2018). A previous year’s “Update” had reported on the Appellate Division decision in that action [142 A D 3d 778 (1st Dept. 2016)]. As the Appellate Division there put it, “in this case, we are revisiting a vexing issue regarding comparative fault: whether a plaintiff seeking summary judgment on the issue of liability must establish, as a matter of law, that he or she is free from comparative fault. This issue has spawned conflicting decisions between the judicial departments, as well as inconsistent decisions by different panels within this Department.” The narrowly-divided Appellate Division concluded that “the original approach adopted by this Department, as well as that followed in the Second Department, which requires a plaintiff to make a *prima facie* showing of freedom from comparative fault in order to obtain summary judgment on the issue of liability, is the correct one.” The dissenters argued that plaintiff’s comparative negligence, unless enough to exonerate defendant entirely, is irrelevant on this motion. For, “the comparative negligence doctrine does not bear upon *whether* a defendant is liable; rather, it bears upon the extent of the defendant’s liability, where both the defendant and the plaintiff engaged in culpable conduct resulting in the injury” [emphasis by the Court]. Thus, “where a defendant fails to raise issues of fact as to his or her own negligence, but succeeds in raising issues of fact as to the plaintiff’s comparative negligence, partial summary judgment on liability with respect to *defendant’s* negligence is warranted, because the defendant will be liable to the extent his or her misconduct proximately caused the injury” [emphasis by the Court]. The Court of Appeals, narrowly-divided, has now resolved the split among the Departments and within the First Department, reversing the Appellate Division here, and holding that plaintiffs do *not* bear the burden of establishing the absence of their own comparative negligence to

obtain partial summary judgment as to defendant's liability. Such a burden, the majority rules, "is inconsistent with the plain language of CPLR 1412," because "it flips the burden, requiring the plaintiff, instead of the defendant, to prove an absence of comparative fault in order to make out a *prima facie* case on the issue of defendant's liability." And, "defendant's approach would have us consider comparative fault a defense. But, comparative negligence is *not* a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's *prima facie* cause of action for negligence, and as CPLR 1411 plainly states, is not a bar to plaintiff's recovery, but rather a diminishment of the amount of damages [emphasis by the Court]." The dissent argued that "determinations of degrees of fault should be made as a whole, and assessing one party's fault with a preconceived idea of the other party's liability is inherently unfair; or, as the Appellate Division characterized it, a defendant would 'enter the batter's box with two strikes already called.'" For, "the issues of defendant's liability and plaintiff's comparative fault are intertwined. A jury cannot fairly and properly assess plaintiff's comparative fault without considering defendant's actions." Here, in *Rodriguez v. Coca Cola*, the Court, back on June 25, 2015, had denied plaintiff's motion for partial summary judgment, based on the law as it then existed prior to the Court of Appeals decision in *Rodriguez v. City of New York*. Plaintiff's motion to now renew that prior motion is denied. "The *Rodriguez* Court did not, by its holding, require the reexamination of years-old trial court orders which, at the time, followed precedent regarding a plaintiff's burden on a summary judgment motion on the issue of liability [citation omitted]. Indeed, in interpreting *Rodriguez*, the Appellate Division, Second Department, has said that 'a plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case' [citations omitted; emphasis by the Court]. The court finds that judicial economy requires that those issues already resolved years ago remain that way."

Derix v. The Port Authority of New York & New Jersey, 162 A D 3d 522 (1st Dept. 2018) – "Plaintiff was not required to demonstrate his own freedom from comparative negligence to be entitled to summary judgment as to defendant's liability [citing *Rodriguez*, reported on directly above]. For this reason, we also reject defendant's argument that the chain on which plaintiff tripped was open and obvious, since that issue too is relevant to comparative fault and does not preclude summary resolution of the issue of defendant's liability."

Russo v. Dement, 61 Misc 3d 855 (Sup.Ct. Suffolk Co. 2018)(Quinlan, J.) – "Post-*Rodriguez*, the Second Department has recognized that where a defendant fails to submit either his/her own affidavit, or that of another person with personal knowledge, in opposition to a motion for summary judgment on the issue of liability, the defendant has failed to raise a triable issue of fact, and a complete determination of the liability of both parties is appropriate [citation omitted]. It has also interpreted *Rodriguez* to mean that if plaintiff's proof has established both plaintiff's freedom from negligence and defendant's

negligence in causing the accident, a complete determination of liability is warranted [citation omitted]. Where there is no issue of plaintiff's conduct producing the injury, the only issues at a 'damages trial' are those related to plaintiff's disability and other items of damages related thereto."

Castillo v. Slupecki, 63 Misc 3d 325 (Sup.Ct. Bronx Co. 2019)(Higgitt, J.) – "In January 2018, plaintiff moved for summary judgment on the issue of 'liability.' At the time plaintiff made that motion, a plaintiff seeking such relief in the First Department was required to establish that the defendant was negligent, that the negligence was a proximate cause of the plaintiff's injuries, and that the plaintiff was free from comparative fault." But, "after the motion papers, the opposition, and a reply were submitted to the court, the Court of Appeals handed down its decision in *Rodriguez v. City of New York*" discussed above. Then, "in October 2018, this court decided plaintiff's summary judgment motion, finding that plaintiff was entitled to summary judgment on the issue of defendant's liability under the *Rodriguez* framework; plaintiff made a *prima facie* showing that defendant was negligent and that such negligence was a proximate cause of plaintiff's injuries, and defendant failed to raise a triable issue of fact as to either element." However, "the court declined to afford plaintiff relief with respect to defendant's affirmative defenses relating to plaintiff's alleged comparative fault, noting 'that plaintiff did not seek (and the court has not considered) dismissal of defendant's affirmative defenses of comparative fault.'" Now, upon reargument, the Court adheres to that determination. "In light of *Rodriguez*, this court's view is that a plaintiff who desires summary judgment dismissing a defendant's affirmative defense (or defenses) relating to the plaintiff's alleged comparative fault should specifically request such relief." For, "a plaintiff's motion for summary judgment on the issue of a defendant's liability alone does not carry with it a request for summary judgment dismissing the affirmative defense of comparative fault. Requiring a plaintiff to specifically request summary judgment dismissing a comparative-fault affirmative defense recognizes that a plaintiff's alleged comparative fault relates to damages, not a defendant's liability [citation omitted], and is consistent with the principle that a court is generally prohibited from granting relief that a movant has not expressly requested."

Lewis v. Cabrera, N.Y.L.J., 1543469673 (Sup.Ct. N.Y.Co. 2018)(Silvera, J.) – "It is well settled that the right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of the two vehicles."

Luna v. CEC Entertainment, Inc., 159 A D 3d 445 (1st Dept. 2018) – "Plaintiff's affidavit in opposition [to defendant's motion for summary judgment], wherein she claimed that she tried to reach for a handrail when she fell, raised only feigned issues of fact, as it directly contradicted, and appears to have been tailored to avoid the consequence of, her

earlier [deposition] testimony” that she was “using both hands to carry her daughter down the steps when she fell, without any indication that she reached for a handrail.”

Matadin v. Bank of America Corporation, 163 A D 3d 799 (2d Dept. 2018) – In this slip and fall case, plaintiff testified at her deposition that “she was unable to identify the cause of her fall.” In this subsequent motion by defendant for summary judgment, the Court concluded that “the defendant established its *prima facie* entitlement to judgment as a matter of law through the deposition testimony of plaintiff.” However, “in opposition to the defendant’s *prima facie* showing on this ground, the plaintiff raised a triable issue of fact through her affidavit, in which she averred that when she stood up after falling, she put her hands on the back of her coat to straighten it and felt that the coat was wet. This, coupled with the fact that it had been snowing, led her to believe that she slipped on snow that had been tracked into the bank.” The Court concluded that there were triable issues of fact, and denied summary judgment.

Mogul v. Baptiste, 161 A D 3d 847 (2d Dept. 2018) – “Any party may move for summary judgment in any action, after issue has been joined’ [citation omitted]. A grant of summary judgment is not premature merely because discovery has not been completed [citations omitted]. In order for a motion for summary judgment to be denied as premature, the opposing party must ‘provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party’ [citations omitted]. Here, since the defendant did not oppose the plaintiff’s motion for summary judgment, she failed to meet her burden of demonstrating that it should be denied as premature.”

SUMMARY JUDGMENT IN LIEU OF COMPLAINT

Henry Quentzel Plumbing Supply Co. v. Riggs Plumbing & Heating at 58th Inc., N.Y.L.J., 155566141 (Sup.Ct. N.Y.Co. 2019)(Nock, J.) – CPLR 3213 provides for the mechanism of a motion for summary judgment in lieu of complaint when the action is based on “an instrument for the payment of money only.” The “‘prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money – an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time.’” Here, an invoice, referencing a statement of account, “does not qualify as ‘an instrument for the payment of money only.’”

Whiteman Osterman & Hanna, LLP v. Preserve Associates LLC, 63 Misc 3d 585 (Sup.Ct. Albany Co. 2019)(Platkin, J.) – “Defendants cite no authority affirmatively establishing the unavailability of CPLR 3213 treatment” to an obligation of a client to a law firm for past-due amount owed, “where, as here, the debt has been reduced to an unconditional promise to pay a sum certain” by means of a promissory note.

CPLR 3211(C) CONVERSION

Corle v. Allstate Insurance Company, 162 A D 3d 1489 (4th Dept. 2018) – CPLR 3211(c) provides that “whether or not issue has been joined, the court, after adequate notice to the parties, may treat the [CPLR 3211] motion [to dismiss] as a motion for summary judgment.” There are, however, Court-made exceptions to the notice requirement. The notice may be dispensed with when the case presents only legal issues fully appreciated by both sides, both parties ask the Court to treat the motion as one for summary judgment, or it is evident that the parties have laid bare their proofs on the motion. Here, “although the court was authorized to treat the motion [to dismiss] as one for summary judgment upon ‘adequate notice to the parties’ [citation omitted], no such notice was given. Further, recognized exceptions to the notice requirement are inapplicable here inasmuch as neither party made a specific request for summary judgment, and the record does not establish that they deliberately charted a summary judgment course.”

DEFAULTS

OBTAINING A DEFAULT JUDGMENT

3021 Briggs Realty LLC v. Reynoso, N.Y.L.J., 1535090617 (Civ.Ct. Bronx Co. 2018) (Rivera, J.) – A default judgment against an individual may not be obtained without an “affidavit of military investigation,” demonstrating that plaintiff has sufficiently investigated whether defendant is a currently active member of the military. Here, despite plaintiff’s attorney’s contention that it is “the practice in the courts” to allow the affidavit to be filed after the Court renders the judgment, the Court holds that, in accordance with the language of the Service Members Civil Relief Act [50 USC §3901 *et seq.*], “before entering judgment for the plaintiff” the Court shall “require the plaintiff to file” the affidavit.

Tan v. AB Capstone Development, LLC, 163 A D 3d 937 (2d Dept. 2018) – “Contrary to the defendants’ argument, the plaintiff did not need to demonstrate her compliance with the additional notice requirement of CPLR 3215(g)(4). ‘By its express terms, the notice requirement is limited to situations where a default judgment is sought against a “domestic or authorized foreign corporation” which has been served pursuant to Business Corporation Law §306(b), and does not pertain to a limited liability company.’”

Crowdplay US Inc. v. Midnight Gaming Corp., N.Y.L.J., 1550135613 (Sup.Ct. N.Y.Co. 2019)(Cohen, J.) – “A default judgment can be granted despite a binding arbitration provision.”

Andrade v. Perez, 159 A D 3d 593 (1st Dept. 2018) – A defendant who has defaulted is “not entitled to any further discovery, including discovery in preparation for an inquest.”

Newhouse v. Davis, 171 A D 3d 480 (1st Dept. 2019) – “Defendant, having had his answer stricken, was limited to an inquest at which he could only contest the extent of plaintiff’s damages [citation omitted]. Thus, the inquest court improperly reopened the issue of liability and made a determination with respect thereto.”

Naber Electric v. Triton Structural Concrete, Inc., 160 A D 3d 507 (1st Dept. 2018) – Supreme Court denied plaintiffs’ motion to enter a default judgment, and granted defendants’ cross-motion to compel acceptance of its late answer. The Appellate Division affirms. “Although the affidavit of merit provided by defendants’ executive lacked any detail concerning their potential defenses to plaintiffs’ claims for payment for work performed on three subcontracts, an affidavit of merit is ‘not essential to the relief sought’ by defendants before entry of a default order or judgment [citations omitted]. Accordingly, given the shortness of the delay and absence of evidence of willfulness or prejudice to plaintiffs, as well as the State’s policy of resolving disputes on the merits, defendants were properly granted an opportunity to defend plaintiffs’ claims on the merits.”

HSBC Bank USA, N.A. v. Reynolds, N.Y.L.J., 1533021122 (Sup.Ct. Suffolk Co. 2018) (Whalen, J.) – In order to avoid dismissal for failure to take proceedings for the entry of judgment within one year after the default, pursuant to CPLR 3215(c), “plaintiff need not actually obtain nor specifically seek the default judgment within one year [citations omitted]. As long as ‘proceedings’ are being taken that manifest ‘an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal.” Here, plaintiff took proceedings by moving “for an order of reference by mailing same to the office of defendant’s counsel,” a “mere” two months after the expiration of the one year time-frame. But other activity during that period persuaded the Court that plaintiff had a “reasonable excuse” for the two-month delay. Accordingly, plaintiff’s motion for a default judgment was granted.

Sunrise Acupuncture PC v. Travelers Home & Marine Insurance, N.Y.L.J., 1555977247 (Civ.Ct. Kings Co. 2019)(Melendez, J.) – “The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory inasmuch as courts “shall” dismiss claims [citation omitted] for which default judgment are not sought within the requisite one year period, as those claims are then deemed abandoned’ [citation omitted]. Moreover, CPLR 3215(c) expressly provides that a court may dismiss a complaint as abandoned ‘upon its own initiative or on motion.’ The statute further provides, however, that the failure to timely seek a default may be excused if ‘sufficient cause is shown why the complaint should not be dismissed.’” Here, “plaintiff’s claim that the court was required to give notice prior to the CPLR 3215(c) dismissal” is “erroneous,” as the statute specifically provides “that a court may dismiss an action as abandoned ‘upon its own initiative or on motion.’” And, “this case was properly dismissed, *sua sponte*, pursuant to CPLR 3215(c) as the case lay dormant in the court system without joinder of issue and without a default

judgment against Defendant for over three years. Furthermore, this application [to vacate the dismissal] must be denied as Plaintiff does not submit an affidavit of merit, and the excuse of law office failure is vague, conclusory, and unsubstantiated.”

Ibrahim v. Nablus Sweets Corp., 161 A D 3d 961 (2d Dept. 2018) – Here, the Court rejects plaintiff’s argument of a reasonable excuse for his failure to take proceedings for the entry of judgment within one year after the default. “The excuse was contained in a brief paragraph in the supporting affirmation of an associate [at plaintiff’s counsel] who stated, in sum and substance, that the attorney who commenced the action left the employ of the law firm of record, and the plaintiff’s file was only discovered in May 2016 when the firm was relocating its offices. There was no affirmation from a principal of the law firm, and no indication in the associate’s affirmation that he had any personal knowledge of the purported law office failure or that he was even employed by the firm at the time it allegedly occurred. The one-year period to move for the entry of a default judgment lapsed in August 2015, and there is no indication that the attorney had left prior thereto.”

Capital One Bank (USA) v. Eastman, N.Y.L.J., 1552463774 (Civ.Ct. Kings Co. 2019) (Roper, J.) – “Law office failure may be viable grounds for reasonable excuse” for failure to take a default judgment within a year of the default, pursuant to CPLR 3215(c), but “the bar is high.” Plaintiff must adduce “detailed articulable facts.” Here, plaintiff’s “reasonable excuse to satisfy the high bar for the ‘sufficient cause’ exception in this strict mandatorily applied statute of CPLR 3215(c) is encapsulated merely as, ‘Plaintiff’s counsel inadvertently allowed the one-year period to elapse.’” This, ruled the Court, was not adequate, the Court labeling it “merely an ‘oops’ defense.”

Colonial Funding Network v. On Demand Delivery, N.Y.L.J., 1537517915 (Sup.Ct. N.Y.Co. 2018)(Cohen, J.) – Plaintiff’s excuse for failure to take proceedings for the entry of a default judgment within one year of the defendant’s May 2016 default, in violation of CPLR 3215(c), was “that there were personnel changes in its internal legal department, and a change of external counsel, between July 2017 and February 2018. Plaintiff’s general counsel (who was hired at the end of June 2017) asserts that it was not until the completion of an internal audit of the legal department at an unspecified date that Plaintiff concluded that a motion for default judgment had not been timely filed.” The Court “does not find the excuse offered by Plaintiff – basically, a failure of communication within its internal legal department and with external counsel – to be persuasive.” For, “a failure of a party of its counsel to keep track of the case, without extenuating circumstances more compelling than those present here, does not constitute sufficient cause.”

VACATING A DEFAULT

Vaca v. Village View Housing Corporation, 170 A D 3d 619 (1st Dept. 2019) – Plaintiff Fowler “was not entitled to relief under CPLR 5015(a)(1) because the September 15, 2015 order granting Whirlpool’s motion to dismiss was not entered on default. Fowler’s counsel appeared in court on the return date and participated in oral argument on the motion, and nothing in the court’s decision indicated that it was granting relief on default. Therefore, CPLR 5015(a)(1) is inapplicable, and Fowler’s only remedy was to have timely appealed or sought reargument, neither of which it did.”

Lull v. Van Tassell, 171 A D 3d 1155 (2d Dept. 2019) – “A defendant moving to vacate a default judgment on the ground of lack of personal jurisdiction is not required to demonstrate a reasonable excuse for the default and a potentially meritorious defense [citations omitted]. ‘The failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void.’”

Vogt v. Eberhardt, 163 A D 3d 1514 (4th Dept. 2018) – “We reject plaintiff’s contention that defendants failed to proffer a reasonable excuse for their default. Defendants submitted an affidavit of the claims specialist for Nationwide who was responsible for managing their defense, which established that the claims specialist had received copies of the summons and complaint in the instant action and determined that defendants were entitled to a defense and indemnification. Although she communicated that information to the law firm that was defending [a related co-defendant] in the first action, the claims specialist inadvertently neglected to assign counsel to represent defendants in the instant action. We conclude that Nationwide’s inadvertent failure to assign counsel to defendants is a reasonable excuse for their default.”

Russo v. Dement, 61 Misc 3d 855 (Sup.Ct. Suffolk Co. 2018)(Quinlan, J.) – “A motion to renew and/or reargue is an improper vehicle to challenge a judgment or order granted upon default.”

Benchmark Farm, Inc. v. Red Horse Farm, LLC, 162 A D 3d 836 (2d Dept. 2018) – Pursuant to CPLR 317, “a defendant who has been served with a summons other than by personal delivery may be allowed to defend the action within one year after he or she obtains knowledge of entry of the judgment upon a finding of the court that the defendant did not personally receive notice of the summons in time to defend and has a potentially meritorious defense.” Here, defendant was served by service upon the Secretary of State, but did not learn about the action in time to defend because an old address was on file with the Secretary of State. “Although the defendant did not explain why it failed to update its address with the Secretary of State, ‘there is no necessity for a defendant moving pursuant to CPLR 317 to show a “reasonable excuse” for its delay’ [citations omitted], and there is no basis in the record to conclude that the defendant deliberately attempted to avoid service, especially since the plaintiff had knowledge of the

defendant’s actual business address and had written to the defendant at that address regarding the dispute that gave rise to the plaintiff’s complaint.”

Berardi Stone Setting, Inc. v. Stonewall Contracting Corp., 170 A D 3d 934 (2d Dept. 2019) – “In order to obtain vacatur of a default judgment pursuant to CPLR 317, a defendant must establish that it moved to vacate the default within one year after it obtained knowledge of entry of the judgment, that it did not receive notice of the summons in time to defend, that it did not deliberately attempt to avoid service, and that it has a potentially meritorious defense.” And, “although the defendant did not explain why it failed to update its address with the Secretary of State, ‘there is no necessity for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for its delay’ [citations omitted]. Furthermore, there is no basis in the record to conclude that the defendant deliberately attempted to avoid service, especially since the plaintiff had actual knowledge of the defendant’s Westchester County business address at least two months before the summons and complaint were filed in this action and, thus, could have attempted to serve the defendant personally pursuant to CPLR 311.”

Dwyer Agency of Mahopac, LLC v. Dring Holding Corp., 164 A D 3d 1214 (2d Dept. 2018) – “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. In general, a defendant’s failure to keep a current address on file with the Secretary of State does not constitute a reasonable excuse [citations omitted]. However, there is no *per se* rule that a corporation served through the Secretary of State, and which failed to update its address on file there, cannot demonstrate an ‘excusable default.’ Rather, a court should consider, among other factors, the length of time for which the address had not been kept current.”

Ort v. Ort, 168 A D 3d 754 (2d Dept. 2019) – Supreme Court “providently exercised its discretion” when it conditioned the granting of plaintiff’s motion to vacate the order marking the matter off calendar for his default in appearing at a compliance conference upon his “appearing for an in-person deposition in this State on or before a certain date.”

CPLR 3216

Bank of America v. Guillaume, 169 A D 3d 625 (2d Dept. 2019) – “CPLR 3216 is the general statutory authority for neglect-to-prosecute dismissals’ [citation omitted]. Pursuant to CPLR 3216(b)(3), a court may dismiss an action for want of prosecution only after the court or the defendant has served the plaintiff with a written demand requiring the plaintiff ‘to resume prosecution of the action and to serve and file a note of issue within 90 days after receipt of the demand,’ and also stating that the failure to comply with the demand will serve as a basis for a motion to dismiss the action. Notably, the time within which the plaintiff must act runs from the receipt, and not the service of the demand.” Of course, “generally, “proof that an item was properly mailed gives rise to a

rebuttable presumption that the item was received by the addressee” [citations omitted]. ‘The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed.’” Here, defendant “failed to establish that the 90-day demand was sent by certified mail and received by the plaintiff or anyone acting on its behalf.” The sole “proof” was an affirmation of counsel, lacking personal knowledge. And, “even though the certified mail receipt bears a postmark date of July 28, 2017, there was no evidence that the 90-day demand was mailed under that certified mail receipt number.”

Marinello v. Marinello, 171 A D 3d 906 (2d Dept. 2019) – “A court cannot dismiss an action, *sua sponte*, pursuant to CPLR 3216(a) unless the conditions set forth in CPLR 3216(b) have been met, including the requirement that: ‘the court or party seeking such relief shall have served a written demand requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period *will serve as a basis for a motion* by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed’ [citations omitted; emphasis by the Court]. Moreover, the court should not have administratively dismissed the amended complaint without further notice to the parties.”

Deutsche Bank National Trust Company v. Bastelli, 164 A D 3d 748 (2d Dept. 2018) – “An action cannot be dismissed pursuant to CPLR 3216(a) ‘unless a written demand is served upon “the party against whom such relief is sought” in accordance with the statutory requirements, along with a statement that the “default by the party upon whom such notice is served in complying with such demand within said ninety day period *will serve as a basis for a motion* by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed”’ [citations omitted; emphasis by the Court]. While a conditional order of dismissal may have ‘the same effect as a valid 90-day notice pursuant to CPLR 3216’ [citations omitted], the conditional order here ‘was defective in that it failed to state that the plaintiff’s failure to comply with the notice “will serve as a basis *for a motion*” by the court to dismiss the action for failure to prosecute’ [citations omitted; emphasis by the Court]. Moreover, the conditional order failed to satisfy the notice requirement on the additional ground that there was ‘no indication that the plaintiff’s counsel was present at the status conference at which the court issued the conditional order of dismissal,’ nor was there ‘evidence that the order was ever properly served upon the plaintiff’ [citation omitted]. In the absence of proper notice, ‘the court was without power to dismiss the action for the plaintiff’s failure to comply with the conditional order of dismissal’ [citation omitted]. Lastly, the Supreme Court erred in administratively dismissing the action without further notice to the parties and without benefit of further judicial review.”

Nationwide Capital Group, Inc. v. Weiss, 170 A D 3d 870 (2d Dept. 2019) – “While a conditional order of dismissal may have ‘the same effect as a valid 90-day notice pursuant to CPLR 3216’ [citations omitted], the conditional order here was defective in that it did not state that the plaintiff’s failure to comply with the notice will serve as a basis for a motion by the court to dismiss the action for failure to prosecute.”

Element E, LLC v. Allyson Enterprises, Inc., 167 A D 3d 981 (2d Dept. 2018) – “Here, the court order which purported to serve as a 90-day notice pursuant to CPLR 3216 ‘was defective in that it failed to state that the plaintiff’s failure to comply with the notice ‘will serve as a basis for a motion’ by the court to dismiss the action for failure to prosecute’ [citations omitted]. Moreover, the record contains no evidence that the court ever made a motion to dismiss, or that there was an ‘order’ of the court dismissing the case.” It is “evident from this record that the case was ministerially dismissed without the court having made a motion, and ‘without the entry of any formal order by the court dismissing the matter’ [citation omitted]. The procedural device of dismissing an action for failure to prosecute is a legislative creation, not a part of a court’s inherent power [citation omitted], and, therefore, a court desiring to dismiss an action based upon the plaintiff’s failure to prosecute must follow the statutory preconditions under CPLR 3216.”

Spaulding v. AVR Realty Company, LLC, 60 Misc 3d 825 (Sup.Ct. Nassau Co. 2018) (Brandveen, J.) – “So what is the consequence today to a plaintiff in a case in the Second Department for failing to timely serve a note of issue after being directed to do so by a court order certifying the case as ready for trial? In essence – none, if a defendant failed to serve a proper 90-day demand in accordance with all of the requirements of CPLR 3216 [citations omitted]. The Second Department does not even consider plaintiff’s noncompliance in timely filing a note of issue a default until CPLR 3216 has been followed.” For, “the Second Department has declared that administratively purging these pre-note of issue cases, without the service of a 90-day written demand or an order pursuant to 22 NYCRR 202.27, ‘is not permitted,’ and should not be deemed a dismissal of the action.” Furthermore, under the 2015 amendment to CPLR 3216, “a certification order would have to set forth specific conduct constituting neglect by the plaintiff to qualify as a proper CPLR 3216 demand [citations omitted]. A defendant, of course, can still seek dismissal of the complaint pursuant to CPLR 3216 if the statutory preconditions are met, but if the court, on its own initiative, wishes to dismiss a pre-note of issue case, it must give the parties notice of its intention to do so.”

VOLUNTARY DISCONTINUANCE

Citibank, N.A. v. Bravo, 168 A D 3d 1161 (3d Dept. 2019) – After Supreme Court had granted an order of preclusion against plaintiff “because of plaintiff’s failure to comply with discovery requests,” plaintiff moved to voluntarily discontinue the action. The Appellate Division affirms the denial of that motion. “A party should not be permitted to discontinue an action for the purpose of circumventing an order of the court’ [citation

omitted]. Under the circumstances of this case, allowing plaintiff to discontinue the action without prejudice would permit it to circumvent the 2014 order [of preclusion], as well as our 2016 decision [affirming it], and avoid the consequences of its dilatory conduct.”

JUDGMENT BY CONFESSION

GTR Source, LLC v. FutureNet Group, Inc., 62 Misc 3d 794 (Sup.Ct. Orange Co. 2018) (Bartlett, J.) – In conjunction with the sale of receivables, defendant executed a confession of judgment which authorized entry of judgment “in the Federal District Court for the Southern District of New York, and in the Supreme Court of the State of New York for the counties of Richmond, Orange, Westchester, Kings, Erie and Ontario.” Defendant previously moved to vacate the judgment entered in Orange County “on the purported ground that the affidavit of judgment by confession did not comply with the requirements of CPLR 3218. Defendants contended (1) that CPLR 3218 requires an affidavit for out-of-state residents to designate a *single county* in which a judgment by confession may be filed; (2) that the single-county requirement is *jurisdictional*; (3) that inasmuch as the affidavit at issue here designated *six* New York counties wherein judgment by confession was authorized, it failed to comply with the requirements of CPLR 3218; and consequently, (4) that the judgment herein must, *upon motion by the judgment debtor*, be declared void and vacated” [emphasis by the Court]. The Court denied that motion, holding that: “(1) the alleged violation of CPLR 3218 may render a judgment by confession void and subject to vacatur upon motion by *a bona fide creditor*, but the debtor defendants lacked standing to contest the terms of their affidavit of judgment by confession unless entry of judgment pursuant thereto was so unfair as to violate defendants’ due process rights; and (2) due process does not *per se* require the designation by affidavit of a single county, or prohibit the designation by affidavit of as many as six counties” [emphasis by the Court]. Now, the receiver appointed by the Court in defendants’ home state of Michigan similarly moves to vacate the judgment by confession, re-arguing the “single county” argument, and adding the claim that, since plaintiff is a New Jersey corporation, and defendant a Michigan corporation, subject matter jurisdiction to enter the judgment was lacking pursuant to Business Corporation Law §1314. The Court rejects both arguments. First, as to the “single county” argument, the receiver stands in the shoes of the defendants, and the Court adheres to its conclusion that only a creditor has standing to attack the sufficiency of the affidavit of confession. And, as to BCL 1314, that provision “is concerned solely with ‘*an action or special proceeding* against a foreign corporation [citation omitted; emphasis by the Court]. However, ‘a judgment by confession may be entered, *without an action*, either for money due or to become due upon an affidavit executed by the defendant’ [citations omitted; emphasis by the Court].” Moreover, “Business Corporation Law §1314 (a) provides that ‘an action or special proceeding against a foreign corporation *may be maintained by a resident of this state for any cause of action*’ [emphasis by the Court]. Since plaintiff

GTR maintained a place of business in New York and was a resident of this state at all times encompassing the period wherein its judgment by confession was entered and enforced, its entry and enforcement of the judgment against the nonresident judgment debtor, if deemed ‘an action or special proceeding,’ was authorized by Business Corporation Law §1314(a).” Finally, BCL 1314(b) “provides that an action or special proceeding against a foreign corporation may be maintained by another foreign corporation ‘where the subject matter of the litigation is situated within this state.’” Here, the “subject matter” is the judgment entered in New York, “not the underlying transaction between plaintiff and defendants.”

BILL OF PARTICULARS

Schonbrun v. DeLuke, 160 A D 3d 1100 (3d Dept. 2018) – “It is well settled that a bill of particulars is intended to amplify the pleadings, limit the proof, and prevent surprise at trial, and it may not be used to allege a new theory not originally asserted in the complaint.” Thus, plaintiff was not entitled to discovery on a theory of recovery mentioned only in his bill of particulars.

Cedano v. New York Racing Association, Inc., 171 A D 3d 1126 (2d Dept. 2019) – “Motions to amend or supplement a bill of particulars are governed by the same standards as those applying to motions to amend pleadings’ [citations omitted]. CPLR 3025(b) provides that ‘any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.’ Here, the plaintiff failed to submit a proposed amended bill of particulars on his cross motion for leave to amend the bill of particulars, as required by CPLR 3025(b). Therefore, we agree with the Supreme Court’s determination to deny that cross motion.”

DISCLOSURE

LIMITATIONS ON DISCOVERY

Norddeutsche Landesbank Girozentrale v. Tilton, 165 A D 3d 447 (1st Dept. 2018) – “While a party seeking disclosure of tax returns must make a strong showing that the information contained in the returns is necessary and unavailable from other sources [citations omitted], the underlying financial information, when contained in documents other than tax returns, such as in Form K-1s, is typically discoverable if material and necessary.”

Garcia v. 2728 Broadway Housing Development Fund Corp., 171 A D 3d 491 (1st Dept. 2019) – “Under the unusual circumstances of this case, the court did not improvidently exercise its discretion in directing plaintiff to produce the 2014 and 2015 tax returns [citations omitted]. Article X of the certificate of incorporation and section 5.05(b)(i) of the proprietary lease restricting transfers to persons who do not meet the income eligibility restriction, and article V, §4 of the bylaws adopted the provisions of the certificate of incorporation. Thus, as the motion court found, ‘arguably,’ even if plaintiff was viewed as an initial shareholder, the transfer of her father’s interest from his estate to her may require a showing that she meets the income requirement. Accordingly, defendant made a sufficient showing, in the context of this discovery motion, that the tax returns are ‘necessary to the litigation.’”

Greenberg v. Spitzer, 63 Misc 3d 554 (Sup.Ct. Putnam Co. 2019)(Grossman, J.) – The parties dispute which of them, the demanding party or the producing party, should bear the cost of production of documents. “CPLR 3103(a) provides for protective orders ‘denying, limiting, conditioning or regulating the use of any disclosure device’ with such protective orders ‘designed to prevent unreasonable expense’ to any person. There is no specific statutory authority imposing a party’s production costs on the party making a discovery request.” Here, “at this stage of the proceedings, recognizing the enormity of the expense (which was not known at the time of the discovery demands or preliminary conference), the court will require defendant to reimburse plaintiff to the extent of one half of the production costs of \$265, 454.57, or the amount of \$132,727.29, subject to a further determination and award of disbursements at the conclusion of the action.”

EXPERT DISCLOSURE

Kanally v. DeMartino, 162 A D 3d 142 (3d Dept. 2018) – CPLR 3101(d)(1), enacted in 1985, “provides that each party ‘shall identify’ the people it intends to call as expert witnesses at trial and ‘shall disclose in reasonable detail the qualifications of each expert witness’ [citation omitted]. The use of the verb ‘shall’ indicates the mandatory nature of the obligations [citation omitted]. The statute creates an exception permitting, but not requiring, the omission of the expert’s name in medical, dental and podiatric malpractice cases.” The question of how much – if at all – to limit disclosure of the “qualifications” of an expert in a medical malpractice case in order to enforce plaintiff’s right to withhold the expert’s name, has bedeviled the Courts ever since. The earliest appellate attempt to deal with the issue was the Second Department’s decision in *Jasopersaud v. Rho*, 169 A D 2d 184 (2d Dept. 1991). There, the Court concluded that, in each case, there must be a balance drawn between the competing interests of full disclosure, and anonymity of medical experts in medical malpractice cases, and appeared to set down specific items that must be disclosed – such as the expert’s board certifications, state of licensure, medical school attended, areas of expertise, and institutions of internship, residency or fellowship. But, said the Court, such clearly identifying facts as “the dates associated

with the attainment of the foregoing qualifications” or present hospital affiliation need not be provided, “since we are of the view that under the circumstances, the disclosure of such information would tend to reveal the identity of the plaintiff’s expert.” The advances in computer technology in the decade after *Jasopersaud* was decided led Courts to revisit the issue. Several concluded that, given the statutory preference for anonymity, and the ease with which the particular information which *Jasopersaud* directed disclosed could now be used by readily available software to identify any expert, the “spirit” rather than the “letter” of *Jasopersaud* should be used to further limit disclosure. Thus, in *Engel v. Defeo*, 189 Misc 2d 673 (Sup.Ct. Nassau Co. 2001), the Court held that “in today’s context, ten years after *Jasopersaud*, computer technology and expertise has outstripped the plaintiff’s attorney’s ability to conceal his expert’s identity, and for this Court to blindly apply the directive in that case of *Jasopersaud*,” would “fly in the face of the statutory mandate that the plaintiff can omit and withhold her expert’s identity. While *Jasopersaud* (*supra*) has set up a viable balancing test to be used in determining this issue of expert disclosure, technology has rendered the fulcrum of that balance inoperable.” Thus, more general disclosure was all that the Court required [*see, also, Duran v. New York City Health & Hospitals Corp.*, 182 Misc 2d 232 (Sup.Ct. Bronx Co. 1999)(in light of the fact that the expert’s identity is otherwise readily obtainable with a *Lexis-Nexis* search, plaintiff need only provide “the expert’s state of licensure and board certification”); *Deitch v. May*, 185 Misc 2d 484 (Sup.Ct. Rockland Co. 2000)(for the same reasons, it was sufficient for plaintiff to tell that the expert is “licensed to practice medicine in New York State and board certified in neurosurgery”)]. On the other hand, there were cases which embraced *Jasopersaud*. For example, in *Esquilin v. The Brooklyn Hospital Center Downtown Campus*, 190 Misc 2d 753 (Sup.Ct. Kings Co. 2002), the Court emphasized that CPLR 3101(d)(1)(i) makes an attempt to balance plaintiff’s need to protect a medical expert in a medical malpractice case from peer pressure, against a defendant’s need for adequate discovery. And, “while computer technology and accessible information has expanded greatly in the 10 1/2 years since *Jasopersaud*, so has the willingness and availability of medical ‘experts’ to come forward and testify against the interests of their colleagues.” The Court concluded that “these are matters best addressed by the Legislature since it seems clear to this Court that providing the information which one party seeks as essential to its ability to properly prepare for trial or move for summary judgment could lead to disclosure of the opposing expert’s name if one is prepared to engage in the necessary ‘detective’ work. This Court, in any event, still regards *Jasopersaud* as prevailing and controlling authority which, even now, properly ‘harmonizes and effectuates the objectives sought to be achieved by the competing provisions’” of the statute. Then, in *Thomas v. Alleyne*, 302 A D 2d 36 (2d Dept. 2002), the Second Department re-visited *Jasopersaud*, and concluded “that the holding of that case was, if anything, unduly restrictive of the discovery authorized under New York law in respect to the qualifications of the experts proposed to be called at trial by the various parties.” Agreeing with plaintiffs that the balancing test of *Jasopersaud*

had become outdated in light of technological advances, the Court determined to “abandon” the balancing approach of that decision “as being both unworkable and inconsistent with the terms of the governing statute.” Thus, the Court held “that defendants in medical malpractice actions are presumptively entitled to a statement of the plaintiff’s expert’s qualifications ‘in reasonable detail’ (CPLR 3101[d][1][i]), as the statute commands, and that the plaintiffs in such cases may avoid compliance with this obligation only upon production of proof sufficient to sustain findings (a) that there is a reasonable probability that such compliance would lead to the disclosure of the actual identity of their expert or experts, *and* (b) that there is a reasonable probability that such disclosure would cause such expert or experts to be subjected to ‘unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice’ (CPLR 3103[a])” [emphasis added]. The Court concluded that the original concern – that medical experts might be pressured by their peers not to testify in medical malpractice cases, and that the medical profession was unique in that regard – even if it “has a rational basis at all,” is “certainly not such a forceful one as to warrant, for reasons of ‘policy,’ a departure from a literal construction of CPLR 3101(d)(1)(i).” Thus, even when “full disclosure of the qualifications of a plaintiff’s expert” will permit ready discernment of the expert’s identity, plaintiff will be required to disclose, unless plaintiff is able to make “a factual showing that there exists a concrete risk, under the special circumstances of a particular case, that a prospective expert medical witness would be subjected to intimidation or threats if his or her name were revealed before trial.” At the same time, in *Thompson v. Swiantek*, 291 A D 2d 884 (4th Dept. 2002), the Appellate Division, Fourth Department, reached the opposite result. Plaintiff revealed only that his medical expert in this medical malpractice case, “is a ‘board certified urologist’ who is ‘licensed to practice in both New Jersey and Pennsylvania and is a professor of urology in Pennsylvania.”” The Court denied the request for more detailed disclosures. “It is undisputed that disclosure of the additional information sought, i.e., the medical school that the expert attended and the location of that expert’s internships, residencies and fellowships, would enable defendants to ascertain the identity of the expert [citations omitted]. Because disclosure of that additional information would ‘effectively lead to disclosure of the expert’s identity,’ the request for such disclosure is ‘palpably improper.’” Lower Courts in the First Department were divided on whether to follow *Thomas* or *Thompson*. In *Scher v. St. Luke’s-Roosevelt Hospital*, N.Y.L.J., January 28, 2003, p. 18, col. 4 (Sup.Ct. N.Y.Co.)(Bransten, J.) and *Muniz v. Our Lady of Mercy Medical Center*, N.Y.L.J., May 1, 2003, p. 22, col. 1 (Sup.Ct. Bronx Co.)(Renwick, J.), the Courts held that, in the absence of authority from the Appellate Division, First Department, they would follow the holding in *Thomas* rather than *Thompson*. But, in *Hara v. Levin*, N.Y.L.J., January 30, 2003, p. 23, col. 1 (Sup.Ct. Bronx Co.)(Manzanet-Daniels, J.), the Court, citing *Thompson* with approval, found that the sketchy background information offered by plaintiff was sufficient to avoid disclosure of the expert’s identity. Now, 16 years later, in *Kanally*, the Third Department weighs in, and adopts the Second Department’s

reasoning in *Thomas*. For, “inasmuch as this state’s expert disclosure statute is already the most restrictive in the nation, there is no reason for this Court to continue to interpret the statute in a way that permits parties to severely limit the amount of information they provide regarding their expert witnesses.” Thus, “like the Second Department held in *Thomas v. Alleyne* [*supra*], we conclude that our current standard is not only impractical, but contrary to the statutory language and ‘the salutary policy of encouraging full pretrial disclosure so as to advance the fundamental purpose of litigation, which is to ascertain the truth’ [citation omitted]. Accordingly, we adopt that Court’s rule that parties in medical malpractice cases ‘will ordinarily be entitled to full disclosure of the qualifications of an opponent’s expert, except for the expert’s name, notwithstanding that such disclosure may permit such expert’s identification,’ but a party may obtain a protective order under CPLR 3103(a) by making a factual showing that there exists a reasonable probability, ‘under the special circumstances of a particular case, that a prospective expert medical witness would be subjected to intimidation or threats if his or her name were revealed before trial.’”

Cordts v. Fiege, 60 Misc 3d 617 (Sup.Ct. Monroe Co. 2018)(Frazee, J.) – The Fourth Department has permitted discovery “of physicians conducting independent medical examinations [IME] at the request of defendants’ insurance carriers to determine if there is any bias, interest or financial motivation that could influence their reports.” That is because “the nature of the relationship” between the physician and the insurer “raises impartiality into question.” At issue in this case is whether to extend that rule to treating physicians. The Court suggests that, generally, no such discovery should be permitted, for, unlike the IME physician, “a treating physician is hired by an injured party to take care of his/her medical needs without regard to any litigation that might ensue or be pending.” And, “as a matter of policy, treating physicians should be allowed to devote their time to the treatment of patients and not to have their time unnecessarily taken up with the litigation process. Further, physicians should not be discouraged from taking as patients those individuals who may have been injured in an accident by potential involvement in the litigation process.” But, here, the evidence shows a significant relationship between the treating physician and plaintiff’s attorney. He has treated “dozens” of counsel’s clients, counsel does legal work for the doctor’s practice, and the doctor has patients sign a “doctor’s lien,” allowing payment of fees from any sums recovered in a lawsuit. Under these circumstances, the Court finds that the doctor’s “bias, motive or interest” are relevant. Thus, discovery should be permitted where, as here, there has been “an initial showing that a treating physician may not be retained by the patient principally to treat but also for his/her assistance with litigation.” However, the Court quashes the subpoena for deposition testimony, with leave to seek less intrusive discovery of the physician.

PRIVILEGES

ATTORNEY-CLIENT PRIVILEGE

Galasso v. Cobleskill Stone Products, Inc., 169 A D 3d 1344 (3d Dept. 2019) – The purpose of the attorney-client privilege “is ‘to ensure that one seeking legal advice will be able to confide fully and freely in his or her attorney secure in the knowledge that his or her confidences will not later be exposed to public view to his or her embarrassment or legal detriment’ [citation omitted]. ‘Generally, communications made in the presence of third parties, whose presence is known to the client, are not privileged’ [citation omitted]. However, ‘statements made to the agents or employees of the attorney or client, or through a hired interpreter, retain their confidential (and therefore privileged) character, where the presence of such third parties is deemed necessary to enable the attorney-client communication and the client has a reasonable expectation of confidentiality.’”

Metropolitan Bridge & Scaffolds Corp. v. New York City Housing Authority, 168 A D 3d 569 (1st Dept. 2019) – “The gravamen of NYCHA’s [third party] complaint is that third-party defendants allegedly defrauded NYCHA’s law department into awarding contracts based on false representations. To prevail at trial, NYCHA must establish that it reasonably relied on the alleged misrepresentation in the relevant forms and certifications. The court correctly found that having placed the knowledge of its law department at issue, NYCHA waived attorney-client privilege with respect to the subject documents. NYCHA cannot seek to prevent the disclosure of evidence showing that its attorneys – the very individuals who performed the bid review function for NYCHA – recommended that NYCHA award the contracts to plaintiff despite knowledge of the operative facts [citation omitted]. Further, NYCHA may not rely on attorney-client privilege while selectively disclosing other self-serving privileged communications.”

ATTORNEY WORK PRODUCT

Matter of Peerenboom v. Marvel Entertainment, LLC, 160 A D 3d 439 (1st Dept. 2018) – “Some of the disputed documents contain draft pleadings or emails discussing changes to such pleadings, which constitute material protected by the work product privilege [citations omitted]. In addition, several documents containing discussions between attorneys regarding topics related to the pending Florida action between petitioner and Perlmutter constitute attorney work product as they reflect ‘an attorney’s legal research, analysis, conclusions, legal theory or strategy’ [citation omitted]. The detailed invoices prepared by Perlmutter’s attorneys are also protected as work product since they contain summaries of their ‘legal research, analysis, conclusions, legal theory or strategy.’”

MATERIAL CREATED FOR LITIGATION

Rickard v. New York Central Mutual Fire Insurance Company, 164 A D 3d 1590 (4th Dept. 2018) – “To the extent that *Laika* [*v. ACA Insurance Company*, 128 A D 3d 1508 (4th Dept. 2015)] holds that any documents in a claim file created after commencement of an action in a SUM case in which there has been no denial or disclaimer of coverage are *per se* protected from discovery, it should not be followed. Rather, a party seeking a protective order under any of the categories of protected materials in CPLR 3101 bears ‘the burden of establishing any right to protection.’”

Matter of Peerenboom v. Marvel Entertainment, LLC, 160 A D 3d 439 (1st Dept. 2018) – “Documents concerning an investigation undertaken by Kroll Advisory Solutions are entitled to the qualified protection provided by CPLR 3101(d)(2) for materials prepared in anticipation of litigation. The record shows that Kroll was hired by Perlmutter’s attorney to conduct an investigation in connection with the pending Florida action, which includes claims of defamation broadly implicating petitioner’s reputation. Petitioner has not asserted that the investigation firm was retained for other purposes [citation omitted]. As such, emails between and among Kroll and the attorneys discussing the investigation and Kroll’s findings are protected, and petitioner has not made any showing of substantial need and inability to obtain this information without undue hardship.”

Marazita v. City of New York, 62 Misc 3d 416 (Sup.Ct. Queens Co. 2018)(Kerrigan, J.) – In this personal injury action, plaintiff seeks the complete “raw data” including “testing data, testing manuals and all documents generated by neuropsychological testing conducted upon plaintiff” by defendant’s expert neuropsychologist. It is undisputed that that material is relevant, but also undisputed that it was created solely for the purpose of litigation. And plaintiff is not “unable without undue hardship to obtain the substantial equivalent of it by other means.” For plaintiff has retained her own expert to perform his own examination of plaintiff, which presumably would generate the same “raw data.” And the Court rejects the argument that such data constitutes plaintiff’s own statement, discoverable pursuant to CPLR 3101(e).

THE COMMON INTEREST “PRIVILEGE”

Kindred Healthcare, Inc. v. SAI Global Compliance, Inc., 169 A D 3d 517 (1st Dept. 2019) – “The common interest privilege is an exception to the traditional rule that the presence of a third-party at a communication between counsel and client is sufficient to deprive the communication of confidentiality. The common interest doctrine is a limited exception to waiver of the attorney-client privilege, and requires that: (1) the underlying material qualify for protection under the attorney-client privilege, (2) the parties to the disclosure have a common legal interest, and (3) the material must pertain to pending or reasonably anticipated litigation for it to be protected. The record, here, demonstrates that the common interest agreement was entered into in reasonable anticipation of litigation.”

PMC Aviation 2012-1 LLC v. Jet Midwest Group, N.Y.L.J., 1537941883 (Sup.Ct. N.Y.Co. 2018)(Schechter, J.) – “The Court of Appeals recently addressed the scope of the common interest exception in *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.* (27 N Y 3d 616, 6223-23 [2016]). Where ‘two or more clients separately retain counsel to advise them on matters of common legal interest, the common interest exception allows them to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest’ [citation omitted]. The key holding of *Ambac* was that, unlike in other jurisdictions, application of the common interest exception requires that the communications were shared in connection with ‘pending or anticipated litigation’ [citation omitted]. Here, Amur shared the subject documents with the Company during this litigation while united in interest against the JMG Parties. This litigation posture is obvious from the court’s prior decisions. The only wrinkle here is that the communications that were shared with the Company predate the litigation, and, arguably, not all of them were made when litigation was anticipated. The parties agree that this is not the ordinary situation in which the common interest exception is invoked, as the exception usually implicates communications between co-litigants, not disclosure of one side’s pre-litigation privileged communications to a co-litigant. Nonetheless, it makes sense that co-litigants in an active litigation who share a common interest should be able to share their own pre-litigation privileged communications if that disclosure furthers their common interest in the litigation without any fear of waiver. The JMG Parties have not cited any authority to the contrary. The court, therefore, finds that no waiver occurred.”

THE FIFTH AMENDMENT PRIVILEGE

Carver Federal Savings Bank v. Shaker Gardens, Inc., 167 A D 3d 1337 (3d Dept. 2018) – “It is settled that ‘a party may not be held in contempt based upon his or her good faith invocation of the Fifth Amendment privilege against self-incrimination’ [citations omitted]. The Fifth Amendment privilege against self-incrimination, which ‘can be asserted in any proceeding, civil or criminal, protects against any disclosures which the individual reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used’ [citations omitted]. However, ‘this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because the witness declares that in so doing he or she would incriminate himself or herself’ [citations omitted]. Stated differently, a witness may validly claim the privilege only where it is shown that the hazards of incrimination are ‘substantial and real, and not merely trifling or imaginary’ [citations omitted]. Determining whether the privilege is applicable thus involves a factual inquiry in which the court must determine, ‘from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result’ [citations omitted]. Preliminarily, we agree with plaintiff that the

subpoenaed tax forms – that is, defendant’s income tax returns, W-2 wage statements and 1099 forms – fall within the ‘required records exception’ to the privilege against self-incrimination. Under this exception, ‘the Fifth Amendment privilege which exists as to private papers cannot be asserted with respect to records which are required, by law, to be kept and which are subject to governmental regulation and inspection.’” Moreover, “there is nothing in this record indicating, nor does defendant assert, that he is the subject of any criminal investigation or proceeding. More to the point, defendant has not shown that his claimed fear of prosecution is anything other than ‘imaginary’ [citation omitted] or based on something more than a ‘remote and speculative possibility’ [citations omitted]. Where, as here, ‘the danger of incrimination is not readily apparent, the witness should be required to establish a factual predicate’ for the invocation of the privilege [citations omitted]. Defendant made no such showing, instead merely making a broad, undifferentiated assertion of the Fifth Amendment privilege as to each and every question asked, as well as to all documents requested, on the basis of sweeping and unsubstantiated assertions of counsel. Such a blanket invocation of the privilege – even as to questions as innocuous as defendant’s marital status and whether he has any children or owns his home – simply cannot be sustained on this record.” Thus, defendant is required to “make a particularized objection to each discovery request,” and the matter is remitted to Supreme Court “to conduct an *in camera* inquiry to assess the validity of the assertion of the privilege upon such particularized objections.”

Signature Finance LLC v. SHG Catering Corp., N.Y.L.J., 1552383473 (Sup.Ct. Nassau Co. 2019)(Diamond, J.) – “An agent or officer of an organization cannot invoke the Fifth Amendment and decline to produce records and documents of the organization over which he had custody in a representative capacity, even if the contents of the documents would personally incriminate him, as the act of producing the documents does not involve any risk of testimonial self-incrimination.”

OTHER PRIVILEGES

Prag v. Prag, 161 A D 3d 1364 (3d Dept. 2018) – “By ‘providing for the sealing of records of a criminal proceeding which terminates in favor of the accused’ [citation omitted], CPL 160.50 ‘serves the laudable goal of insuring that one who is charged but not convicted of an offense suffers no stigma as a result of his or her having once been the object of an unsustainable accusation’ [citations omitted]. It is undisputed that the charges against the husband related to the December 2015 incident [of an alleged assault] were ‘deemed dismissed as a result of an adjournment in contemplation of dismissal and, therefore, the records of that criminal prosecution were sealed’ [citations omitted]. The wife does not claim that any statutory exception entitled her to the records. Her primary contention is instead that the husband, by denying the alleged behavior that led to the charges, waived the statutory bulwark against disclosure by ‘commencing a civil action and affirmatively placing the information protected by CPL 160.50 into issue’ [citations

omitted]. The wife’s argument founders upon the fact that it was she, not the husband, who has ‘placed in issue elements that are common or related to the prior criminal action’ by alleging the husband’s assaultive conduct [citation omitted]. The husband, in contrast, has only denied the wife’s allegations and sought various relief upon, in part, the premise that they are untrue. There may well be instances where a defendant affirmatively raises issues, be they financial or otherwise, so as to waive the protection afforded by CPL 160.50, but ‘more than simply denying the allegations in the complaint’ is required.”

Arma v. East Islip Union Free School District, 171 A D 3d 1122 (2d Dept. 2019) – “‘A youthful offender adjudication is not a judgment of conviction for a crime or any other offense’ [citation omitted]. In keeping with the statutory goal that eligible youths not be stigmatized by a youthful offender adjudication, CPLR 720.35 directs that records relating to the prosecution be sealed.” And, “‘a person adjudicated a youthful offender may refuse to answer questions regarding the charges and police investigation, whether he or she pleaded guilty, and whether a youthful offender adjudication was made.’” This action against a school district resulted from an altercation in which plaintiff was injured, and the other person involved was adjudicated a youthful offender. Plaintiff seeks to depose that other person, to question her as to the events. The Court denies defendant’s motion for a protective order. “‘Not all of the information contained within the protected records is necessarily privileged’ [citation omitted]. The statutory grant of confidentiality afforded to official records and the information contained therein does not extend to the facts underlying the incident which gave rise to the youthful offender adjudication [citation omitted]. Thus, an eligible youth may not refuse, on grounds of confidentiality, to answer questions about the facts underlying the subject incident, even though those facts also form the basis of his or her youthful offender adjudication.”

Drum v. Collure, 161 A D 3d 1509 (4th Dept. 2018) – “Education Law §6527(3) ‘shields from disclosure the proceedings and the records relating to performance of a medical or a quality assurance review function’ [citations omitted]. The party invoking the privilege must establish that the document at issue was ‘generated in connection with a quality assurance review function pursuant to Education Law §6527(3)’ [citation omitted]. Here, the court properly determined that [defendant] Sawyer’s affirmation, which was submitted in support of the motion for a protective order, met that burden.” For, it “‘outlined the quality assurance review procedure at MFSH in detail and explained that the slide show [at issue] was created for MFSH’s weekly quality assurance review meeting.’” However, the Court held that the slide show is discoverable under an exception to the privilege “for ‘statements made by any person in attendance at a medical or quality assurance review meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting.’” And “‘statements’ include “‘written statements, such as letters [citation omitted], notes [citation omitted] and the PowerPoint slide show at issue here.’”

Johnston v. Hillis, 64 Misc 3d 208 (Sup.Ct. St. Lawrence Co. 2019)(Farley, J.) – The “narrow” exception to the privilege afforded medical or quality assurance review meeting communications under Education Law §6527(3) is “limited to (1) *statement* given at an otherwise privileged peer review meeting (2) *by a party* to a lawsuit which (3) involves the *same underlying conduct* that is the topic of discussion at the meeting” [emphasis by the Court]. Here, plaintiff seeks the deposition testimony of one defendant as to what another defendant said at a peer review meeting. The Court overrules defendants’ objection to that testimony. “Section 6527(3) does not specify that a defendant witness may only be required to testify as to what *he or she* – as opposed to *another* defendant treatment provider – said at a quality assurance meeting, and the Court declines to graft such an additional requirement onto its clear language” [emphasis by the Court].

Pasek v. Catholic Health System, Inc., 159 A D 3d 1553 (4th Dept. 2018) – A document privileged pursuant to Education Law §6527(3) is absolutely privileged, and “not subject to disclosure no matter how strong the showing of need or relevancy.” Indeed, “the purpose of the privilege ‘is to “enhance the objectivity of the review process” and to assure that medical review or quality assurance committees “may frankly and objectively analyze the quality of health services rendered” by hospitals and thereby improve the quality of medical care.’”

Matter of Home Box Office, Inc. v. Laster, N.Y.L.J., 1562307949 (Sup.Ct. N.Y.Co. 2019) (Edmead, J.) – “The Shield Law is more than simply a codification of the common-law journalist’s privilege. New York extends broader protection to the press than that which the common-law provides.” Civil Rights Law §79-h “renders information subject to the privileges, such as the names of confidential sources ‘inadmissible in any action or proceeding or hearing before any agency’ [citation omitted]. There is another branch of the statute that grants a ‘qualified privilege’ where news was ‘not obtained or received in confidence’ [citation omitted]. Under this qualified privilege, where confidential information or sources are not involved, the party seeking disclosure still faces a high evidentiary burden. In such cases, courts will not compel the revealing of nonconfidential news unless ‘the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party’s claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source.’” Under the first prong, the news sought must be *highly* material and relevant, not merely “material and necessary.” The second prong requires the demanding party to show “that her defense ‘virtually rises or falls with the admission or exclusion of the proffered evidence.’” The test “is not merely that the material may be helpful or probative, but whether or not the defense of the action may be presented without it.” And “courts have made it clear that the critical or necessary prong ‘does not have in mind general and ordinary impeachment material or matters which might arguably bear on the assessment of credibility of witnesses.’” The third prong

requires “that the ‘news’ sought must be not otherwise available, meaning the information or news within the footage, not the work product itself.”

DEPOSITIONS

Matter of Spira, N.Y.L.J., 1527733383 (Surr.Ct. Queens Co. 2018)(Kelly, J.) – “There is no authorization for service of a subpoena *ad testificandum* outside the state [citations omitted]. While under the ‘longarm’ statute, a summons may be served outside the state, there is no such provision for a subpoena.”

Liberty Petroleum Realty, LLC v. Gulf Oil, L.P., 164 A D 3d 401 (1st Dept. 2018) – “Depositions of opposing counsel are disfavored for three reasons. First, the ‘practice of attorneys deposing their adversaries hardly seems calculated to “assist preparation for trial by sharpening the issues and reducing delay and prolixity”’ [citations omitted]. Second, ‘the practice of calling opposing counsel as a witness at trial is offensive to our conception of the adversarial process’ [citation omitted]. Third, the practice of deposing opposing counsel raises at least the possibility of attorney disqualification. This ‘implicates not only the ethics of the profession but also the substantive rights of the litigants’ [citation omitted], including the right to counsel of one’s choosing and the potential that the proceedings can become ‘stalled and derailed’ [citation omitted]. The Appellate Division, Second Department, has required the party who seeks to depose opposing counsel, in addition to showing that the information sought is material and necessary, to demonstrate ‘a good faith basis’ [citations omitted]. We now adopt the factor required by the Second Department. In addition to showing that the information sought is material and necessary, the subpoenaing party must demonstrate good cause, in order to rule out the possibility that the deposition is sought as a tactic intended solely to disqualify counsel or for some other illegitimate purpose.” The First Department’s analysis “leads us to add another factor.” Thus, “in the unusual situation where a party seeks to depose opposing counsel, we hold that the party seeking the deposition must show that the deposition is necessary because the information is not available from another source.”

Carrero v. New York City Housing Authority, 162 A D 3d 566 (1st Dept. 2018) – “Supreme Court correctly struck plaintiff’s errata sheet purporting to correct the transcript of her General Municipal Law §50-h hearing testimony, because plaintiff made numerous substantive changes to the testimony without providing a sufficient explanation for them.”

Carroll v. City of New York, N.Y.L.J., 152354902 (Sup.Ct. N.Y.Co. 2019)(Bluth, J.) – “‘Material or critical changes to testimony through the use of an errata sheet are prohibited’ [citation omitted]. An errata sheet may be struck where ‘plaintiff made numerous substantive changes to the testimony without providing a sufficient explanation for them.’” Here, “as an initial matter, the errata sheet was late. The Moving Defendants

submit an affidavit of service for plaintiff's deposition transcript that claims it was mailed on June 15, 2018 [citation omitted]. Plaintiff claims she did not receive the transcript until 'on or about the first week of July' and then sent along the errata sheet on August 30, 2018 [citation omitted]. Plaintiff's counsel does not sufficiently rebut the facts that the deposition transcript was served on June 15 or give a specific reason why it took so long to complete the errata sheet. Noting that plaintiff is elderly is not enough for this Court to extend the time to respond. And plaintiff's focus on when the transcript was actually received misses the point; even if plaintiff did not receive the transcript until early July, that does not automatically toll plaintiff's time to submit an errata sheet. Therefore, the errata sheet dated August 30, 2018 is stricken because it was submitted well beyond the sixty-day time limit." In any event, "a review of plaintiff's proposed changes demonstrate that they are substantive and are not accompanied by sufficient explanations."

Matter of 91 Street Crane Collapse Litigation (Calabro v. City of New York), 159 A D 3d 511 (1st Dept. 2018) – CPLR 3119, which adopted the Uniform Interstate Deposition and Discovery Act, provides a mechanism for disclosure in New York for use in an action that is pending in another state or territory within the United States [citation omitted], not the other way around. Thus, it is not applicable in this case, in which parties to an action pending in New York seek discovery from out-of-state witnesses." The law of the jurisdiction where those witnesses are found will govern the mechanism for taking discovery there.

Billock v. Union Carbide Corporation, 170 A D 3d 1388 (3d Dept. 2019) – In this mesothelioma wrongful death case, in which defendant is alleged to have supplied "joint compound" containing asbestos to Georgia-Pacific LLC, "prior to trial defendant filed a motion *in limine* (1) to preclude plaintiff from introducing videotaped deposition testimony given by Charles Lehnert, a former Georgia-Pacific employee familiar with that company's joint compound formulas, in two unrelated actions in, respectively, 2001 in Illinois and 2003 in Texas, and (2) permitting it, in the event that this testimony was not precluded, to introduce videotaped deposition testimony given by Lehnert in 2007 in a third action in Texas, wherein he purportedly contradicted his 2001 and 2003 testimony." Supreme Court denied the motion to preclude, but granted the motion to allow the 2007 testimony. The closely-divided Appellate Division reverses the subsequent defendant's verdict. "CPLR 3117(a)(3) provides, in relevant part, that 'any part or all of a deposition, so far as admissible under the rules of evidence, may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules.'" Thus, permitting the 2007 deposition to be admitted into evidence was error. "Although defendant was a party to the 2007 Texas action, plaintiff was not, and he had no opportunity to be present and cross-examine Lehnert. Thus, this testimony was not admissible under CPLR 3117(a)(3)." Since the Court was ordering a new trial, the

majority examined the ruling permitting use of the 2001 and 2003 depositions, and “we find that none of Lehnert’s deposition testimony should have been admitted into evidence at this trial. Although a live witness may be impeached with prior inconsistent testimony, Lehnert never testified for any party in this action.” Thus, “the jury was essentially asked to determine whether Lehnert, an empty chair in New York, testified more credibly in Illinois or Texas. In this scenario, CPLR 3117(a)(2) did not permit plaintiff to introduce the 2001 and 2003 depositions on his case-in-chief, and CPLR 3117(c) did not permit defendant to impeach those depositions with another deposition.” The dissenting Justices argued that the 2007 deposition should have been permitted in evidence to rebut the earlier depositions. “Although plaintiff was not a party in that Texas action, the plaintiffs in that action were no doubt equally motivated to establish their claims as plaintiff is here [citation omitted]. Lehnert’s 2007 deposition also falls within the embrace of the common-law former testimony hearsay exception [citations omitted]. Supreme Court authorized defendant to utilize Lehnert’s 2007 deposition ‘in the interest of justice, and in the interest of fairness,’ and, for the reasons set forth above, we perceive no abuse of discretion in the court’s determination. Having so concluded, it is unnecessary to address the denial of defendant’s motion to preclude Lehnert’s 2001 and 2003 deposition testimony.”

INTERROGATORIES

Goldstein v. Orensanz Events LLC, N.Y.L.J., 1529974100 (Sup.Ct. N.Y.Co. 2018)(Reed, J.) – “CPLR 3130 does not prohibit the use of both depositions and interrogatories in actions rooted in breach of contract. The prohibition against the use of both depositions and interrogatories applies only to actions to recover damages for personal injury, injury to property or wrongful death, i.e., in cases predicated solely on a cause of action for negligence.” And, “absent evidence that a party intended to abuse discovery, a court may permit interrogatories and conduct a deposition in the same action, notwithstanding the wording of CPLR 3130(1).”

DISCLOSURE OF SOCIAL MEDIA

Renaissance Equity Holdings LLC v. Webber, 61 Misc 3d 298 (Civ.Ct. Kings Co. 2018) (Wang, J.) – Last year’s “Update” reported on *Forman v. Henkin*, 30 N Y 3d 656 (2018), in which the Court of Appeals essentially ruled that discovery with respect to social media should be treated the same as any other type of discovery. “New York discovery rules do not condition a party’s receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder’s so-called ‘privacy settings’ govern the scope of disclosure of social media

materials. That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable [citations omitted]. Directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation – such an order would be likely to yield far more nonrelevant than relevant information. Even under our broad disclosure paradigm, litigants are protected from ‘unnecessarily onerous application of the discovery statutes’ [citation omitted]. Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules – there is no need for a specialized or heightened factual predicate to avoid improper ‘fishing expeditions.’ In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the potential utility of the information sought against any specific ‘privacy’ or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate – for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court.” But, “even private materials may be subject to discovery if they are relevant.” Here, in *Renaissance*, a holdover proceeding involving succession rights to a rent-stabilized apartment, respondent claims to be the adopted daughter of the deceased tenant, and that the apartment was her primary residence. Petitioner, hoping to show that respondent has spent considerable time living elsewhere, “seeks, without limitation, ‘all of Respondent’s posts whether in her legal name, Benze Lohan or any other aliases (whether posted by or for respondent) to social media.’ Even if ‘all’ posts are limited to the relevant period, the demand is nevertheless overbroad because it fails to state the specific information sought within these posts on the narrow issue of primary residence. Indeed, and within the context of online social media, seeking discovery of posts ‘for respondent’ may include publications by a third party in an online forum respondent has no access to and, as such, are not in respondent’s possession, custody or control [citations omitted]. Like the personal injury plaintiff in *Forman* who was asked to disclose the ‘entirety’ of her Facebook profile, directing that respondent on her succession defense produce ‘all’ social media posts is tantamount to revealing ‘every transaction, communication, and photograph that respondent shared with any person on any topic’

during a two-year period.” Thus, the demand “is insufficiently tailored to avoid disclosure of nonrelevant materials.”

Marfo v. Castillo, N.Y.L.J., 1556869626 (Sup.Ct. N.Y.Co. 2019)(Silvera, J.) – In this personal injury action, defendant seeks “to compel plaintiff to provide all photos and videos of plaintiff from the date of loss until the present from his smart phone, social media accounts, and computers.” In support, defendant “lists the damages alleged by plaintiff, and argues that by virtue of plaintiff’s claimed injuries, which include, *inter alia*, anxiety, mental anguish, and loss of enjoyment of life, the requested discovery is discoverable.” But “defendant’s blanket request for plaintiff’s social media information fails to even attempt to narrow or limit the requested discovery to eliminate material that would be irrelevant to the instant action.” Moreover, “defendant has failed to provide any basis for the request of the documents and information sought. Plaintiff’s deposition has not been taken, and defendant has provided no basis for their knowledge that the requested information even exists.”

Vasquez-Santos v. Mathew, 168 A D 3d 587 (1st Dept. 2019) – “Private social media information can be discoverable to the extent it ‘contradicts or conflicts with a plaintiff’s alleged restrictions, disabilities, and losses, and other claims’ [citations omitted]. Here, plaintiff, who at one time was a semi-professional basketball player, claims that he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball. Although plaintiff testified that pictures depicting him playing basketball, which were posted on social media after the accident, were in games played before the accident, defendant is entitled to discovery to rebut such claims and defend against plaintiff’s claims of injury. That plaintiff did not take the pictures himself is of no import. He was ‘tagged,’ thus allowing him access to them, and others were sent to his phone.” Defendant’s access, however, “is appropriately limited in time, i.e., only those items posted or sent after the accident, and in subject matter, i.e., those items discussing or showing plaintiff engaging in basketball or other similar physical activities.”

Doe v. The Bronx Preparatory Charter School, 160 A D 3d 591 (1st Dept. 2018) – In this action for damages resulting from an attack on plaintiff on defendant’s property, the Court concludes that “defendant’s demands for access to social media accounts for five years prior to the incident, and to cell phone records for two years prior to the incident, were overbroad and not reasonably tailored to obtain discovery relevant to the issues in the case.”

NOTICE TO ADMIT

Fetahu v. New Jersey Transit Corp., 167 A D 3d 514 (1st Dept. 2018) – “A notice to admit is designed to elicit admissions on matters which the requesting party “reasonably believes there can be no substantial dispute” [citations omitted].’ ‘A notice to admit may

not be utilized to request admission of material issues or ultimate or conclusory facts,’ or ‘facts within the unique knowledge of other parties’ [citation omitted]. Rather, it is ‘only properly used to eliminate from trial matters which are easily provable and about which there can be no controversy’ [citation omitted]. Further, because a notice to admit ‘is not intended as simply another means for achieving discovery,’ it may not be used to obtain information in lieu of other disclosure devices.”

Smith v. Brown, 61 Misc 3d 681 (Sup.Ct. Bronx Co. 2018)(Higgitt, J.) – In this personal injury action, defendant has served a notice to admit upon plaintiff, seeking admissions that she owns an Instagram account, that she moved that account from public to private, and that certain specific photographs obtained from the account were of plaintiff, and taken after the accident. Plaintiff, seeking to strike the notice, “argues that defendant Pasquale is attempting, impermissibly, to use the notice to admit in lieu of other disclosure devices, such as a deposition.” The Court denies the motion to strike. While “the notice to admit may not be used to request admission of ‘ultimate conclusions’ that can only be made after trial or information of a technical, detailed or scientific nature,” here, “defendant Pasquale sought admissions from plaintiff as to uncontroversial, ‘clear-cut matters of fact’ that are within plaintiff’s knowledge.” For, “plaintiff either owns and maintains an Instagram account with a specified handle or she does not, and either that handle was changed from a public to private account setting after a specific date or it was not. Moreover, with respect to the requested admissions relating to the photographs – that were obtained from plaintiff’s Instagram account – plaintiff can state whether she is the one depicted in the photographs – most of which appear to be ‘selfies’ – and whether the photographs were taken after the accident. The notice did not seek admissions as to any ultimate conclusions (such as which driver or drivers were negligent) or information of a technical, detailed or scientific nature. Therefore, that the matters on which defendant Pasquale seeks admissions could be explored at a deposition does not take them out of the ambit of the notice to admit.”

SPOILIATION

McDonnell v. Sandaro Realty, Inc., 165 A D 3d 1090 (2d Dept. 2018) – “‘Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence’ [citations omitted]. ‘A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable 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’ [citations omitted]. Where evidence has been intentionally or willfully destroyed, its relevance is presumed [citation omitted]. However, where evidence has been destroyed negligently, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party’s claim or defense [citation

omitted]. If the moving party is still able to establish or defend a case, then a sanction less severe than striking the pleadings of the offending party is appropriate.”

SM v. Plainedge Union Free School District, 162 A D 3d 814 (2d Dept. 2018) – The infant plaintiff was injured when he attempted to do a second cartwheel into a handstand from atop monkey bars during recess at defendant’s school. “According to the deposition testimony of the school principal, given the nature of the accident, an incident report was completed by the school nurse, notice was given to the school’s insurance company, and a report was made directly to the ‘central office.’ In addition, immediately following the accident, the school principal reviewed surveillance footage to determine the cause of the accident. The defendant preserved 24 seconds of surveillance footage from the day of the accident. The preserved footage shows what was alleged to have been the infant plaintiff’s second attempt at the cartwheel-to-handstand maneuver. He is seen on top of the monkey bars for no more than six seconds before his fall. During the course of this litigation, the plaintiffs made a discovery demand for, *inter alia*, ‘the entire footage of the recess period leading up to the time of the accident.’ In response, the defendant stated that it had saved only that portion of the video which depicted the ‘actual accident,’ and claimed that because it had no prior notice of the need to preserve any additional footage, in keeping with the defendant’s usual custom and practice, the remaining footage was automatically erased 30 days after the accident.” The Court directs a “negative inference charge against the defendant.” For, “plaintiffs demonstrated that the defendant had an obligation to preserve surveillance footage of the moments leading up to the infant plaintiff’s accident at the time of its destruction, but negligently failed to do so. Given the nature of the infant plaintiff’s injuries and the immediate documentation and investigation into the cause of the accident by the defendant’s employees, the defendant was clearly on notice of possible litigation and, thus, under an obligation to preserve any evidence that might be needed for future litigation [citations omitted]. The defendant failed to meet this obligation. The defendant acted negligently in unilaterally deciding to preserve only 24 seconds of footage and passively permitting the destruction of the remaining footage, portions of which were undisputedly relevant to the plaintiff’s case.”

Squillacioti v. Independent Group Home Living Program, Inc., 167 A D 3d 673 (2d Dept. 2018) – “Because the plaintiffs asserted causes of action alleging negligent training and supervision, the defendants’ knowledge of any prior wrongdoing by its employees and information concerning that training are issues central to the plaintiffs’ causes of action, and the employees’ personnel files would be critical in determining those issues [citations omitted]. In support of their motion, the plaintiffs established that the defendants improperly failed to ‘suspend their routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents [citations omitted], resulting in the negligent destruction of Escajadillo’s personnel file. However, the plaintiffs did not demonstrate that they were deprived of the ability to establish their case. Accordingly, the drastic sanction of striking the defendants’ answer is not

appropriate [citations omitted], but the lesser sanction of directing that an adverse inference charge be given at trial with respect to Escajadillo’s personnel file is warranted.”

Siras Partners LLC v. Activity Kuafu Hudson Yards LLC, 171 A D 3d 680 (1st Dept. 2019) – “Plaintiffs served discovery requests, which explicitly included electronic communications regarding the parties’ joint development project, upon defendants in May 2015. Shang Dai and Dennis Shan, principals of Kuafu, admitted that they used the social media app WeChat to discuss the project and failed to preserve those communications following the discovery requests. They assert that in separate incidents in May 2016 their phones were damaged and they replaced them with new phones. When they downloaded the application to the new phones, the chat histories were lost. Even assuming that Shang Dai and Dennis Shan did not intentionally destroy the WeChat messages, defendants’ failure to preserve the discussions for more than a year and to take timely actions to recover the damaged phones and data constitutes gross negligence.” Accordingly, Supreme Court’s order granting an adverse inference as a spoliation sanction was affirmed.

Richter v. BMW of North America, LLC, 166 A D 3d 1029 (2d Dept. 2018) – In November 2013, plaintiff was injured when the “soft-close” automatic door feature on her leased vehicle allegedly malfunctioned. In July 2015, plaintiff’s attorney wrote to the dealership that leased her the car, which was located in Rockland County, notifying it that plaintiff intended to sue. In September 2015, plaintiff took the car to the dealership, complaining of the malfunction. The dealership inspected, and replaced the door feature. The next day, plaintiff’s attorney wrote to defendant, the manufacturer of the vehicle, threatening a lawsuit. The action was commenced in November 2015. In June 2016, plaintiff returned the vehicle to a dealership located in California. Defendant’s motion for spoliation sanctions was granted, since “the plaintiff had the mechanism replaced [and] the evidence was negligently destroyed before the defendant had an opportunity to inspect it.” But, “since the defendant’s ability to prove its defense was not fatally compromised by the destruction of the evidence [citations omitted], the appropriate sanction for the spoliation herein is not to strike the complaint, but rather to direct that an adverse inference charge be given against the plaintiff at trial with respect to the unavailable evidence.”

Sanders v. 210 N. 12th Street, LLC, 171 A D 3d 966 (2d Dept. 2019) – Plaintiff moved for spoliation sanctions for plaintiff’s failure to preserve more than a two-minute video clip showing plaintiff’s fall on defendant’s premises. Defendant opposed, arguing that it had never been requested to maintain the entire footage. “For the first time in reply, the plaintiff produced an unsigned letter dated February 23, 2016, purportedly sent to the defendant by the plaintiff’s counsel, requesting that the defendant preserve videos and surveillance films showing the location of the accident for 6 hours before and 2 hours

after the accident for any lawsuit that may be commenced.” Defendant denied receiving the letter. “We reject the plaintiff’s argument that he is entitled to the presumption of receipt. The mere assertion in the reply affirmation of the plaintiff’s attorney that the letter dated February 23, 2016 was ‘sent’ to the defendant, unsupported by someone with personal knowledge of the mailing of the letter or proof of standard office practice or procedure designed to ensure that the letter was properly addressed and mailed, was insufficient to give rise to the presumption of receipt that attaches to letter duly addressed and mailed.”

Watson v. 518 Pennsylvania Housing Development Fund Corporation, 160 A D 3d 907 (2d Dept. 2018) – Plaintiff was shot by an intruder in defendant’s building, and sought “records regarding the condition of the building’s entrances and locks.” Defendant belatedly denied that any such records existed. The Appellate Division affirms the denial of plaintiff’s motion to strike defendant’s answer. “The plaintiff failed to sustain his burden of establishing that spoliation occurred as there was no evidence submitted that the requested documents ever actually existed [citations omitted]. The plaintiff also did not establish that the absence of any such documents deprived him of his ability to prove his claim.” However, under these circumstances, “the Supreme Court should have exercised its discretion to grant the plaintiff the alternative relief of an order of preclusion.” For, “the defendant’s dilatory discovery conduct cannot be condoned, and it would be manifestly unfair to the plaintiff for the defendants to attempt to offer any of the subject documents at trial, should the documents be located.”

ELECTRONIC DISCLOSURE

Dennehy v. Harlem Hospital Center, N.Y.L.J., 1544739019 (Sup.Ct. N.Y.Co. 2018) (Silver, J.) – In this medical malpractice action, the Court, after an *in camera* inspection, directs production of the “audit trails/metadata” of the patient’s medical records. For, “the metadata report spans from August 1, 2016 to August 10, 2016, and delineates the date, time, procedure, status of the procedure, and provider who treated Mrs. Lam during her hospitalization at Harlem Hospital on August 1, 2016.” Thus, “the entries contained therein may be material and germane to the issue of defendants’ alleged failure to properly and timely diagnose and treat Mrs. Lam.” And, “to the extent that the metadata report is duplicative of medical records already provided by defendants, that concern is mitigated by the brevity of the report itself as it consists of only 25 pages and does not detail the specific results or findings of any particular test or procedure.” Finally, “Dr. Clark’s testimony regarding his treatment of Mrs. Lam during her hospitalization does not negate plaintiffs’ entitlement to Mrs. Lam’s medical records as plaintiffs are not obligated to accept Dr. Clark’s recollection of the events leading up to Mrs. Lam’s death as true, accurate, or full in scope.”

Vargas v. Lee, 170 A D 3d 1073 (2d Dept. 2019) – The Appellate Division reverses the denial of plaintiff’s motion to “compel the defendant Wyckoff Heights Medical Center to

produce the audit trail of the patient record of the plaintiff Jose Vargas for the period of May 1, 2012, through May 17, 2012.” Plaintiffs argued “that since the allegations of negligence in this case included ‘the failure to timely and properly diagnose and treat the injured plaintiff’s medical complications following his foot surgery,’ the requested portion of the audit trail was relevant to ‘the timing and substance of the injured plaintiff’s care following that surgery.’” It is undisputed here that “an audit trail generally shows the sequence of events related to the use of a patient’s electronic medical records; i.e., who accessed the records, when and where the records were accessed, and changes made to the records [citations omitted]. Hospitals are required to maintain audit trails under federal and state law [citations omitted]. As argued by the plaintiffs, the requested audit trail was relevant to the allegations of negligence that underlie this medical malpractice action in that the audit trail would provide, or was reasonably likely to lead to, information bearing directly on the post-operative care that was provided to the injured plaintiff. Moreover, the plaintiffs’ request was limited to the period immediately following the injured plaintiff’s surgery.” And, “the affidavit of Wyckoff’s vice president of information technology, in which she averred that compilation of the requested audit trail would be ‘time-consuming,’ was conclusory and inadequate to show that the requested production would be unduly onerous.”

MEDICAL RECORDS AND EXAMINATIONS

Brito v. Gomez, 168 A D 3d 1 (1st Dept. 2018) – As the majority of this closely-divided Court stated it, “we are asked on this appeal to decide whether a litigant in a personal injury action who makes a claim for lost earnings and loss of enjoyment of life waives the physician-patient privilege with respect to prior injuries not raised in the lawsuit. Based on our settled precedent, we find that the privilege is waived only for injuries affirmatively placed in controversy.” In this automobile accident case, plaintiff’s claim for damages is specifically with respect to injuries to her cervical spine, lumbar spine and left shoulder. Her bill of particulars claims, among the items of damage, loss of enjoyment of life. Defendant sought information concerning prior knee surgery, and plaintiff sought a protective order. The majority holds that “neither plaintiff’s bill of particulars nor her deposition testimony places her prior knee injuries in controversy.” And, “our cases” grant “discovery of medical records only where the plaintiff has alleged an aggravation or exacerbation of prior injuries.” For, “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 Court acknowledged that “the Second Department has 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.’” But, “we are not persuaded by the reasoning of the Second Department.” The dissenters posited the question presented as “whether plaintiff, who seeks damages for the impairment of her ability to walk and to stand allegedly caused by back injuries suffered in a motor vehicle accident, may invoke the physician-patient privilege to avoid producing records

of the surgeries on her knees that she received not long before the accident. In my view, the majority's denial of such discovery to defendants unrealistically ignores the fact that plaintiff has placed at issue her ability to walk and to stand, a specific bodily function to which her knees are as vital as her spine, by seeking damages for the impairment of that function. Defendants should be permitted to explore the true source of this functional deficit. It is grossly unfair to allow plaintiff unilaterally to cut off any inquiry into an imminently possible alternative source of the specific physical impairment for which she seeks damages (not merely an amorphous impairment of earning capacity or enjoyment of life, as mischaracterized by the majority) by the simple expedient of omitting an allegation that she injured her knees in the accident. Contrary to the majority's view, this Court's precedents, while more restrictive of discovery in this context than those of the Second Department, do not go so far as to compel such an unjust result."

McMahon v. New York Organ Donor Network, Inc., 161 A D 3d 680 (1st Dept. 2018) – Last year's "Update" reported on the Supreme Court decision in this action [56 Misc 3d 467 (Sup.Ct. N.Y.Co. 2017)]. Supreme Court held that, "the instant motion appears to raise an issue of first impression – whether an O[rgan] P[rocedure] O[rganization] that is not covered by HIPAA must produce medical records it obtained from a covered entity because this information is required in order to run its organization. The reason that defendant receives medical records is that it needs the information to process organ donations. Defendant must know certain information about a donor's medical history in order to ensure that a donation is successful. However, defendant is not a covered entity and, therefore, must turn over the requested information. Defendant failed to identify a federal regulation or case law that would prevent this court from requiring disclosure." The Appellate Division agrees that "disclosure of these records is not prohibited by federal law." For, while defendant "is required to abide by HIPAA's privacy protections pursuant to Public Health Law §4351(8)," because "the subject disclosure would be made in the course of a judicial proceeding and pursuant to a qualified protective order, it is authorized under HIPAA." The Court modified the Supreme Court order to direct that "all identifying patient information be redacted."

Peterson v. Estate of Rozansky, 171 A D 3d 805 (2d Dept. 2019) – "A party seeking to inspect a defendant's medical records must first demonstrate that the defendant's physical or mental condition is 'in controversy' within the meaning of CPLR 3121 [citations omitted]. Even where this preliminary burden has been satisfied, discovery may still be precluded where the information requested is privileged and thus exempt from disclosure pursuant to CPLR 3101(b) [citations omitted]. Once the physician-patient privilege is validly asserted, it must be recognized, and the information sought may not be disclosed unless it is demonstrated that the privilege has been waived [citations omitted]. A waiver of the privilege occurs when, in bringing or defending a personal injury action, a litigant affirmatively places his or her mental or physical condition in issue [citations omitted]. A party does not waive the privilege whenever forced to defend an action in which his or

her condition is in controversy or by simply denying the allegations in the complaint [citations omitted]. Rather, in order to effect a waiver, a defendant must affirmatively assert the condition ‘either by way of counterclaim or to excuse the conduct complained of by the plaintiff.’” The majority here concludes that the deceased defendant “did not place his mental condition at the time of the [2004] accident ‘in controversy’ or waive the privilege attached to his medical records by allegedly declining to be deposed in September 2006 [on the grounds of dementia] [citation omitted]. The plaintiffs could have moved at that time to compel the deposition and challenged the social worker’s diagnosis. Instead, nine years after the social worker’s letter, and six years after Rozansky’s death, and after filing three notes of issue over the course of some seven years, indicating that discovery was complete and the case was ready for trial, the plaintiffs purported to use the mechanism of a trial subpoena to compel production of Rozansky’s medical records from October 22, 1999 to the present.” The dissenter argued that “Rozansky’s mental and/or physical health has been placed in controversy not by the defendant’s pleadings, but by Rozansky’s refusal, nearly three years prior to his death, to fulfill his deposition obligations in the normal course of the litigation. If Rozansky was so mentally impaired as to render him unable to be deposed in September 2006, as stated in the social worker’s letter, questions reasonably arise regarding, *inter alia*, when Rozansky’s progressive Alzheimer’s disease had been diagnosed and whether he was suffering from the condition at or around the time of the accident.”

Carr-Hoagland v. Patterson, 170 A D 3d 1616 (4th Dept. 2019) – “We reject plaintiffs’ contention that Supreme Court abused its discretion in denying that part of their motion with respect to the medical records [of the deceased defendant]. Plaintiffs failed to meet their burden of establishing that decedent’s medical condition is ‘in controversy’ [citations omitted]. We agree with plaintiffs, however, that decedent’s pharmacy records are not protected by the physician-patient privilege [citations omitted] and are ‘material and necessary’ to the prosecution of the action.”

Markel v. Pure Power Boot Camp, Inc., 171 A D 3d 28 (1st Dept. 2019) – In this personal injury action, plaintiff was accompanied to her examination by defendant’s chosen physician by an IME “watchdog.” Defendant now seeks the observer’s notes taken during the examination. The IME observer “is an agent of the plaintiff’s attorney. Consequently, the requested notes and materials constitute materials prepared for trial, bringing them within the conditional or qualified privilege protections of CPLR 3101(d)(2). Materials prepared in anticipation of litigation and preparation for trial may be obtained only upon a showing that the requesting party has a ‘substantial need’ for them in the preparation of the case and that without ‘undue hardship’ the requesting party is unable to obtain the substantial equivalent by other means.” Defendants have failed to meet that burden. “Key to this analysis is that the defendants’ doctor conducted plaintiff’s examination and can provide defendants with any information concerning what generally occurred and what he did at the IME.” And, “there is no claim by defendants

that they are unable to communicate with their own doctor about what transpired at the IME.” Finally, “an important consideration in the Court’s analysis is plaintiff’s representation that the IME observer will not be testifying at trial on plaintiff’s affirmative case. We are not deciding whether a different result would obtain were the IME observer expected to be, or actually is, called as a witness at any time during the case.”

ENFORCING DISCLOSURE ORDERS

Mordekai v. City of New York, 168 A D 3d 926 (2d Dept. 2019) – “The plaintiff waived any objection to the adequacy and timeliness of the defendants’ disclosure of certain evidence by filing a note of issue and certificate of readiness stating that disclosure was complete and that there were no outstanding requests for disclosure.”

Cap Rents Supply, LLC v. Durante, 167 A D 3d 700 (2d Dept. 2018) – “Although a party may not be compelled to produce or sanctioned for failing to produce information that does not exist or is not in its possession or control [citations omitted], the failure to provide information in its possession or control precludes the party from later offering at trial evidence regarding that information.” Thus, while defendant “demonstrated that the requested invoices” could not be located, and that others “were not in the respondents’ possession and control,” Supreme Court should have precluded respondents “from later offering evidence regarding the requested invoices” that “were not produced.”

Sepulveda v. 101 Woodruff Avenue Owner, LLC, 166 A D 3d 835 (2d Dept. 2018) – “To be relieved of the adverse impact of the conditional order, the defendants were required to demonstrate a reasonable excuse for [defendant] Baez’s failure to appear for his deposition and a potentially meritorious defense [citations omitted]. The defendants failed to demonstrate a reasonable excuse because the assertions by their counsel that they were unable to locate Baez and, therefore, could not produce him for depositions, were inadequate to excuse his conduct [citation omitted]. ‘The fact that a defendant has disappeared or made himself or herself unavailable is not a basis for denying a motion to strike his or her answer for failure to appear at a deposition’ [citations omitted]. As the defendants failed to demonstrate a reasonable excuse, we need not reach the issue of whether they demonstrated the existence of a potentially meritorious defense.”

Suarez v. Dameco Industries, Inc., 167 A D 3d 501 (1st Dept. 2019) – “The motion court providently exercised its discretion in granting plaintiff’s motion to strike Dameco’s answer for willful failure to comply with discovery orders [citation omitted]. Dameco’s counsel offered a barebones affirmation disclosing that Dameco was now defunct and claiming that counsel’s attempts to contact unnamed former officers of Dameco through an investigative service had been unsuccessful, which was insufficient to establish good-faith efforts to comply [citations omitted]. Although Dameco was apparently still in business when the action was commenced, defense counsel provided no explanation for

Dameco's failure to preserve any records relating to its repair, service, and maintenance of the elevator that allegedly caused plaintiff's injuries, including inspection records that Dameco was statutorily required to prepare. In light of plaintiff's showing of willful failure to comply, and since the complete absence of records impedes plaintiff's ability to prove his case, the sanction of striking Dameco's answer was appropriate under the circumstances."

Marcelo v. Elmoudni, N.Y.L.J., 1534818340 (Sup.Ct. N.Y.Co. 2018)(Silvera, J.) – "The Appellate Division First Department has found that 'the specific remedy for a party's failure to appear for deposition was preclusion, not the striking of his answer.'" Here, "the defendants failed to appear for seven scheduled depositions, have not provided this Court with a proper explanation for their failure to appear, and did not apprise the Court of their inability to be deposed on the scheduled deposition dates. Thus, the Court can infer that defendants have willfully failed to comply with discovery warranting the imposition of preclusion." The Court "shall preclude any testimony of defendants at trial and from providing any affidavits as to any substantive motion concerning liability and proximate cause."

Fuentes v. 257 Toppings Path LLC, N.Y.L.J., 1556879150 (Sup.Ct. Nassau Co. 2019) (Feinman, J.) – After plaintiffs testified at deposition that the injured plaintiff had never experienced pain or treatment for his back or neck prior to the accident, after the injured plaintiff repeated that statement during the independent medical examination, and after plaintiffs provided defendants with medical records that made no mention of any such complaints, defendant obtained other medical records showing that the injured plaintiff had been treated on four separate occasions for such pain prior to the instant accident. Plaintiffs' response to defendants' motion to dismiss the complaint on the grounds of a fraud upon the Court was that they "merely forgot" those treatments. The Court concludes that plaintiffs "forfeited the right to have their claims decided on the merits," and dismissed the complaint.

STIPULATIONS AND SETTLEMENT

Kataldo v. Atlantic Chevrolet Cadillac, 161 A D 3d 1059 (2d Dept. 2018) – "To be enforceable, a stipulation of settlement must conform to the criteria set forth in CPLR 2104 [citations omitted]. Where, as in the instant case, counsel for the parties did not enter into a settlement in open court, an 'agreement between parties or their attorneys relating to any matter in an action is not binding upon a party unless it is in a writing subscribed by him or his attorney.'" An email message "may be considered 'subscribed' as required by CPLR 2104, and, therefore capable of enforcement, where it 'contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an

intent that the name be treated as a signature’ [citation omitted]. Here, the email confirming the settlement agreement was sent by counsel for the party seeking to enforce the agreement, LICO. There is no email subscribed by the plaintiff, who is the party to be charged, or by her former attorney. In the absence of a writing subscribed by the plaintiff or her attorney, the settlement agreement is unenforceable against the plaintiff.”

Grant v. Almonte, 168 A D 3d 428 (1st Dept. 2019) – “The requisite formality necessary to accord an oral agreement binding effect as an ‘open court’ stipulation under CPLR 2104 was not present when, following a pre-trial conference at which an unidentified *per diem* attorney appeared for plaintiff, the matter was marked ‘settled’ in the court’s records. There was no indication of the terms of the settlement, and the agreement was never further recorded, memorialized, or filed with the County Clerk.”

Amerally v. Liberty King Produce, Inc., 170 A D 3d 637 (2d Dept. 2019) – “A stipulation made by the attorney may bind a client even where it exceeds the attorney’s actual authority if the attorney had apparent authority to enter into the stipulation’ [citations omitted]. Here, the plaintiff is bound by the settlement agreement signed by her former attorney. Even if the attorney lacked actual authority to enter into the settlement agreement on the plaintiff’s behalf, a finding that he had the apparent authority to do so is warranted by the facts [citation omitted]. The plaintiff’s former attorney participated in the mediation with the plaintiff’s knowledge and consent, and represented to the mediator and to defense counsel that a representative from his office had spoken with the plaintiff and obtained authority to settle the action for the sum of \$150,000. Additionally, the law firm that employed the attorney who participated in the mediation was the plaintiff’s attorney of record in the action, and attorneys from that law firm signed and verified the summons and complaint and signed and certified a note of issue filed in the action.”

Kadosh v. Kadosh, 169 A D 3d 439 (1st Dept. 2019) – “The stipulation between plaintiff and defendant, made in open court, setting forth the manner of resolving the parties’ claims and waiving their rights to appeal the trial court’s determination, is binding on defendant [citations omitted]. The record does not support defendant’s claim that he entered into the stipulation based on a unilateral mistake [citations omitted]. Prior to the terms of the stipulation being read in open court, defendant conferred with counsel and agreed that the trial court’s determination would be final, that the court would not be required to issue a reasoned decision, and that he would waive his right to appeal. Although the trial court indicated that it would review the evidence, it never stated that it would issue a reasoned decision. Finally, defendant later confirmed, on the record, that he agreed to waive his right to appeal and understood that he would not have an opportunity to obtain a detailed, reasoned decision.” The Court dismissed the appeal.

Howell v. City of New York, 165 A D 3d 567 (1st Dept. 2018) – “Once defendants failed to timely pay all sums due to plaintiffs within ninety days of his tender of the requisite

settlement documents [citation omitted], plaintiff was entitled to a judgment ‘for the amount set forth in the release, together with costs and lawful disbursements, and interest on the amount set forth in the release *from the date that the release and stipulation discontinuing action were tendered*’ (CPLR 5003-a[e])” [emphasis added]. Thus, CPLR 5003-a(e) is specific about what may be contained in a judgment against a settling defendant who has not timely paid a plaintiff his settlement proceeds.

Given the absence in that provision of any reference to prejudgment interest, there is no basis for departing from the ‘irrefutable inference that what is omitted or not included was intended to be omitted or excluded.’” Accordingly, “plaintiff is not entitled to prejudgment interest.”

PRE-TRIAL PROCEEDINGS

Hernandez v. Santiago, N.Y.L.J., 1536305836 (Civ.Ct. Bronx Co. 2018)(Gomez, J.) – “Generally, a defendant to whom discovery is owed waives the right to such discovery when plaintiff files his or her note of issue and the defendant fails to timely move to vacate it [citations omitted]. However, ‘where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.’” But, “notably, the mere need for further discovery [citation omitted], or the absence of prejudice were post-note discovery authorized, is not an unusual or unanticipated circumstance warranting further post-note discovery.”

Thompkins v. Ortiz, 165 A D 3d 428 (1st Dept. 2018) – “The order that marked the case off the calendar directed plaintiff to provide additional discovery. It thus effectively vacated the note of issue and returned the case to pre-note of issue status [citation omitted]. As CPLR 3404 does not apply to cases in which either no note of issue has been filed or the note of issue has been vacated [citation omitted], it does not apply to this case.”

Geffner v. Mercy Medical Center, 167 A D 3d 574 (2d Dept. 2018) – “Where a court dismisses an action pursuant to 22 NYCRR 202.27, on the ground that the plaintiff is unprepared to proceed to trial, to be relieved of that default, the plaintiff must demonstrate both a reasonable excuse for the default and a potentially meritorious cause of action [citations omitted]. Here the plaintiff failed to substantiate or provide requisite detail regarding her proffered excuse of expert unavailability so as to demonstrate a reasonable excuse for her lack of readiness.”

TRIAL AND JUDGMENT

JURY ISSUES

Ballinger v. Stelle Architects, PLLC, 171 A D 3d 846 (2d Dept. 2019) – “The decision whether to relieve a party from a failure to serve a timely request for a jury trial lies within the sound discretion of the trial court [citations omitted]. Here, the plaintiff’s moved, in effect, pursuant to CPLR 4102(e) for leave to serve and file a late jury demand more than one year after the defendant served a note of issue which did not request a jury trial. In the absence of any evidence in the record to excuse this inordinate delay, the Supreme Court did not improvidently exercise its discretion in denying the plaintiffs’ motion.”

Braun v. Cesareo, 170 A D 3d 1540 (4th Dept. 2019) – “By note of issue filed on August 28, 2015 and served by mail, plaintiff elected a nonjury trial. Pursuant to CPLR 4102(a), defendants could have demanded a trial by jury by filing such demand by September 17, 2015. Defendants did not do so. On September 18, 2015, i.e., one day after the deadline for demanding a trial by jury, the parties appeared in court for the scheduled trial. After ‘extensive discussion off the record’ in the court’s chambers, the court determined that the parties waived their right to a trial by jury. Defendants’ counsel placed on the record his objection and made an oral application for leave to file a late demand for a jury trial. After additional extensive arguments from counsel from both sides, the court adhered to its determination and denied the application.” A divided Appellate Division concludes that “the court’s denial of defendants’ application was an abuse of discretion. Defendants made their application for relief just one day after the deadline to make a timely demand for a jury trial [citations omitted]. In opposition to the application, plaintiff established no prejudice from that negligible delay.” The dissent argued that, because “the so-called ‘order’” did not result from a motion on notice, it was “unreviewable.”

TRIAL SUBPOENAE

Effective August 24, 2018, CPLR 2305(d) has been added to the statute, providing that, “where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where applicable, forthwith.”

Chicoine v. Koch, 161 A D 3d 1139 (2d Dept. 2018) – “A court of record generally has the power ‘to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court’ (Judiciary Law §2-b[1]). ‘Where the attendance at trial of a party or person within the party’s control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with CPLR 2103(b) to the party’s attorney of record’ [citation omitted]. Contrary to the defendant’s contention,

because he is a party to this action, over whom personal jurisdiction had been obtained, he is ‘found in the state’ within the meaning of Judiciary Law §2-b(1),” even though, after commencement of this action, he had relocated from New York to South Carolina.

TRIAL PROCEDURE

Effective January 1, 2019, CPLR 4540-a has been added to the statute, providing that, “material produced by a party in response to a demand pursuant to article 31 of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility.”

VERDICTS

Loretta v. Split Development Corp., 168 A D 3d 823 (2d Dept. 2019) – “The ‘setting aside of a jury verdict as a matter of law and the setting aside of a jury verdict as contrary to the weight of the evidence involve two inquiries and two different standards’ [citations omitted]. A motion pursuant to CPLR 4404(a) to set aside a jury verdict and for judgment as a matter of law ‘will be granted where there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial’ [citations omitted]. A jury verdict should not be set aside as contrary to the weight of the evidence ‘unless the jury could not have reached the verdict by any fair interpretation of the evidence.’”

Nieves v. 8 Avenue Furniture, Inc., 170 A D 3d 1029 (2d Dept. 2019) – “A jury finding that a party was negligent but that the negligence was not a proximate cause of the accident is contrary to the weight of the evidence ‘only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause’ [citations omitted]. Here, the defendant made no attempt to present a nonnegligent explanation for the accident; instead, it contended only that the plaintiff misidentified the van that struck her. The jury, having rejected the defendant’s theory and found not only that the defendant’s van was involved in the accident but also that the driver of the van was negligent in its operation, lacked a sufficient factual basis upon which to conclude that the defendant’s negligence was not a substantial factor in causing the accident.”

Blanchard v. Chambers, 160 A D 3d 1314 (3d Dept. 2018) – “Based on defendant’s own testimony, the verdict exonerating her from any comparative fault is against the weight of the evidence, and plaintiffs’ motion to set aside the verdict should have been granted on that basis and a new trial ordered.” Defendant motorist testified that she saw – from about 100 yards away – plaintiff and others beginning to cross the roadway. She estimated her speed at 30 miles per hour, and neither slowed down, nor sounded her horn.

She merely, as she approached, “twisted my wheel of the car thinking I could get around them.” Thus, “the jury’s verdict exonerating defendant could not have been reached on any fair interpretation of the evidence.”

Ambrose v. Brown, 170 A D 3d 1562 (4th Dept. 2019) – After the jury returned a verdict for defendants in this medical malpractice action, plaintiffs moved for a mistrial on the ground of “substantial juror confusion,” which was granted by Supreme Court. Upon defendants’ motion to reargue, plaintiffs opposed, again solely on the ground of juror confusion. Supreme Court denied reargument. Upon appeal from the granting of the mistrial, the Appellate Division reversed and reinstated the verdict. Thereafter, in November 2016, almost two years after the verdict, plaintiffs “made a posttrial motion pursuant to CPLR 4404(a) to set aside the verdict in the interest of justice, raising various alleged trial errors.” The Appellate Division affirms the denial of that motion. “Pursuant to CPLR 4405, a posttrial motion to set aside a jury verdict shall be made within 15 days after the jury renders its verdict or is discharged. Here, however, plaintiffs’ November 2016 motion was made almost two years after the jury rendered its verdict and was discharged. Moreover, plaintiffs’ November 2016 motion was in violation of CPLR 4406, which provides that, ‘in addition to motions made orally immediately after decision, verdict or discharge of the jury, there shall be only one motion under this article with respect to any decision by a court, or to a verdict on issues triable as of right by a jury; and each party shall raise by the motion or by demand under rule 2215 every ground for post-trial relief then available to the party.’”

JUDGMENTS

Wells Fargo Bank, N.A. v. Choo, 159 A D 3d 938 (2d Dept. 2018) – “Although Supreme Court retains ‘inherent discretionary power to relieve a party from a judgment or order for sufficient reason and in the interest of substantial justice’ [citations omitted], ‘a court’s inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through fraud, mistake, inadvertence, surprise or excusable neglect.’”

SPECIAL PROCEEDINGS

Matter of Northwest 5th & 45th Realty Corp. v. Mitchell, Maxwell & Jackson, Inc., 164 A D 3d 1158 (1st Dept. 2018) – “Because a special proceeding is treated like a summary judgment motion [citations omitted], petitioner could not cure the deficiency in its petition in reply.”

ARTICLE 78 PROCEEDINGS

GENERAL CONSIDERATIONS

Matter of Reillo v. New York State Thruway Authority, 159 A D 3d 993 (2d Dept. 2018) – “CPLR 7804(c) provides that when a CPLR article 78 proceeding is commenced against a ‘state body or officers’ by a notice of petition, the notice of petition must be served upon the Attorney General. Here, upon conducting a ‘particularized inquiry’ into the nature of the Thruway Authority and the statute claimed to be applicable to it [citations omitted], we conclude that the Thruway Authority is a ‘state body’ for the purposes of CPLR 7804(c) [citations omitted]. Accordingly, since the Attorney General was not served, the court properly denied the petition and dismissed the proceeding.”

Matter of Levine v. Suffolk County Department of Social Services, 164 A D 3d 1446 (2d Dept. 2018) – “A verified petition is required to establish a jurisdictional predicate for a special proceeding.” However, “a document that is not denominated a verified petition may satisfy CPLR 304 and 7804 if it is the functional equivalent of a verified petition [citation omitted]. Here, none of the papers filed and served by the petitioner was denominated a verified petition. However, the petitioner’s papers, particularly her affidavit and the affirmation of her attorney, gave notice as to what administrative section was being challenged, the events upon which the action was taken, the basis of the challenge, and the relief sought [citations omitted]. Therefore, the papers fulfilled the purposes of a verified petition and were the functional equivalent of a verified petition.”

Matter of D’Alessandro, 59 Misc 3d 748 (Sup.Ct. Kings Co. 2018)(Rivera, J.) – “Under CPLR article 78, a petitioner is not entitled to discovery as of right, but must seek leave of court pursuant to CPLR 408. Because discovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding, discovery is granted only where it is demonstrated that there is need for such relief [citation omitted]. In a summary proceeding in which a petitioner moves for disclosure under CPLR 408, the pertinent criteria for consideration include, *inter alia*: (1) whether the petitioner has asserted facts to establish a cause of action; (2) whether a need to determine information directly related to the cause of action has been demonstrated; (3) whether the requested disclosure is carefully tailored so as to clarify the disputed facts; (4) whether any prejudice will result; and (5) whether the court can fashion or condition its order to diminish or alleviate any resulting prejudice.”

Matter of Francello v. Mendoza, 165 A D 3d 1555 (3d Dept. 2018) – “Supreme Court must transfer a CPLR article 78 proceeding to the Appellate Division when a petition raises the issue of ‘whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence’ [citation omitted], and the proceeding cannot be terminated based on other objections [citation omitted]. A substantial evidence question ‘is presented only where a quasi-judicial evidentiary hearing has been held [citations omitted]. ‘Municipal land use agencies like a zoning board are quasi-legislative, quasi-

administrative bodies, and the public hearings they conduct are informational in nature and do not involve the receipt of sworn testimony or taking of evidence within the meaning of CPLR 7803(4)' [citations omitted]. Indeed, while parties before a legislative agency, such as a zoning board, 'have a right to be heard and to present facts in support of their position, the forum in which they do so is not a quasi-judicial proceeding involving the cross-examination of witnesses and the making of a record within the meaning of CPLR 7803(4) [citations omitted]. 'Accordingly, determinations of such agencies are reviewed under the "arbitrary and capricious" standard of CPLR 7803(3), and not the "substantial evidence" standard of CPLR 7803(4)' [citations omitted]. Where, as here, the proceeding requires application of the arbitrary and capricious standard, transfer to this Court is not appropriate."

Matter of Fildon, LLC v. Planning Board of the Incorporated Village of Hempstead, 164 A D 3d 501 (2d Dept. 2018) – "The Supreme Court should not have transferred this proceeding to this Court pursuant to CPLR 7804(g) because the determination to be reviewed was 'not made after a trial-type hearing held pursuant to direction of law at which evidence was taken.'"

Matter of Erie County Sheriff's Police Benevolent Association, Inc. v. County of Erie, 159 A D 3d 1561 (4th Dept. 2018) – "Supreme Court erred in transferring the proceeding to this Court pursuant to CPLR 7804(g) on the ground that the petition raised a substantial evidence issue. 'Respondent's determination was not "made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law" [citation omitted]. Rather, the determination was the result of a hearing conducted pursuant to the terms of the collective bargaining agreement' [citations omitted]. Nevertheless, in the interest of judicial economy, we consider the merits of the petition."

Matter of Williams v. New York State Justice Center for the Protection of People with Special Needs, 62 Misc 3d 171 (Sup.Ct. Albany Co. 2016)(Weinstein, J.) – CPLR 7804(g) "makes transfer of the entire petition [to the Appellate Division] mandatory whenever a substantial evidence challenge is raised, except where the matter may be terminated on the basis of an 'objection' encompassed within the rule." The Second and Fourth Departments "have construed CPLR 7804(g) to mean that only an argument raised in opposition to the petition, and which would result in its dismissal, can be addressed by the trial court prior to transfer of a substantial evidence question; a claim advanced by petitioner that will 'terminate' the proceeding to the extent it will result in him or her obtaining the relief sought is not an 'objection' under the rule." The First Department, however, "has taken the opposite view." Its decisions uphold "the denial of a transfer motion where petitioner raised a meritorious due process claim, on which basis the petition was granted." In the Third Department, in which this Court sits, two decisions "address this issue, and reach contrary conclusions." The Court here opts to follow the Second and Fourth Department decisions. "The First Department's reading of the

transfer rule is not supported by the statutory language and is contrary to its legislative history. I hold, in short, that an argument advanced affirmatively by petitioner is not an ‘objection’ as contemplated by this rule, and transfer of the petition in light of the substantial evidence challenge it raises is therefore mandatory.”

STATUTE OF LIMITATIONS

Valyrakis v. 346 West 48th Street Housing Development Fund Corporation, 161 A D 3d 404 (1st Dept. 2018) – “A proceeding challenging an action taken by a cooperative corporation must be commenced within four months after the action is final [citation omitted]. ‘In circumstances where a party would expect to receive notification of a determination, but has not, the Statute of Limitations begins to run when the party knows, or should have known, that it was aggrieved by the determination.’”

Hughey v. Metropolitan Transportation Authority, 159 A D 3d 596 (1st Dept. 2018) – “While plaintiff originally brought this matter as a plenary action asserting that defendants breached a contract to provide him with the pension benefits that he was entitled to under the MTA’s Pension Plan, the gravamen of plaintiff’s claim as ultimately presented to the motion court was a review of the Board’s administrative determination interpreting the pension plan. Consequently, the motion court properly concluded that this matter was in the nature of a CPLR article 78 proceeding, and subject to the four-month statute of limitations.”

Lakeview Outlets, Inc. v. Town of Malta, 166 A D 3d 1445 (3d Dept. 2018) – Although framed as a declaratory judgment action, “plaintiff’s complaint alleges that the mitigation fees imposed by defendant violated SEQRA and constituted an illegal tax with no demonstrated nexus between the identified impacts from the projects and the mitigation fees imposed.” That claim “is properly viewed as ‘an administrative act of defendant’s Town Board under the circumstances of this case, as opposed to a legislative act, such that any challenge thereto should have been the subject of an Article 78 proceeding.’” And, “to the extent that plaintiff attempts to couch its claims in constitutional terms, we need only note that ‘the simple expedient of denominating the instant action as one for declaratory relief and characterizing the matter as one of constitutional dimension does not cure plaintiff’s failure to comply with the four-month statute of limitations applicable to CPLR article 78 proceedings.’”

Matter of Broadway Barbeque Corporation v. New York City Department of Health and Mental Hygiene, 160 A D 3d 719 (2d Dept. 2018) – “In March 2010, the respondent/defendant New York City Board of Health adopted section 81.51 of the New York City Health Code [citation omitted], which authorizes the grading of inspection results for certain food service establishments and the posting of those grades [citation omitted]. This grading system was implemented in July 2010. In August 2014, the petitioners/plaintiffs (hereinafter the appellants) commenced this hybrid proceeding

pursuant to CPLR article 78 and action for declaratory relief challenging the authority of the respondents/defendants (hereinafter the respondents) to implement the grading system and seeking to invalidate the system.” The gravamen of the petition “was that the grading system was implemented in violation of lawful procedure, affected by an error of law, and arbitrary and capricious. Therefore, the Supreme Court correctly determined that the four-month statute of limitations set forth in CPLR 217(1) applies to this proceeding.” Accordingly, the action is time-barred. For, “the appellants challenge the adoption of the grading system, which became effective in July 2010. Inasmuch as the appellants did not commence the instant proceeding until August 2014, more than four years later, their causes of action are time-barred.”

Matter of Lohman v. Egan, 171 A D 3d 1490 (4th Dept. 2019) – “An application to reconsider the determination of an administrative body does not extend the four-month statutory period within which to seek judicial review of the determination [citations omitted]. A second application seeking the same relief is merely an application for reconsideration of the first application and thus does not extend the limitations period [citations omitted]. By contrast, where the application is based upon new evidence and ‘the agency conducts a fresh and complete examination of the matter based on that evidence, an aggrieved party may seek review in a CPLR article 78 proceeding commenced within for months of the new determination.’”

ARBITRATION

THE ARBITRATION AGREEMENT

Ramos v. Uber Technologies, Inc., 60 Misc 3d 422 (Sup.Ct. Kings Co. 2018)(Rivera, J.) – “There is no dispute that on November 4, 2015, Ramos registered an account with Uber using an Uber application on her mobile telephone. Uber contends that by the process of registering, Ramos necessarily accepted Uber’s terms and conditions which included an agreement to arbitrate.” The final screen of the registration process, “displays the last step, denominated ‘ADD PAYMENT,’ where the applicant would input their credit card details or PayPal information. Below the input fields for the credit card information is the following text: ‘By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.’ To finish the process the applicant must click on a button labeled ‘DONE.’ The applicant could before clicking the button labeled ‘DONE’ review the “Terms & Conditions” by clicking on the text. But the only indication that clicking on the text would send the applicant to additional screens containing the terms and conditions is that the text “is displayed within a rectangular box.” Thus, “the instructions on the third screenshot do not contain any language or any indication advising the applicant that clicking on the words ‘Terms and Conditions and Privacy Policy’ will take the applicant to another screen purportedly containing Uber’s terms and conditions. In

fact, an applicant may complete the registration process after completing the third screenshot and hitting the ‘DONE’ button without ever seeing or even being aware that a separate screen contains Uber’s terms and conditions.” Thus, “Uber has not demonstrated that Ramos clearly, explicitly and unequivocally agreed to arbitration when she registered for Uber services.”

Scotti v. Tough Mudder Incorporated, 63 Misc 3d 843 (Sup.Ct. Kings Co. 2019)(Silber, J.) – “The creation of online contracts “has not fundamentally changed the principles of contract’ [citations omitted]. The question of whether there is agreement to accept the terms of an online contract turns on the particular facts and circumstances. Courts generally look for evidence that a website user had actual or constructive notice of the terms by using the website [citation omitted]. Where the person’s alleged consent is solely online, courts seek to determine whether a reasonably prudent person would be put on notice of the provision in the contract, and whether the terms of the agreement were reasonably communicated to the user.” There are, the Court notes, four general types of online contracts: “(a) browsewrap; (b) clickwrap; (c) scrollwrap; and (d) sign-in-wrap.” They are defined as follows: “*Browsewrap* exists where the online host dictates that assent is given merely by using the site. *Clickwrap* refers to the assent process by which a user must click “I agree,” but not necessarily view the contract to which she is assenting. *Scrollwrap* requires users to physically scroll through an internet agreement and click on a separate “I agree” button in order to assent to the terms and conditions of the host website. *Sign-in-wrap* couples assent to the terms of a website with signing up for use of the site’s services.” At issue here is a “clickwrap” agreement that would, if printed out, run some seven pages, containing an arbitration agreement. “A party may be bound to a click-wrap agreement by clicking a button declaring assent, so long as the party is given a ‘sufficient opportunity to read the agreement, and assents thereto after being provided with an unambiguous method of accepting or declining the offer.’” But, “the presentation of the online agreement matters: Whether there was notice of the existence of additional contract terms presented on a webpage depends heavily on whether the design and content of that webpage rendered the existence of terms reasonably conspicuous. Clarity and conspicuousness of arbitration terms are important in securing informed consent.” Here, “plaintiffs did not have actual notice of the arbitration provision at issue in this case. However, plaintiffs can still be bound by the contractual terms if there is inquiry notice of the terms and plaintiffs ‘assented to the terms through the conduct that a reasonable person would understand to constitute consent.’” But, “terms should not be enforced when they are ‘buried at the bottom of a webpage or tucked away in obscure corners’ [citation omitted]. Special attention should be paid to whether the site design brings the consumer’s attention to ‘material terms that would alter what a reasonable consumer would understand to be her default rights when initiating an online transaction,’ and, in appropriate cases, such terms should not be enforced even when the contract is otherwise enforceable.” Here, “Tough Mudder has failed to establish that the webpage, as it existed in 2016 when the plaintiffs registered for

the TM event, provided reasonable notice of the relevant term (the arbitration provision) of the [contract]. In fact, Tough Mudder has failed to set forth sufficiently detailed evidence as to how its online registration webpage appeared to the plaintiffs, or other users/registrants, during the relevant time period.”

Denson v. Donald J. Trump for President, Inc., N.Y.L.J., 1537244198 (Sup.Ct. N.Y.Co. 2018)(Bluth, J.) – The arbitration clause in the parties’ agreement states that: “Without limiting the Company’s or any other Trump Person’s right to commence a lawsuit in a court of competent jurisdiction in the State of New York, any dispute arising under or relating to this agreement may, at the sole discretion of each Trump Person, be submitted to binding arbitration.” First, “the arbitration clause confines arbitration to ‘any dispute arising under or relating to this agreement.’ It does not require arbitration for any ‘dispute between the parties’ or even ‘any dispute arising out of plaintiff’s employment.’ And the agreement itself only includes a specific list of five prohibited acts on plaintiff’s part: no disclosure of confidential information, no disparagement, no competitive services, no competitive solicitation and no competitive intellectual property claims [citation omitted]. Moreover, the agreement is simply titled ‘Agreement’ – not ‘Employment Agreement’ – and it contains nothing about plaintiff’s job responsibilities, terms of her employment, salary, benefits, or her ability to pursue her own claims.” Thus, “there is simply no way to construe this arbitration clause in this agreement to prevent plaintiff from pursuing harassment claims in court.”

Wolf v. Wahba, 164 A D 3d 1405 (2d Dept. 2018) – “A decedent’s agreement to arbitrate a controversy is binding on the representative of the decedent’s estate.” But, here, “although the 2000 Operating Agreement contained a broad arbitration clause, all of the parties to this action subsequently entered into the 2014 Agreement. The 2014 Purchase Agreement was not silent on the issue of dispute resolution [citation omitted]. Rather, it explicitly provided that ‘the parties hereto agree that any suit or proceeding arising out of this Agreement or the consummation of the transaction contemplated thereby shall be brought only in a federal or state court located in the State of New York.’” Thus, “the forum selection clause contained therein superseded the arbitration clause contained in the 2000 Operating Agreement with respect to the matters in dispute, and the parties were bound to resolve this dispute in accordance with the 2014 Purchase Agreement.”

Giffone v. Berlerro Group, LLC, 163 A D 3d 780 (2d Dept. 2018) – The agreement between the parties provided that, “if there are any disputes regarding this agreement, such dispute shall be brought within one year of the date of this Agreement and will be determined by binding arbitration.” The agreement “was executed on February 2, 2014, and the infant plaintiff’s alleged injuries occurred on May 9, 2015, more than one year later. Thus, under the circumstances of this case, there was not a clear, explicit, and

unequivocal agreement between the plaintiffs and the defendants to submit the instant dispute to arbitration.”

Alam v. Uddin, 160 A D 3d 915 (2d Dept. 2018) – “Where a party has applied for an order compelling arbitration, the court shall direct the parties to arbitrate if, among other conditions, ‘there is no substantial question whether a valid agreement was made’ [citation omitted]. Here, the defendant alleged that his signature on the purported partnership agreement was a forgery and thus no valid agreement was made. Contrary to the defendant’s contention, the question of forgery is a threshold question for the court and not an arbitrator to determine.”

DISCOVERY IN AID OF ARBITRATION

Matter of Roche Molecular Systems, Inc., 60 Misc 3d 222 (Sup.Ct. Westchester Co. 2018)(Ruderman, J.) – CPLR 3119 authorizes “the issuance of New York subpoenas for depositions that were directed by an arbitral tribunal, rather than by a court in the context of a lawsuit.” For, “in making reference to the out-of-state ‘proceeding’ from which the subpoena arises, the statute does not use the words ‘action’ or ‘litigation.’ Nor does it require that the out-of-state document which is ‘issued under authority of a court of record’ be rendered by a judge following any particular form of judicial review. It is the commission to take an out-of-state deposition, issued by a clerk of the Superior Court of California, that satisfies the definition of an ‘out-of-state subpoena’ provided by CPLR 3119(a)(1) and (4).” Thus, since the statute “merely requires that the subpoena or other such document be ‘issued under authority of a court of record,’” petitioner here “does not rely on an arbitral subpoena, but rather on a commission obtained from a court of record based on the arbitrator’s authorization to seek such a commission.” And, while “many federal courts have held that section 7 of the FAA does not allow arbitrators to order discovery from nonparties,” in contrast, here, “this matter does not involve a subpoena issued by an arbitral tribunal, but rather, a New York subpoena properly issued pursuant to CPLR 3119 based on a commission properly issued by a California state court pursuant to California Civil Procedure Code §1297.271.” Finally, a First Department decision, *ImClone Systems, Inc. v. Waksal*, 22 A D 3d 387 (1st Dept. 2005), has held that “depositions of nonparties may be directed in FAA arbitrations where there is a showing of ‘special need or hardship,’ such as where the information sought is otherwise unavailable.” And, “the ruling by the First Department is controlling on this New York State trial-level court in the absence of any contrary ruling by the Second Department or the Court of Appeals.”

WAIVER OF ARBITRATION

Matter of Long Island Power Authority Hurricane Sandy Litigation (Coyle v. Long Island Power Authority), 165 A D 3d 1138 (2d Dept. 2018) – “The service of a pre-answer motion to dismiss does not constitute waiver of the right to arbitrate, since ‘a defendant is

entitled to have the sufficiency of a complaint tested before a duty to seek arbitration arises.’”

COMPELLING OR CHALLENGING ARBITRATION

Lamps Plus, Inc. v. Varela, ___ U.S. ___, 2019 WL 1780275 (2019) – In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), the Supreme Court held that when an arbitration agreement is silent on the question of a class action arbitration, no such class action arbitration is permissible. Here in *Lamps Plus*, the issue as framed in the Chief Justice’s “opinion of the Court,” is whether class action arbitration is permissible when the agreement is “ambiguous” with respect to class action arbitration. The Court, 5-4, reverses the Ninth Circuit, and concludes that, here, class action arbitration is not permitted by the agreement at issue. The Chief Justice, writing for himself and at least three other Justices, held that unless an agreement to permit class action arbitrations is clear, no such arbitrations have been agreed to. In so holding, the opinion rejected the argument, pressed by the dissenters, that state law on the interpretation of contracts should apply, including the fairly universal concept that an ambiguous provision in a contract should be interpreted against the drafter. For, here, “the FAA provides the default rule for resolving ambiguity.” And the doctrine of interpreting ambiguity against the drafter “cannot substitute for the requisite affirmative ‘contractual basis for concluding that the parties *agreed* to class arbitration” [emphasis by the Court]. But, whether this conclusion garnered the support of five Justices is . . . dare I say it . . . ambiguous. For Justice Thomas, the fifth vote, wrote a separate concurrence, in which he concluded that this agreement was *not* ambiguous, but, rather was “silent” as to class arbitration. He also noted that Federal Courts must “apply ‘background principles of state contract law’ when evaluating arbitration agreements.” Yet, he also wrote that “I remain skeptical of this Court’s implied pre-emption precedents [citation omitted], but I join the opinion of the Court because it correctly applies our FAA precedents.”

Matter of Long Island Power Authority Hurricane Sandy Litigation (Coyle v. Long Island Power Authority), 165 A D 3d 1138 (2d Dept. 2018) – “Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory “knowingly exploits” the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement’ [citations omitted]. ‘The benefits must be direct, and the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the arbitration provision in pursuing its claim [citations omitted]. ‘Where the benefits are merely “indirect,” a nonsignatory cannot be compelled to arbitrate a claim’ [citation omitted]. ‘A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself.’” The ““guiding principle is whether the

benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration clause.”

CONFIRMING OR VACATING THE AWARD

Matter of Steyn v. CRTV, LLC, 175 A D 3d 1 (1st Dept. 2019) – “For an award to be set aside for manifest disregard [of the law], the arbitrator must understand and correctly state the law, but proceed to disregard the same [citations omitted]. Application of the ‘manifest disregard of the law’ standard requires the court to make, in essence, three inquiries: (1) whether the legal principle allegedly ignored by the arbitrator was well defined, explicit, and clearly applicable; (2) whether the arbitrators knew of the governing legal principle; and (3) whether knowing that principle, the arbitrators refused to apply it or ignored it [citations omitted]. A court may not vacate an arbitration award because it thinks the arbitrators made the wrong decision [citation omitted]. Indeed, even if the court thinks that the arbitrator reached the wrong result of applied the law incorrectly, the court should nevertheless confirm the award, ‘despite the court’s disagreement with it on the merits, if there is a barely *colorable* justification for the outcome reached” [emphasis by the Court].

Matter of Fast Care Medical Diagnostics, PLLC/PV v. Government Employees Insurance Company, 161 A D 3d 1149 (2d Dept. 2018) – Petitioner provided medical services to its 15-year-old patient after a motor vehicle accident, and both the infant and his mother assigned all benefits under their policy with respondent to petitioner. When petitioner sought to arbitrate the assigned claim, the arbitrator “dismissed the proceeding, without prejudice, on the ground that Fast Care had failed to comply with CPLR 1209, which provides, in relevant part, that ‘a controversy involving an infant shall not be submitted to arbitration except pursuant to a court order made upon application of the representative of such infant.’” The Master Arbitrator confirmed the determination. The Appellate Division affirms the vacatur of that determination. “The arbitrator’s award was irrational and in conflict with CPLR 1209, which applies ‘only where an infant is a party’ to an arbitration proceeding [citations omitted]. The infant patient was not a party to the arbitration; rather, Fast Care, as the infant’s assignee, was the party that brought the arbitration.” Therefore, “the arbitrator disregarded established law in determining that the requirements of CPLR 1209 applied here.”

Whitney v. Perrotti, 164 A D 3d 1601 (4th Dept. 2018) – “It is well established that an arbitrator’s failure to set forth his or her findings or reasoning does not constitute a basis to vacate an award.”

Matter of Gassman Baiamonte Gruner, P.C. v. Katz, 164 A D 3d 790 (2d Dept. 2018) – “The decision as to whether to grant an adjournment is within the sound discretion of the arbitrator, and misconduct only occurs when the arbitrator abuses that discretion [citations omitted]. There may be an abuse of discretion when the refusal to grant an

adjournment results in the foreclosure of the presentation of material, pertinent evidence.” Here, no such abuse occurred, and the award is confirmed.

American International Specialty Lines Insurance Company v. Allied Capital Corporation, 167 A D 3d 142 (1st Dept. 2018) – “Absent an agreement to the contrary, after an arbitrator renders a final award, the arbitrator may not entertain an application to change the award, ‘except to correct a deficiency of form or a miscalculation of figures or to eliminate matter not submitted.’” The “submission by the parties determines the scope of the arbitrators’ authority’ [citation omitted]. Thus, ‘if the parties agree that the arbitration panel is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so and once the arbitrators have finally decided the submitted issues, they are, in common-law parlance, “*functus officio*,” meaning that their authority over those questions is ended.” The doctrine of *functus officio* “presumes that an arbitrator’s final decision on an issue strips him of authority to consider that issue further.” The dissenter contended, that, in this case, “the arbitrators’ decision to reconsider the disputes submitted to them and reach a different conclusion about whether respondent had suffered a loss under the relevant insurance policy, made before they finally determined the arbitration, was not in excess of their authority and did not require vacatur under CPLR 7511.”

ENFORCEMENT OF JUDGMENTS

Medallion Bank v. Papa of 5 Hacking Corp., N.Y.L.J., 1531185771 (Sup.Ct. N.Y.Co. 2018)(Ostrager, J.) – CPLR 5232(a) provides, *inter alia*, that “at the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion of the judgment creditor or support collection unit has provided, the levy shall be void except as to property or debts which have been transferred or paid to the sheriff or to the support collection unit or as to which a proceeding under sections 5225 or 5227 has been brought.” Here, a motion to extend the 90-day limit was made on the 90th day after the levy. The Court holds that the motion is timely. “The judgment creditor need only commence a proceeding within 90 days to avoid expiration of the levy.” The filing of the motion before expiration of the 90 days “constitutes a timely request for an extension of time to perfect the levies.”

Matter of New York Community Bank v. Bank of America, N.A., 169 A D 3d 35 (1st Dept. 2019) – “This appeal requires us to consider whether a presumption of joint tenancy with rights of survivorship in a safety deposit box also extends to its contents where only one of the persons who rented the box is a judgment debtor. Most of the jurisprudence concerning the statutory presumption of joint tenancy [citation omitted], relates to cash deposits in bank accounts, not deposits of property into safe deposit boxes. We find the safety deposit box rental agreement controlling on the issue of ownership and that the

judgment creditor, New York petitioner (NYCB) established that the notice respondents are joint tenants of the contents of the box, with rights of survivorship. The notice respondents failed to come forward with evidence to the contrary, making the box's contents subject to the judgment creditor's levy." The safety deposit box's rental agreement provided that the renters, husband and wife, had equal access to and control over the contents of the box. The Court applied the case law concerning joint bank accounts – that "a presumption of joint tenancy with right of survivorship arises" – to the contents of the jointly owned box. Thus, "each named tenant 'is possessed of the whole of the account so as to make the account vulnerable to the levy of a money judgment by the judgment creditor of one of the joint tenants.'" Of course, the presumption of joint ownership "may be rebutted by showing that the true situation as to ownership is different and that the account was established in joint names solely as a matter of convenience, not with the intention of conferring any beneficial property interest on the other individual [citation omitted]. This argument was raised by Rachel before Supreme Court and now, on appeal. To defeat the presumption, however, there must be direct proof that no joint tenancy was intended [citation omitted]. Neither Ari nor Rachel offered sworn affidavits in opposition to NYCB's petition. They relied on an attorney's affirmation to present their claim that Rachel only added Ari's name to the rental agreement as a matter of convenience and that the contents of the box are her separate property." But, "such indirect evidence does not rebut the presumption of joint tenancy in the box or require a hearing."

Colfin Bulls Funding B LLC v. Ampton Investments, Inc., N.Y.L.J., 1545275582 (Sup.Ct. N.Y.Co. 2018)(Freed, J.) – "It is well settled that 'the order of priority among judgments is to be determined strictly in accordance with the chronological service of execution levies and the filing of orders for turnover or receiverships' [citation omitted]. A judgment creditor who, like Colfin, serves only a restraining notice is 'required to take further steps in enforcing his judgment, such as the execution or levy upon the judgment debtor's property, in order to prevent the intervening rights of third parties from taking precedence over his claim against the judgment debtor.'"

Diaz v. Galopy Corporation International, N.V., 61 Misc 3d 429 (Sup.Ct. N.Y.Co. 2018) (Crane, J.) – A prior year's "Update" reported on the First Department's decision in *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Company*, 117 A D 3d 609 (1st Dept. 2014). There, plaintiff moved for summary judgment in lieu of complaint to convert a money judgment of the courts of England into a New York judgment. Defendant opposed, arguing that New York lacked jurisdiction over defendant, and that defendant had no assets in the State. The Court concluded that the issue in deciding whether to confirm a foreign country judgment is whether the foreign Court had jurisdiction over defendant, not whether New York does. For, "in proceeding under article 53, the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function

of recognizing the foreign country money judgment and converting it into a New York judgment.” Nor “does the CPLR require the judgment debtor to maintain property in New York for New York to recognize a foreign money judgment. While CPLR 5304 provides a list of specific reasons why the trial court may refuse recognition of the foreign country judgment, the lack of property in the state is not one of them. Thus, ‘even if defendant does not presently have assets in New York, plaintiff nevertheless should be granted recognition of the foreign country money judgment pursuant to CPLR article 53, and thereby should have the opportunity to pursue all such enforcement steps in future, whenever it might appear that defendant is maintaining assets in New York.’” Finally, “*Shaffer v. Heitner* (433 U.S. 186 [1977]) does not require otherwise. In *Shaffer*, the United States Supreme Court stated that ‘once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a state where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter’ [citation omitted]. *Shaffer* requires minimum contacts between the defendant and the forum in the action that determines the defendant’s liability to the plaintiff and CPLR article 53 satisfies this due process requirement by providing that New York courts, in performing their ministerial function, will only recognize foreign judgments where the defendant had minimum contacts with the judgment forum.” Last year’s “Update” reported on *AlbaniaBEG Ambient Sh.P.K. v. Enel S.p.a.*, 160 A D 3d 93 (1st Dept. 2018), in which the Court declined “to extend the holding of *Abu Dhabi* beyond the particular circumstances under which that case was decided.” The parties’ contract contained an Italian choice-of-law clause, and provided for resolution of any dispute by arbitration in Rome. Having lost an arbitration in Rome, plaintiff then commenced an identical action in the courts of Albania, and secured a judgment it sought to have recognized and enforced in New York. Defendant opposed, claiming that the judgment was not a money judgment, was not “final” under Albanian law, and was decided in a jurisdiction that does not provide due process of law. “Unlike judgments of sister states, to which the Full Faith and Credit Clause of the Constitution applies, judgments of foreign countries are recognized in New York under the doctrine of comity [citation omitted], according to the principles and procedures set forth in [CPLR] article 53.” First, the Court rejected defendant’s argument that, because it is not “at home” in New York, and the cause of action sued upon has no relationship to New York, the Supreme Court’s decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014) mandates denial of the application for want of jurisdiction. “We do not believe that *Daimler*’s restriction of general jurisdiction to states where a corporate defendant is ‘at home’ should be extended to proceedings to recognize or enforce foreign judgments.” But, “our conclusion that *Daimler* is not controlling, however, still leaves open the question of whether this proceeding may be maintained under the jurisdictional principles governing article 53 proceedings.” Plaintiff argued that *Abu Dhabi* “established that no jurisdictional predicate, whether *in personam* or *in rem*, is ever required for any

proceeding seeking recognition and enforcement of a foreign country judgment under Article 53. In our view, *Abu Dhabi* should not be read so broadly.” For, “critically, the *Abu Dhabi* defendant – unlike defendants here – did not raise *any* of the previously described statutory grounds for nonrecognition of a foreign country judgment set forth in CPLR 5304 [emphasis by the Court]. As reflected in the record of *Abu Dhabi*, neither did the defendant in that case argue – as the instant defendants argue here – that the foreign judgment at issue failed to meet any of the prerequisites to enforcement under article 53, such as being ‘final, conclusive and enforceable where rendered’ [citation omitted] or ‘granting or denying recovery of a sum of money.’” Thus, “the *Abu Dhabi* holding applies only ‘under the circumstances’ [citation omitted] that were presented by that case, namely, where the defendant – unlike the defendants in the case before us – does *not* contend that substantive grounds exist to deny recognition to the foreign judgment under article 53 [emphasis by the Court]. The underlying premise of *Abu Dhabi*’s holding that Supreme Court in that case had properly entered judgment under article 53, even if jurisdiction over the defendant’s person or property had been lacking, was that the court had been merely ‘performing a ministerial function’ [citation omitted] in according recognition to a foreign judgment of unquestioned finality, conclusiveness and validity under the standards of article 53. Thus, in *Abu Dhabi*, entertaining the recognition and enforcement proceeding in New York imposed ‘no hardship’ on the defendant, since ‘there was nothing to defend’ [citation omitted], given that the defendant was not raising any substantive defenses to the recognition of the English judgment. *Abu Dhabi*, by its own terms, is not controlling where – as is the case here – the foreign judgment’s entitlement to recognition under article 53 is placed in question. In that situation, there is something to defend, and the court’s function ceases to be merely ministerial. In such a case – and the matter before us is such a case – the court will be required to determine contested questions of fact, of law, or of both, and, if nonmandatory grounds for nonrecognition of a judgment are raised, to exercise judicial discretion [citation omitted]. To require a defendant to litigate such substantive issues in a forum where it maintains no property, and where it has no contacts that would otherwise subject it to personal jurisdiction would ‘offend the traditional notions of fair play and substantial justice’ [citation omitted] at the heart of the Due Process Clause.” Here, in *Diaz*, the Court holds that, “only when a judgment debtor opposing recognition of a foreign country judgment asserts substantive statutory grounds for denying recognition, must there be either *in personam* or *in rem* jurisdiction in New York [citing *AlbaniaBEG*]. Otherwise, this court’s personal jurisdiction over a defendant is not required for recognition of a foreign money judgment [citing *Abu Dhabi*].” Having concluded that the foreign judgment here may be recognized in New York, the Court turns to the issue of the proper exchange rate to be applied. The foreign judgment is in Venezuelan bolívares. Venezuela has seen inflation on an enormous scale at a rate that “has exceeded 6,000% per annum.” Plaintiff argues that the proper rate is the “official” Venezuelan rate, as of the date of the Venezuelan judgment. The Court, however, agrees

RECENT CPLR DECISIONS OF INTEREST

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with defendant that ““where local currency restrictions would prevent a party from converting its money into dollars, New York courts have been disinclined to employ “official” exchange rates, seeking instead to appraise realistically the relative values of the currencies.’” Thus, the “true market rate” should be applied. And, “the exchange rate in effect on the date of the New York judgment’s entry is the applicable rate.”