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MEMORANDUM

DATE: September 1, 2015

RE: RECENT CPLR DECISIONS OF INTEREST

FROM: Burton N. Lipshie

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JURISDICTION

CPLR 301 – PRESENCE JURISDICTION

Gucci America, Inc. v. Li, 768 F.3d 122 (2d Cir. 2014) – Last year's "Update" reported on the Supreme Court's landmark decision in *Daimler AG v. Bauman*, ___ U.S. ___, 134 S.Ct. 746 (2014). In *Daimler*, almost certainly its most important jurisdiction decision in some 70 years, an eight-Justice majority of the Supreme Court essentially rewrote the law of presence 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 familiar standard for general, presence, jurisdiction – that a corporation is present in a State in which it "does business" both "continuously and systematically" – has been abrogated, except, possibly, in "exceptional" cases. The Court issued a sweeping opinion on the constitutional limits of "presence jurisdiction," and, in the process, swept away decades of New York CPLR 301 jurisprudence. First, the Court rejected the argument, accepted and followed by many Circuits [*see*, *Gelfand v. Tanner*, 385 F.2d 116 (2d Cir. 1967)(regularly cited and followed by New York courts)], that when a local agent performs services for the foreign principal that are so important that "if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services," the presence of the agent in the state makes the principal present in that state. That test, said the Court, "stacks the deck," because "it will always yield a pro-jurisdiction answer." Instead, the Court relied heavily on – and expanded upon – its recent decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ___, 131 S.Ct. 2846 (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 has been the law since Judge Cardozo's 1917 decision 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 acknowledges "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. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State [citation omitted], quite another to expose it to suit on claims having no connection whatever to the forum State." Finally, the majority offered to "clarify" in the face of the concurring opinion, 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." Justice Sotomayor concurred in the result, but disagreed with the Court's broad restatement of presence jurisdiction. Applying the traditional tests to determine if the exercise of jurisdiction over the defendant comports with Due Process, Justice Sotomayor concluded that, as the Court had articulated in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), jurisdiction over Daimler on these facts would be "unreasonable and unfair." But she disagreed with the test for general jurisdiction adopted by the majority. The majority, she argues, "ignores the lodestar of our personal jurisdiction jurisprudence: A State may subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the state's law and

protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial." For, "until today, our precedents had established a straight-forward test for general jurisdiction: Does the defendant have 'continuous corporate operations within a state' that are 'so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities'? [citations omitted] In every case where we have applied this test, we have focused solely on the magnitude of the defendant's in-state contacts, not the relative magnitude of those contacts in comparison to the defendant's contacts with other States." But, in this decision, the majority "concludes otherwise. Referring to the 'continuous and systematic' contacts inquiry that has been taught to generations of first-year law students as 'unacceptably grasping' [citation omitted], the majority announces the new rule that in order for a foreign defendant to be subject to general jurisdiction, it must not only possess continuous and systematic contacts with a forum State, but those contacts must also surpass some unspecified level when viewed in comparison to the company's 'nationwide and worldwide' activities.'" Last year's "Update" also reported on the Second Circuit's opinion in *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 750 F.3d 221 (2d Cir. 2014), in which the Court, in a fairly colossal understatement, wrote: "We note some tension between *Daimler*'s 'at home' requirement and New York's 'doing business' test for corporate 'presence,' which subjects a corporation to general jurisdiction if it does business here 'not occasionally or casually, but with a fair measure of permanence and continuity.' *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917)(Cardozo, J.)(codified along with other 'doing business' case law by N.Y. C.P.L.R. 301). Not every company that regularly 'does business' in New York is 'at home' there. *Daimler*'s gloss on due process may lead New York courts to revisit Judge Cardozo's well-known and oft-repeated jurisdictional incantation." Here, in *Gucci*, the Second Circuit holds that, "prior to *Daimler*, controlling precedent in this Circuit made it clear that a foreign bank with a branch in New York was properly subject to general personal jurisdiction here [citations omitted]. Under prior controlling precedent of this Circuit, the Bank was subject to general jurisdiction because through the activity of its New York branch, it engaged in a 'continuous and systematic course of doing business in New York.'" *Daimler* overruled that line of cases.

In re LIBOR-Based Financial Instruments Antitrust Litigation, 2015 WL 4634541 (S.D.N.Y. 2015)(Buchwald, J.) – "It is uncontested that the Global Bank Defendants are not incorporated in New York, nor is their principal place of business in New York." Thus, "under *Goodyear* and *Daimler*, general personal jurisdiction may not be exercised unless these defendants present an exceptional case. The New York plaintiffs rely principally on representations that Global Bank Defendants made to the Federal Reserve and the Federal Deposit Insurance Corporation that their New York operations are 'significant to the activities of a critical operation or core business line' [citation omitted]. They also rely on licenses that three Global Bank Defendants obtained from the New York State Department of Financial Services." But, "we conclude without hesitation that

none of these contacts with New York" comprises "an 'exceptional case where the defendant's contacts with those states are so substantial as to render it "at home" in that state' [citation omitted]. The defendant in *Daimler*, like the defendants here, had continuous and systematic contacts, which were both substantial in an absolute financial sense, and significant to the defendant's business. Notwithstanding the defendant's 'sizable' operations, general personal jurisdiction was nonetheless inappropriate [citation omitted]. Here, even if the defendants' contacts with New York * * * happen to have been somewhat greater as an absolute or relative matter than were Daimler's contacts with California, the difference is not so marked as to present a case where, as in *Perkins* [*v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952)], the defendant could truly be called at home in those states." However, "it is well established that 'parties can consent to personal jurisdiction through forum-selection clauses in contractual agreements' [citation omitted]. 'Where pre-dispute forum-selection provisions have been obtained through "freely negotiated" agreements and are not "unreasonable and unjust" then enforcement does not offend due process.'"

7 West 57th Street Realty Company, LLC v. Citigroup, Inc., 2015 WL 1514539 (S.D.N.Y. 2015)(Gardephe, J.) – *Daimler* "effected a change in the law, providing defendants such as the Foreign Banks with a personal jurisdiction defense that was previously unavailable to them." Accordingly, the failure, pre-*Daimler*, to raise a jurisdiction defense does not waive a post-*Daimler* motion to dismiss.

Peters v. Peters, 127 A D 3d 656 (1st Dept. 2015) – Reaching the opposite conclusion from the Southern District in *7 West 57th Street Realty* directly above, the First Department holds that "*Daimler* did not establish a new rule, but 'clarified' the general jurisdiction standard previously 'set forth' in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, ___ U.S. ___, 131 S.Ct. 2846 (2011) [citation omitted], which was decided before plaintiff made its motion to compel. Under the standard first articulated in *Goodyear*, UBS did not contest in its motion papers that it is 'essentially at home' in New York [citation omitted]; therefore, it waived its objection based on personal jurisdiction."

Meyer v. The Board of Regents of the University of Oklahoma, 2014 WL 2039654 (S.D.N.Y. 2014)(McMahon, J.) – Plaintiff alleges that a work of art, stolen from her family "by the Nazis during World War II," is now in the possession of defendant University, in Oklahoma. The Court grants defendant's motion to dismiss. There is no long arm basis for jurisdiction here, for no acts relevant to the piece of art happened in New York. Plaintiff claims general jurisdiction under CPLR 301 because defendant has raised money by sale of bonds with the assistance of New York underwriters, and that defendant has a bank account here. "Long before *Daimler* such activities were insufficient to subject a nationally prominent university to general jurisdiction in this state." The Court recognized that, "in *Daimler* the Supreme Court was careful to note that domicile (for individuals) and place of incorporation and principal place of business

(for corporations) would not always be the only fora in which general jurisdiction could appropriately be asserted. But the Court rejected the *Daimler* plaintiffs' assertion that general jurisdiction exists in any state in which an individual or corporation 'engaged in a substantial, continuous, and systematic course of business' – a phrase from *International Shoe* that referred to the assertion of specific, rather than general, jurisdiction [citation omitted]. More important, the Court noted that a defendant's operations in a state other than its 'home' state(s) would have to be 'so substantial and of such a nature as to render the corporation at home in that State' before general jurisdiction could be exercised; such a case, it went on to say, would be 'exceptional.'" This was not such a case.

Fernandez v. Daimler Chrysler, A.G., N.Y.L.J., 1202664816262 (Sup.Ct. Rockland Co. 2014)(Kelly, J.) – This product liability action relates to a rollover accident that occurred in Pennsylvania. Thus, whatever contacts defendant Daimler has with New York are irrelevant for long arm jurisdiction purposes. The issue is whether New York may exercise general jurisdiction. Plaintiff points to "board meetings, communications and the like." But those board meetings "were held in New York to accommodate personnel from the defendant's corporate homes in Stuttgart, Germany and Auburn Hills, Michigan. The fact that New York was used to ease the travel burdens of Daimler employees evidences the fact that Daimler was not 'at home' in New York. Daimler A.G. cannot possibly be 'at home' in each of these locations [citation omitted]. In fact, it appears that the quantum of activity inside New York is far exceeded by the activity outside New York." Moreover, "Daimler A.G. has no employees in New York. The occasional presence of its chairman and the leasing of property by a subsidiary are insufficient to establish a corporate home."

Saarstahl AG v. Wirthlin Worldwide Consulting, LLC, 2014 WL 2727018 (Sup.Ct. N.Y.Co. 2014)(Sherwood, J.) – "The record makes clear that defendant Wirthlin, based in Utah and incorporated in Delaware, is not 'at home' in New York. Rather, its presence here consists merely of having a New York mailing address and a New York phone number. The exercise of general personal jurisdiction over defendant would violate due process under *Daimler*."

Mejia-Haffner v. Killington, Ltd., 119 A D 3d 912 (2d Dept. 2014) – Six months after the Supreme Court's decision in *Daimler*, the Court here nonetheless holds that "'a foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of "doing business" here that a finding of its "presence" is warranted' [citations omitted]. Mere solicitation of business within New York will not subject a defendant to New York's jurisdiction [citations omitted]. Instead, a plaintiff asserting jurisdiction under CPLR 301 must satisfy the standard of 'solicitation plus,' which requires a showing of 'activities of substance in addition to solicitation.'"

D&R Global Selections, S.L. v. Piniero, ___ A D 3d ___, 2015 WL 2237392 (1st Dept. 2015) – "As defendant neither is incorporated in New York State nor has its principal place of business here, New York courts may not exercise jurisdiction over it under CPLR 301 [citing *Daimler*]."

Bailen v. Air & Liquid Systems Corporation, 2014 WL 3885949 (Sup.Ct. N.Y.Co. 2014)(Heitler, J.) – One of the issues that remains open in the wake of the *Daimler* decision is the continuing validity of the almost universal holding of New York cases that New York courts may exercise general jurisdiction over foreign corporations that have registered to do business in New York, and have designated the Secretary of State as agent for service of process here [*see*, Business Corporation Law §1304]. Last year's "Update" reported on *Beach v. Citigroup Alternative Investments LLC*, 2014 WL 904650 (S.D.N.Y. 2014), one of the first post-*Daimler* decisions, in which the Court held that "notwithstanding these limitations [announced in *Daimler*], a corporation may consent to jurisdiction in New York under CPLR 301 by registering as a foreign corporation and designating a local agent." Similarly, here, in *Bailen*, the Court holds that, even after *Daimler*, "a corporation may consent to jurisdiction in New York under CPLR 301 by registering as a foreign corporation and designating a local agent [citations omitted]. In other words, a New York court may exercise general jurisdiction over a corporation, regardless of whether it is 'at home' in New York, so long as it is registered to do business here as a foreign corporation and designates a local agent for service of process."

Chatwal Hotels & Resorts LLC v. The Dollywood Company, 2015 WL 539460 (S.D.N.Y. 2015)(McMahon, J.) – "Prior to *Daimler*, some courts concluded that registering to do business in the state of New York automatically confers general jurisdiction on that person or entity [citations omitted]. However, other courts were unwilling to find that registering to do business in the state, without more, was enough to confer general jurisdiction over an entity, even though registration is 'very strong evidence that the corporation is subject to *in personam* jurisdiction' [citations omitted]. After *Daimler*, with the Second Circuit cautioning against adopting 'an overly expansive view of general jurisdiction' [citation omitted], the mere fact of Herschend's being registered to do business is insufficient to confer general jurisdiction in a state that is neither the state of incorporation or its principal place of business."

Matter of B&M Kingstone, LLC v. Mega International Commercial Bank Co., Ltd., ___ A D 3d ___, 2015 WL 4726634 (1st Dept. 2015) – In its attempt to enforce a judgment, petitioner seeks information from respondent bank, headquartered in Taiwan, by service of an information subpoena on its New York branch. The Court directs enforcement of the subpoena with respect to accounts held in *any* of the bank's branches, because "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."

Gliklad v. Bank Hapoalim B.M., 2014 WL 3899209 (Sup.Ct. N.Y.Co. 2014)(Schweitzer, J.) – The Court here concludes that defendant bank, incorporated in Israel, with its principal place of business in Tel Aviv, is not subject to general jurisdiction in New York. First, even if defendant's New York branch is "the center of its operations in the United States," this "says nothing with respect to an elevated level of continuous and systematic activity. Center of operations is an opaque concept, having no identifiable meaning in the circumstances. There is no center of operations test with respect to general jurisdiction post-*Daimler*. Second, general jurisdiction was not acquired by the defendant's being licensed to do business in New York pursuant to Banking Law §200. That section provides that the designation of the Superintendent of Banking as agent for service of process provides for jurisdiction 'in any action or proceeding against it on a cause of action arising out of a transaction with its New York agency or branch or branches." Thus, the designation is only with respect to claims based on long arm – not general – jurisdiction.

Putnam Leasing Company, Inc. v. Pappas, 46 Misc 3d 195 (Dist.Ct. Nassau Co. 2014)(Ciaffa, J.) – "This court sees nothing in *Daimler* which questions the general validity of contractual forum selection provisions, such as the one involved in this case. To the contrary, a long line of cases treat contractual forum selection provisions as a permissible substitute for minimum contacts." Forum selection clauses "do 'not offend due process' unless applied in an 'unreasonable or unjust' manner [citation omitted]. Absent proof of 'fraud, undue influence, or overweening bargaining power,' a forum selection clause ordinarily 'should be given full effect' [citation omitted]. While forum selection clauses remain 'subject to judicial scrutiny for fundamental fairness' [citation omitted], 'form contracts' containing such clauses are presumptively valid and this holds true regardless of whether the terms are 'subject to negotiation' [citations omitted]. For these reasons, the court rejects defendant's contention that the absence of a New York 'nexus' precludes it from exercising jurisdiction consistent with due process. Since *Daimler*'s due process analysis does not alter or limit prior decisions upholding forum selection clauses, the court reaffirms that it possessed jurisdiction over the instant case, consistent with due process, pursuant to the forum selection clause of the lease."

Smart Trike, MNF, PTE, Ltd. v. Piermont Products LLC, 2014 WL 2042298 (Sup.Ct. N.Y.Co. 2014)(Kornreich, J.) – This case presents another issue that will be affected by the Supreme Court's *Daimler* decision. Prior law in New York made clear that when a parent corporation treated a subsidiary as a "mere department," by controlling marketing and operational policies, having the subsidiary financially dependent on the parent, assigning executive personnel, and generally not observing corporate formalities, the presence of the parent in New York sufficed to make the non-New York subsidiary

"present" here [*see*, *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corporation*, 751 F.2d 117 (2d Cir. 1984); *Goel v. Ramachandran*, 111 A D 3d 783 (2d Dept. 2013)(reported on in last year's "Update"). Does the "mere department" concept survive *Daimler*? Last year's "Update" reported on *Deutsche Zentral-Genossenschaftsbank AG v. UBS AG*, 2014 WL 1495632 (Sup.Ct. N.Y.Co. 2014) in which the Court noted that "*Daimler* significantly narrows the parameters for the exercise of general personal jurisdiction, and calls into question the validity of the doing business doctrine [citation omitted] and, arguably also, the mere department doctrine." Similarly, here in *Smart Tryke*, the Court "believes that the 'mere department' doctrine, where fraud need not be alleged for jurisdiction purposes [citation omitted], may no longer be Constitutional [after *Daimler*]. The court will not reach this issue in this case because Piermont failed to properly allege the non-fraud elements of a veil-piercing claim."

NYKCool, A.B. v. Pacific International Services, Inc., 2014 WL 3605632 (S.D.N.Y. 2014)(Kaplan, J.) – Defendant "urges the Court to conclude that jurisdiction based on an alter ego theory" is impermissible in light of the Supreme Court's holding in *Daimler*. The Court "rejects this theory." The Court in *Daimler* "expressed some doubt about the constitutionality of subjecting a company to general jurisdiction under the mere department or agency theory, which provides jurisdiction over the principal where the subsidiary 'performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.'" But, "the Court did not express any doubt as to the soundness of an alter ego theory of jurisdiction, which is present only in the rather different circumstance in which one person or entity truly dominates another so that the two are indistinguishable for practical purposes.'" For, "jurisdiction based on an alter ego theory looks to 'whether the affiliate is so dominated by the defendant as to be its alter ego,' not just the 'affiliate's importance to the defendant.'"

NewLead Holdings Ltd v. Ironbridge Global IV Limited, 2014 WL 2619588 (S.D.N.Y. 2014)(Pauley, J.) – Even after *Daimler*, "'where a parent corporation is present in New York, its foreign subsidiary may be subject to New York jurisdiction if the subsidiary is a "mere department" of the parent' [citation omitted]. To be a 'mere department' there must first be common ownership [citation omitted]. Courts also look to the 'financial dependency of the subsidiary on the parent corporation,' 'the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities,' and 'the degree of control over the marketing and operational policies of the subsidiary exercised by the parent.'"

Paysys International, Inc. v. Atos SE, 2015 WL 4533141 (S.D.N.Y. 2015)(Scheindlin, J.) – "'*Daimler* expressed doubts as to the usefulness of agency analysis that focuses on an

affiliate's importance to the defendant,' not – as here – 'on whether the affiliate is so dominated by the defendant as to be its alter ego.'"

In re M/V MSC Flaminia, 2015 WL 1849714 (S.D.N.Y. 2015)(Scheindlin, J.) – "New York courts may assert general jurisdiction over a foreign company based on the actions of its in-state domestic affiliate in situations where the relationship between the foreign parent and its subsidiary 'validly suggests the existence of an agency relationship or the parent controls the subsidiary so completely that the subsidiary may be said to be simply a department of the parent.' However, if imputing the in-state contacts of the domestic affiliate to the foreign parent does not render the foreign parent 'at home' in the state, then there is no basis to subject the foreign parent to general jurisdiction in the state." Thus, "in *Daimler*, the Supreme Court considered whether imputing the in-state contacts of a subsidiary corporation to its foreign corporate parent would render the foreign entity 'at home' in the forum state. There, the subsidiary's place of incorporation and principal place of business were both outside the forum state. However, the subsidiary had multiple offices throughout the forum state and its sales in the forum state accounted for 2.4% of the foreign parent's worldwide sales. The Court held that even assuming that the subsidiary is at home in the forum state and that the subsidiary's contacts can be imputed to the foreign parent, 'there would still be no basis to subject the foreign corporate parent to general jurisdiction' in the forum state, thereby rejecting the Ninth Circuit's determination that jurisdiction existed under a broad view of agency theory."

SPV OSUS Ltd. v. UBS AG, 2015 WL 4566092 (S.D.N.Y. 2015)(Rakoff, J.) – "The 'mere department' analysis applies only if the parent company is subject to general jurisdiction in the forum."

Hardware v. Ardowork Corporation, 117 A D 3d 561 (1st Dept. 2014) – Although *Daimler* dealt with a state's general jurisdiction over corporations, the Court stated that "'for an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile.'" Here, in a decision dated four months after *Daimler*, the Court, without discussing, or even citing, *Daimler*, holds the individual third-party defendant to be subject to general jurisdiction in New York because he was "'doing business' in New York, through a voluntary, continuous and self-benefitting course of conduct, sufficient to render him subject to the general jurisdiction of this State's courts [citations, including *Bryant v. Finnish National Airline*, 15 N Y 2d 426 (1965), which re-affirmed the decision in *Tauza*, which the Supreme Court apparently overruled in *Daimler*, omitted]. The evidence included, among other things, Mr. Hardware's testimony concerning his long-term employment as a scientist at an 'undisclosed location' in New York, and documentary evidence presented by third-party plaintiffs showing that he also had a long-term business relationship with a New York company, for which he acted as a designated agent."

Magdalena v. Lins, 123 A D 3d 600 (1st Dept. 2014) – Citing *Daimler*, the Court holds that there is no basis for general jurisdiction over the corporate defendant because it "is not incorporated in New York and does not have its principal place of business in New York," and no basis for general jurisdiction over the individual defendant because, "while Lins, a Brazilian national, owns an apartment in New York, he is not domiciled there." Although not discussed in this decision, it is also at least possible that the Supreme Court's *Daimler* decision has called into question the continuing validity of "tagging jurisdiction," despite its unanimous upholding of the concept in *Burnham v. Superior Court*, 495 U.S. 604 (1990). "Tagging" grants general jurisdiction over an individual in a state where that individual is clearly not "at home."

Pichardo v. Zayas, 122 A D 3d 699 (2d Dept. 2014) – In a decision issued ten months after *Daimler*, the Court here holds that the individual defendants are not subject to general jurisdiction in New York, not because of the restrictions imposed by *Daimler*, which it does not cite, but because of this Court's prior decisions interpreting CPLR 301 as not including general jurisdiction over individuals based upon "doing business" in New York. The Court included a "but see" cite to *Hardware v. Ardowork Corporation*, discussed above.

Reich v. Lopez, 38 F.Supp.3d 436 (S.D.N.Y. 2014)(Oetken, J.) – The Court here concludes that *Daimler* limits general jurisdiction over individuals as well as corporations. "For general jurisdiction over an individual to comport with due process, Defendants must be domiciled in New York, served in New York, or have otherwise consented to the court's jurisdiction. Only on truly 'exceptional' occasions may general jurisdiction extend over individuals who are 'at home' in a state that is not otherwise their domicile." Here, defendant's ownership of New York residential property, use of New York office space and banks, retention of New York lawyers and a public relations firm, previous use of New York courts, and frequent travel to New York, while "relevant," still "fall short of establishing a *prima facie* case of jurisdiction."

Reich v. Lopez, 2015 WL 1958878 (S.D.N.Y. 2015)(Oetken, J.) – After jurisdictional discovery is complete, the Court here revisits the issue of "domicile" as a basis for general jurisdiction over an individual post-*Daimler*. "Domicile is the 'technically pre-eminent headquarters that every person is compelled to have in order that by aid of it, certain rights and duties which have attached to it by law may be determined' [citation omitted]. A person has exactly one domicile at all times from his birth to his death [citation omitted]. At birth, he has the domicile of his custodial parent [citation omitted]. He keeps this domicile until, by choice or operation of law, he acquires another [citation omitted]. To acquire a domicile by choice, the law requires physical presence in the domicile state coincident with the intent to make that state one's home – at least for a period of time." That intent "can be inferred from a wide range of facts, and, as such, the totality of the circumstances surrounding a person's residence is relevant to the question."

Here, defendant bought an apartment in midtown Manhattan in 2010 for $11,750,000. He is in the process of renovating that apartment. He also acquired furniture worth more than $100,000, and artwork worth well over $3,000,000. He pays utility bills and receives some mail at that apartment. He keeps most of his money – some $68,000,000 – in New York financial institutions. He has retained New York lawyers, has consented to be sued in New York in several actions, and attends business meetings and social events in New York. He has many close friends and relatives living in New York. But, the defendant has not given up his previous domicile in Venezuela, where he also maintains residences and the headquarters of his business. Despite his purchases and investments in New York, he has spent only 42 nights here over the past 2 1/2 years. The Court rules that the evidence is insufficient to make out a *prima facie* case of New York domicile.

Hopeman v. Hopeman, ___ A D 3d ___, 2015 WL 2237333 (1st Dept. 2015) – Defendant was not subject to general jurisdiction in New York because "there was no evidence that he had established 'physical presence in the State and an intention to make the State a permanent home.'"

Runberg, Inc. v. McDermott, Will & Emery, LLP, N.Y.L.J., 1202727391621 (Sup.Ct. N.Y.Co. 2015)(Singh, J.) – While *Daimler*'s direct holding affects general jurisdiction over corporations, and its fairly specific, although technically *dicta* affects general jurisdiction over individuals, it said nothing about general jurisdiction over partnerships, or, as here, limited liability partnerships. In this legal malpractice action, defendant law firm is an Illinois limited liability partnership, "with numerous locations in the United States, including an office in New York where it regularly conducts business." Defendant Codd is a partner in the firm, resident in its District of Columbia office. Plaintiff is a New York corporation, with its principal place of business in New Jersey. None of the events giving rise to the lawsuit occurred in New York. Defendant law firm did not challenge general jurisdiction over it (which would have raised interesting issues under *Daimler* as to whether it was "at home" in New York because of its office here). The instant motion is to dismiss with respect to Codd, for lack of jurisdiction. The Court rejects plaintiff's argument that general jurisdiction exists over Codd because he is a partner in a firm with such a New York presence. For, "New York partnership law imposes liability on a partner of a foreign limited liability partnership only for acts in New York performed by that individual partner." And plaintiff "cites no case law concluding that jurisdiction is appropriate in New York over a partner of a limited liability partnership for acts performed outside of New York. Plaintiff only cites case law discussing jurisdiction over general partners, whose legal duties and obligations are far broader than those of limited liability partners. Therefore, general jurisdiction may not be established over Codd pursuant to CPLR 301."

CPLR 302 – LONG ARM JURISDICTION

Egg Dragon International Trading, Inc. v. Best Buy Foodservice, Inc., N.Y.L.J., 1202721564560 (Sup.Ct. Nassau Co. 2015)(Feinman, J.) – "Where the parties' contract was negotiated entirely by facsimile or mail, and all the activities in New York relating to the contract were performed by the plaintiff, it cannot be said that the defendant transacted business in New York [citation omitted]. It is also well established that a foreign defendant whose only contact with New York is the purchase of goods by telephone or mail from a New York plaintiff is not subject to long-arm jurisdiction under the 'transacts any business' test of CPLR 302(a)(1)."

Kleinfeld v. Rand, N.Y.L.J., 1202726157762 (Sup.Ct. N.Y.Co. 2015)(Kern, J.) – Plaintiff sues the individual guarantor of a corporate debt. "Plaintiff asserts that defendant's attendance at two, perhaps three, meetings in New York to negotiate the essential terms of the Note, including defendant's personal guaranty, is sufficient to confer jurisdiction over defendant." However, "the court finds that two, maybe three, preliminary meetings in New York where defendant was negotiating the terms of the Note, which was for the benefit of the corporate borrowers, is not sufficient to constitute that defendant, in his individual capacity, was transacting business in New York in connection with the subject guaranty. Rather, there is very limited connection between these alleged meetings in New York and the actual guaranty plaintiff now seeks to recover under. Indeed, the Note and alleged guaranty were both executed in New Jersey, not New York and both defendant and the borrowers are New Jersey residents. Thus, in the instant case, there simply is not a sufficient nexus between defendant's alleged activities in New York in connection with the guaranty and the present action to confer personal jurisdiction over defendant pursuant to CPLR 302(a)(1)."

Runberg, Inc. v. McDermott, Will & Emery, LLP, N.Y.L.J., 1202727391621 (Sup.Ct. N.Y.Co. 2015)(Singh, J.) – In this legal malpractice action, defendant law firm is an Illinois limited liability partnership, "with numerous locations in the United States, including an office in New York where it regularly conducts business." Defendant Codd is a partner in the firm, resident in its District of Columbia office. Plaintiff is a New York corporation, with its principal place of business in New Jersey. None of the events giving rise to the lawsuit occurred in New York. Plaintiff seeks jurisdiction over Codd pursuant to CPLR 302(a)(1), based upon the fact that Plaintiff is a New York corporation, and the fact that Codd has, in the past, represented four unrelated New York clients. First, "the cause of action in this case does not arise from the fact that Codd represented four clients, other than Runberg, who are located in New York." Moreover, "the fact that Runberg is a New York corporation is not enough to confer jurisdiction over Codd in this case. 'A plaintiff may not rely on his own activities within the State, rather than on defendant's independent activities to invoke long-arm jurisdiction.'" Finally, plaintiff sought jurisdiction under CPLR 302(a)(3), asserting "that Codd, through defective legal

representation, deprived Runberg, a New York corporation, of a valuable asset (the patent) thereby causing injury in New York. It is well settled that 'the indirect financial loss resulting from the fact that the injured person resides or is domiciled in New York without more, is insufficient to confer jurisdiction under CPLR 302(a)(3).'"

Rushaid v. Pictet & Cie, 127 A D 3d 610 (1st Dept. 2015) – Plaintiff claims that defendant Swiss bank assisted faithless employees in a kickback scheme by effecting wire transfers on their behalf. "Unlike the Lebanese Canadian Bank (LCD) [over which jurisdiction was sustained in *Licci v. Lebanese Canadian Bank, SAL*, 20 N Y 3d 327 (2012)], however, which was alleged to have 'deliberately used a New York account again and again to effect its support' of a foundation through which money was funneled to a terrorist organization [citation omitted], defendants are alleged to have been 'directed' by plaintiffs' former employees 'to wire the bribe/kickback money to Citibank NA, New York, in favor of Pictet & Co. Bankers Geneva, for the credit of' an account they controlled. Thus, unlike LCD, defendants merely carried out their clients' instructions and have not been shown to have 'purposefully availed themselves of the privilege of conducting activities in New York.'"

Wilson v. Dantas, 128 A D 3d 176 (1st Dept. 2015) – The divided Court concludes that this cause of action, seeking compensation under an agreement establishing a foreign investment program, arises out of defendants' transaction of business in New York sufficient to invoke long arm jurisdiction pursuant to CPLR 302(a)(1), and thus denies defendants' motion to dismiss the complaint. The contract providing for payment to plaintiff was one of several drafted by New York lawyers for Citibank to set up the program. All parties met in New York to execute the contracts. Of the three related contracts here pertinent, two provided a New York choice of forum, and, the complaint alleges, were negotiated as well as executed here. As to the third, which is the one creating plaintiff's rights, while the agreement contained a Cayman Island choice of forum clause, and while the complaint does not specifically allege that it was negotiated in New York, the majority concludes that although the complaint "may have been inartfully drafted in part," it "can infer from the complaint that the Shareholder Agreement was negotiated in New York." But, even if it was not, the three agreements "comprise a broader transaction of business in New York from which plaintiff's cause of action arise for the purposes of personal jurisdiction." For, "'the statutory test may be satisfied by a showing of other purposeful acts performed by defendants in this State in relation to the contract, albeit preliminary or subsequent to its execution.'" And, here, "defendants entered New York to negotiate and execute contracts with New York entities and others for the purpose of establishing a large investment plan. The transaction laid the foundation for a continuing relationship between the parties, including Citibank in New York, which lasted for nearly a decade [citation omitted]. In sum, defendants purposefully availed themselves of New York law by engaging in those negotiations, being physically present in New York at the time the contract was made, and thereby

establishing a continuing relationship between the parties." As to the issue whether plaintiff's claim "arises from" defendants' New York conduct, the majority relied extensively upon the liberal interpretation of that phrase applied by the Court of Appeals in *Licci v. Lebanese Canadian Bank, SAL*, 20 N Y 3d 327 (2012), whether "'in light of all the circumstances, there is an articulable nexus or substantial relationship between the business transaction and the claim asserted.'" Thus here, "as in *Licci*, the facts as alleged surpass the minimum requirement of 'a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former' [citing *Licci*]." For while the contract creating plaintiff's rights contained a Cayman Island choice of forum, "the clause is non-exclusive and the agreement was substantially related to the broader transaction establishing the investment program, so defendants should have reasonably expected to defend their actions in New York." The dissenting Justice argued that, "although the shareholders' agreement is related to other contracts with Citibank, the complaint makes it clear that plaintiff's causes of action arise out of the shareholders' agreement only." And "this is not a matter of what the majority describes as an inartfully drafted pleading. Rather, the complaint is simply devoid of jurisdictional facts that could have been alleged had they existed." In the absence of any allegations that the shareholders' agreement was negotiated in New York, "the mere execution of agreements in New York, however, does not constitute the transaction of business under CPLR 302(a)(1)."

Cellino & Barnes, P.C. v. Martin, Lister & Alvarez, PLLC, 117 A D 3d 1459 (4th Dept. 2014) – A New York law firm sues a Florida law firm "seeking quantum meruit damages for plaintiff's legal representation of a client who later retained defendant to represent her. Defendant eventually settled the client's personal injury claim [in New York] for $495,000 and kept $164,000 as its fee. Plaintiff seeks a portion of that fee as damages in this action." The Court holds that the Florida-based defendant is subject to long arm jurisdiction in New York. For, "defendant represented a client who was injured in a motor vehicle accident in New York and then obtained 'a favorable settlement of her New York personal injury claim from New York tortfeasors in accordance with New York law' [citation omitted]. In addition, before settling the action, the attorney handling the claim for defendant became admitted to practice law in New York. Based on those purposeful activities in New York, we conclude that defendant had the requisite 'minimum contacts' with this state to warrant the exercise of long-arm jurisdiction pursuant to CPLR 302(a)(1)."

Larsen v. Virtual Technologies, N.Y.L.J., 1202638977186 (Sup.Ct. Suffolk Co. 2014) (Emerson, J.) – "Courts are generally loathe to uphold jurisdiction under the transaction-of-business prong of CPLR 302 if the contract at issue was negotiated solely by mail, telephone and fax without any New York presence by the defendant." Here, the note at issue was executed by defendant in California, and is governed by California law. "The Second Circuit has enumerated a variety of factors to be considered in determining

whether an out-of-state defendant has transacted business in New York. They are: (i) whether the defendant has an on-going contractual relationship with a New York plaintiff, (ii) whether the contract was negotiated or executed in New York and whether, after executing the contract, the defendant visited New York for the purpose of meeting the parties to the contract regarding the relationship, (iii) the choice-of-law clause in the contract, (iv) whether the contract required the defendant to send notices and payments into the forum state or subjected them to supervision by a corporation in the forum state. Other factors may also be considered. No single factor is dispositive, and the ultimate determination is based on the totality of the circumstances." Here, "the record reflects that the note was negotiated solely by telephone and mail without any New York presence by the defendants, that the note is governed by the laws of the State of California, and that the defendants never visited New York after execution of the note to meet with the plaintiff. The note was executed simultaneously with a convertible promissory note purchase agreement that provided for notices to be sent to the plaintiff at her address in New York. However, the defendants never sent any payments into New York, and the defendants' correspondence with the plaintiff was limited to only a few letters and e-mails. The court finds that these contacts are insufficient to establish that the defendants intended to project themselves into ongoing New York commerce or that they purposefully availed themselves of the New York forum." Plaintiff's attempt to obtain jurisdiction pursuant to CPLR 302(a)(3) also fails. "The plaintiff has failed to show that she sustained any injury other than financial loss in New York. Assuming that the plaintiff has viable tort claims, the situs of such a nonphysical commercial injury is the place where the critical events associated with the dispute took place, in this case California, and not where the resultant monetary loss occurred [citations omitted]. The mere fact that the economic consequences of what transpired in California may be felt in New York due to the fortuitous location of the plaintiff in New York is not a sufficient basis for jurisdiction under CPLR 302(a)(3)."

C. Mahendra (N.Y.) LLC v. National Gold & Diamond Center, Inc., 125 A D 3d 454 (1st Dept. 2015) – "Plaintiff is a New York wholesale supplier of loose diamonds on consignment to vendors; defendant is a California seller of jewelry, including goods that it accepted on consignment. The parties began doing business with each other in 2002; defendant placed numerous orders, totaling millions of dollars, by telephoning plaintiff in New York and negotiating terms of size, price range, and description of the diamonds. In the course of their dealings, plaintiff shipped diamonds to defendant 'on memorandum' so that defendant could examine the diamonds and decide whether to keep them. Plaintiff then sent defendant invoices for the diamonds it purchased." Then, "several years into the parties' business arrangement, defendant allegedly failed to pay a balance of around $14,000 for a June 2009 consignment. Similarly, defendant allegedly failed to pay more than $50,000 for a March 2011 consignment." The Appellate Division recognizes "that courts of this state have generally held telephone communications to be insufficient for finding purposeful activity conferring personal jurisdiction [citations

omitted]. However, there are exceptions to this general rule, and in some cases, telephone communications will, in fact, be sufficient to confer jurisdiction [citations omitted]. Here, the [supreme] court did not assess defendant's conduct or defendant's purposeful availment of the privilege of doing business in this forum." For, "the 'quality of defendant's contacts' is the primary consideration in deciding the question of long-arm jurisdiction." While "the business dealings in this case were not especially complex, they also did not fall on the opposite end of the spectrum – that is, a single consumer transaction [citation omitted]. The quality of the defendant's conduct was sufficient to subject defendant to long-arm jurisdiction."

Paterno v. Laser Spine Institute, 24 N Y 3d 370 (2014) – Last year's "Update" reported on the Appellate Division decision in this action [112 A D 3d 34 (2d Dept. 2013)]. As the majority at the Appellate Division explained it, the New York plaintiff saw defendants' advertisement on the home page of America Online. Clicking on the ad, he saw a video in which a professional golfer praised defendants' medical services with regard to back pain. Plaintiff then contacted defendants, who are located in Florida, through telephone and e-mail, and sent MRI films to defendants. Defendants recommended surgery, and many communications ensued between plaintiff and defendants. Eventually, plaintiff journeyed to Florida for surgery. It did not go well. Post-surgery, and back in New York, plaintiff continued to contact defendants. Defendants were in contact with plaintiff's New York physicians. Plaintiff returned to Florida for additional surgery. Eventually, plaintiff sued defendants in New York for medical malpractice. In response to defendants' motion to dismiss for lack of jurisdiction, plaintiff urged that defendants were subject to jurisdiction here pursuant to CPLR 302(a)(1). "Plaintiff contended that the defendants' transaction of business in New York was evidenced by LSI's solicitation of his business through its advertisement on AOL; the 'communication stream' between him and the defendants both before and after the surgical procedures; the defendants' consultation with the plaintiff's New York-based physicians; the defendants' direction that the plaintiff have blood work performed in New York; and the filing of the defendants' prescriptions for the plaintiff at New York pharmacies." In addition, plaintiff sought jurisdiction over defendants under CPLR 302(a)(3), urging that their tortious conduct outside the State caused him injury within the State. A closely-divided Appellate Division held that New York lacks jurisdiction over defendants. "It is not the number of contacts which is determinative of whether a defendant purposely availed itself of the benefits and privileges of conducting business in New York. Each jurisdictional inquiry pursuant to CPLR 302(a)(1) will turn upon the examination of the particular facts of the case, 'and although determining what facts constitute "purposeful availment" is an objective inquiry, it always requires a court to closely examine the defendant's contacts for their *quality*'" [emphasis by the Court]. First, the majority held that defendants' website "was informational only and, thus, 'passive' in nature." Then, "contrary to our dissenting colleagues' conclusion, LSI's email messages to the plaintiff in New York and telephone conversations with the

plaintiff while he was in New York do not constitute 'business' activity and are not sufficiently 'purposeful' for jurisdiction purposes." For, "it cannot be concluded that LSI 'projected itself into New York in such a manner as to purposefully avail itself of the benefits and protections of New York law,'" because "the parties' many communications were not intended to do business in New York; rather, the communications focused on doing business outside of New York." Thus, "the 'many communications' between the parties, which mostly emanated from the plaintiff, were all related to the surgeries which occurred in Florida." Nor does it help plaintiff that he "completed, in New York, the paperwork which the defendants had sent to him prior to his initial trip to Florida." And, "neither the fact that the plaintiff underwent certain testing in New York (*i.e.*, blood work and MRIs) in connection with his Florida treatment, nor the fact that the individual defendants telephoned prescriptions to the plaintiff's New York pharmacy, nor even that the defendants had conversations with the plaintiff's local physician, requires the conclusion that the defendants transacted business in this State." Finally, the Court rejected jurisdiction pursuant to CPLR 302(a)(3). Plaintiff's injury occurred in Florida, where the alleged malpractice occurred, and not New York. The dissenting Justices argued that "based on the totality of the circumstances [citation omitted], in light of the number, nature, and timing of all of the contacts involved, including the numerous telephone, email, and text message communications with the plaintiff in New York, the consultations with the plaintiff's New York physicians, the filing of prescriptions in New York pharmacies, and the ordering of blood work and MRIs in New York, as well as LSI's use of its website to solicit business from internet users, LSI had sufficient contacts with New York to be subject to its long-arm jurisdiction. The contacts described above demonstrate the '"purposeful creation of a continuing relationship"' with the plaintiff [citations omitted]. Indeed, these contacts were more extensive than those at issue in *Grimaldi v. Guinn* [72 A D 3d 37 (2d Dept. 2010)], in which this Court concluded that, based on the deployment of a passive website, coupled with 'the number, nature, and timing of all of the contacts involved, including the numerous telephone, fax, e-mail, and other written communications with the plaintiff in New York,' the defendant Guinn had sufficient contacts with New York State to confer jurisdiction over him." Neither the majority nor the dissent considered the question whether, with respect to CPLR 302(a)(1), the cause of action arose from defendant's New York contacts. The Court of Appeals has affirmed. "Regardless of whether by bricks and mortar structures, by conduct of individual actors, or by technological methods that permit business transactions and communications without the physical crossing of borders, a non-domiciliary transacts business when 'on his or her own initiative the non-domiciliary projects himself or herself into this state to engage in a "sustained and substantial transaction of business"' [citations omitted]. Thus, where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of 302(a)(1)." Here, plaintiff "admits that he was the party who sought out and

initiated contact with defendants after viewing LSI's website." And, "passive websites, such as the LSI website, which merely impart information without permitting a business transaction, are generally insufficient to establish personal jurisdiction." Finally, the Court rejects plaintiff's argument based upon the several telephone calls and e-mail communications between the parties. "To the extent plaintiff argues that by sheer volume of contacts, defendants are subject to personal jurisdiction in New York, we disagree. As we have stated it is not the quantity but the quality of the contacts that matters under our long-arm jurisdiction analysis." And, here, defendant's contacts with New York were mainly "responsive in nature, and not the type of interactions that demonstrate the purposeful availment necessary to confer personal jurisdiction over these out-of-state defendants." Indeed, many of those contacts are irrelevant for these purposes. "Here, plaintiff's claim is based on the June and August surgeries in Florida. Contacts after this date cannot be the basis to establish defendant's relationship with New York because they do not serve as the basis for the underlying medical malpractice claim."

Minella v. Restifo, 124 A D 3d 486 (1st Dept. 2015) – The Court concludes that defendant did not "transact any business within New York State." Defendant "is licensed to practice medicine in Connecticut, not New York. Although defendant is associated with a Connecticut facility (Split Rock) whose website displays a New York office and telephone number, Split Rock and defendant maintain separate websites. Further, the listing of a New York office and telephone number on a website, without more, is insufficient to confer personal jurisdiction [citations omitted]. The Split Rock website 'merely imparts information without permitting a business transaction' [citation omitted]. Further, defendant averred without contradiction that the New York address and telephone number on the website refers to his associate Dr. Neil Gordon, who is licensed to (and does) practice medicine in New York. That defendant's associate is a licensed New York physician does not confer jurisdiction over defendant."

Waggaman v. Arauzo, 117 A D 3d 724 (2d Dept. 2014) – Last year's "Update" reported on *Walden v. Fiore*, ___ U.S. ___, 134 S.Ct. 1115 (2014), in which 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. Simplifying the facts, the case involved a Georgia policeman who, the complaint alleged, filed a false affidavit in Georgia which had the effect of delaying the return of significant funds to plaintiffs from where they were impounded in Georgia to where plaintiffs lived in Nevada. The complaint alleged that defendant knew that his conduct would affect plaintiffs in Nevada. The Supreme Court held that the exercise of jurisdiction over defendant by the courts of Nevada violated due process. "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 distinguished this case from its decision in *Calder v. Jones*, 465 U.S. 783 (1984), in which it upheld California's jurisdiction over a Florida-based writer and editor of the National Enquirer, who wrote an article defaming California-resident Shirley Jones. There, the Court now says, defendants had created contacts with California, and not just with the plaintiff. They "relied on phone calls to 'California sources'" for the article. The article was "widely circulated" in California. And "the 'brunt'" of the injury was suffered by plaintiff there. And, since the tort of libel, "is generally held to occur wherever the offending material is circulated," the "effects" caused by the article connected defendants' conduct to California, not just to a plaintiff who lived there. Here, by contrast, "petitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. In short, when viewed through the proper lens – whether the *defendant's* actions connect him to the *forum* – petitioner formed no jurisdictionally relevant contacts with Nevada" [emphasis by the Court]. 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. Petitioner's actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections. 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." The full reach of the *Walden* decision will naturally have to await further case law development. But it will certainly have some impact 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 the defendant should expect or reasonably expect the conduct to have consequences here, and when 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 would injure a New Yorker, it would, it appears, violate due process as articulated in *Walden*. Here, in *Waggaman*, the New York plaintiff sues a Texas-based

doctor alleging that defendant improperly prescribed drugs for plaintiff's mother, while she resided in Florida and Texas. "The plaintiff failed to establish that the defendant's alleged tortious act – prescribing medication in Texas to the plaintiff's mother while she was in Texas and in Florida – caused injury in New York." Moreover, plaintiff failed to show that "the defendant expected or should reasonably have expected the act to have consequences in New York." The Court cited *Walden* as "refining the 'minimum contacts' analysis set forth in *International Shoe Co.*," and stated that the facts here demonstrated "the type of attenuated connection to a forum state that the Supreme Court of the United States now holds violates due process."

In re LIBOR-Based Financial Instruments Antitrust Litigation, 2015 WL 4634541 (S.D.N.Y. 2015)(Buchwald, J.) – "There is no basis to infer that issuers of broadly-traded securities such as bonds and MBS purposely directed those securities into plaintiffs' home forums. These securities may arrive in the hands of plaintiffs and other investors anywhere in the world by the investors' own trades – not at the direction of the issuers. Such a fortuitous, plaintiff-driven contact cannot support personal jurisdiction [citing *Walden*]."

Blau v. Allianz Life Insurance Company, 2015 WL 4911168 (E.D.N.Y. 2015)(Garaufis, J.) – "While *Walden* may affect the jurisdictional analysis for jurisdiction predicated on CPLR section 302(a)(3) – where a defendant is alleged to have committed 'a tortious act without the state causing injury to person or property within the state' – it is less relevant here, for jurisdiction predicated on CPLR section 302(a)(1) – where an action arises out of Allianz North America contracting to provide a service in New York State to a New York State resident. Of course, *Walden*'s warnings that 'it is the defendant's conduct that must form the necessary connection with the forum State,' and 'a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction,' apply in all cases [citation omitted]. Here, Allianz North America's minimum contacts with the forum include more than merely entering into a contract with a New York resident. Rather, Allianz North America entered into a contract with a New York resident under which it agreed to provide a service in New York State; this fact satisfies the minimum contacts inquiry."

7 West 57th Street Realty Company, LLC v. Citigroup, Inc., 2015 WL 1514539 (S.D.N.Y. 2015)(Gardephe, J.) – "In this Circuit, 'where "the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts with the forum are therefore in-forum effects harmful to the plaintiff," a court is to employ an "effects test," by which "the exercise of personal jurisdiction may be constitutionally permissible if the defendant expressly aimed its conduct at the forum"' [citations omitted]. It is not sufficient that conduct incidentally had an effect in the forum, or even that effects in the forum were foreseeable [citations omitted]. Instead, the defendant must have intentionally caused – *i.e.*, expressly aimed to cause – an effect in

the forum through his conduct elsewhere." Here, even "accepting the Amended Complaint's allegations that [plaintiff] Solow resided in New York and was injured here, due process requires more for the exercise of personal jurisdiction. The Foreign Banks' suit-related conduct must tie them to New York *itself*, not just to a plaintiff who happens to reside in New York [citing *Walden*; emphasis by the Court]."

Bowman v. Winger, 2015 WL 16399255 (S.D.N.Y. 2015)(Torres, J.) – The New York-resident plaintiff sues the non-New York defendants, claiming a copyright infringement for the unauthorized use on defendants' website of a photograph taken by plaintiff. "Plaintiff argues that it was reasonable to presume [that defendants should have expected their acts to have consequences within the forum state] because she is located in New York and because Defendants' website is viewable in New York. However, Section 302(a)(3)(ii) has a foreseeability requirement that 'is intended to ensure some link between a defendant and New York State to make it reasonable to require a defendant to come to New York to answer for tortious conduct committed elsewhere' [citations omitted]. The only link that Plaintiff provides between Defendants and New York is her residency and viewing of the Photograph in New York, This is insufficient. 'The fact that the website can be viewed in New York, standing alone, does not mean that the Defendant reasonably expected that its allegedly tortious actions would have consequences in New York State [citation omitted]. Aside from the website, Plaintiff has not provided facts suggesting that Defendants purposefully interacted with New York or explicitly targeted New York in any way. Without New York-specific links, it was not foreseeable that Defendants' acts would have consequences in New York."

Darrow v. Hetronic Deutschland, 119 A D 3d 1142 (3d Dept. 2014) – "In deciding whether an action may be maintained in New York against a nondomiciliary defendant, the court must first determine whether jurisdiction exists under New York's long arm statute [citation omitted] based upon the defendant's contacts with this state; and, if it does, the court then determines 'whether the exercise of jurisdiction comports with due process.'" Here, the claimed basis for jurisdiction is CPLR 302(a)(3). Plaintiff was injured when a remote control device manufactured by defendant – a German company – malfunctioned. There was no dispute that defendant derives substantial revenue from international commerce, so the question was whether "plaintiffs met their burden of establishing that defendant should have reasonably foreseen that a defect in the manufacture of its radio remote controls would have consequences in New York." The record "reflects that defendant maintained an exclusive agreement with H-USA to distribute its products to various locations in the United States, including New York." H-USA, in turn, "affected distribution to certain states in this country through a network of regional distributors, one of which was designated to serve the New York market." Accordingly, "defendant sought to indirectly market its product in New York and, thus, should have reasonably expected a manufacturing defect to have consequences in this state." Moreover, the exercise of jurisdiction over defendant comports with due process.

"The relevant inquiry is whether a defendant 'purposefully availed itself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws.'" Here, since "defendant targeted New York consumers through a network of distributors that rendered it likely that its products would be sold in New York, 'it is not unreasonable to subject it to suit in this state if its allegedly defective merchandise has been the source of injury to a New York resident.'"

JURISDICTION BY CONSENT

C. Mahendra (N.Y.) LLC v. National Gold & Diamond Center, Inc., 125 A D 3d 454 (1st Dept. 2015) – After receiving telephone orders from defendant, its California customer, the New York seller sent goods on consignment, along with an invoice containing a New York choice of forum provision. The Court holds that that provision is not binding on defendant. "UCC §2-207 contemplates situations like the one here, where parties do business through an exchange of forms such as purchase orders and invoices. As the parties did here, merchants frequently include terms in their forms that were not discussed with the other side. UCC §2-207 addresses that scenario, providing, 'the additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless they materially alter it." Here, "the forum selection clause is an additional term that materially altered the parties' oral contracts, and defendant did not give its consent to that additional term."

Professional Merchant Advance Capital, LLC v. Your Trading Room, LLC, 123 A D 3d 1101 (2d Dept. 2014) – The agreement between the parties "contains a forum selection clause, which states that YTR 'submits to the exclusive jurisdiction of any New York state or federal court sitting in the County of Suffolk in the state of New York.' The agreement further provides that YTR's owners 'personally guarantee the performance of the covenants made by YTR in this Agreement.' Since YTR consented to New York jurisdiction in the agreement, Waryn, by assuming YTR's obligations in the agreement, also consented to New York jurisdiction."

Techo-TM, LLC v. Fireaway, Inc., 123 A D 3d 610 (1st Dept. 2014) – "The parties are foreign corporations that neither do nor are authorized to do business in New York [citation omitted], and this case does not fall under any of the exceptions permitting an action in this State by a foreign corporation against another foreign corporation [citation omitted]. Business Corporation Law §1314(b)(4) provides for cases against a non-domiciliary that would be subject to the personal jurisdiction of this State's courts pursuant to CPLR 302. However, while New York recognizes consent as a basis for personal jurisdiction [citations omitted], it does not recognize consent as a basis for long-arm jurisdiction."

JURISDICTIONAL DISCOVERY

Gottlieb v. Merrigan, 119 A D 3d 1054 (3d Dept. 2014) – "Although plaintiff bears the burden of proof as the party seeking to assert jurisdiction, that burden 'does not entail making a *prima facie* showing of personal jurisdiction; rather, plaintiff need only demonstrate that it made a "sufficient start" to warrant further discovery' [citations omitted]. In that regard, we note that the issue of whether long-arm jurisdiction exists often presents complex questions; 'discovery is, therefore, desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits.'"

FORUM NON CONVENIENS

GENERAL CONSIDERATIONS

Koop v. Guskind, 116 A D 3d 672 (2d Dept. 2014) – Plaintiff is a hunting guide who lives and works in Canada. The complaint alleges that defendant, who lives in Richmond County, accidently shot plaintiff during a hunting trip in Canada. Defendant seeks a *forum non conveniens* dismissal. "The doctrine of *forum non conveniens* permits a court to stay or dismiss an action when, although it may have jurisdiction over the action, the court determines that 'in the interest of substantial justice the action should be heard in another forum' [citations omitted]. On a motion to dismiss the complaint on the ground of *forum non conveniens*, the defendant bears the burden of demonstrating 'relevant private or public interest factors which militate against accepting the litigation' [citations omitted]. 'On such a motion, the Supreme Court is to weigh the parties' residencies, the location of the witnesses and any hardship caused by the choice of forum, the availability of an alternative forum, the situs of the action, and the burden on the New York court system' [citations omitted]. 'No one factor is dispositive' [citations omitted]. 'The Supreme Court's determination should not be disturbed unless the court improvidently exercised its discretion or failed to consider the relevant factors' [citations omitted]. Here, the plaintiff is a resident of Canada and the defendant is a resident of Richmond County. The incident complained of occurred in Canada. The location of the defendant's residence is the sole connection in this case to the State of New York. Under the circumstances of this case and considering all of the relevant factors, including the fact that many of the witnesses, including law enforcement officials, emergency responders, medical personnel, and the owner of the hunting lodge who assigned the plaintiff to act as a hunting guide, are in Canada, the Supreme court providently exercised its discretion in granting the defendant's motion to dismiss the complaint pursuant to CPLR 327(a) on the ground of *forum non conveniens* [citations omitted]. However, in order to assure the availability of a forum for the action, the Supreme Court's dismissal should have been

conditioned on the defendant's stipulation to the waiver of jurisdictional and statute of limitations defenses."

Huani v. Donziger, 46 Misc 3d 534 (Sup.Ct. N.Y.Co. 2014)(James, J.), *aff'd*, 129 A D 3d 523 (1st Dept. 2015) – Plaintiffs seek a declaration that the Huaorani, indigenous Ecuadorian people, are entitled to a share of the $18.2 billion judgment obtained from the courts of Ecuador by defendant, a New York lawyer, who represented other Ecuadorian plaintiffs against Chevron Corporation. Supreme Court grants defendant's motion for a *forum non conveniens* dismissal. "It cannot be gainsaid that the interest of Ecuador in determining the rights of its own citizens in the Lago Agrio judgment is greater than that of New York State or any other jurisdiction." Moreover, "Ecuador is a forum more convenient to the parties or witnesses than New York. There is no unfairness in requiring the plaintiffs to prosecute these actions in Ecuador, as they and the [judgment creditors] reside there, [the trustee administering the judgment] is domiciled there, the Texaco petroleum operation that plaintiffs assert caused the environmental damage occurred there, the underlying litigation took place there, and the Lago Agrio judgment to which plaintiffs claim a proportional share was issued there." Moreover, "the determination of plaintiffs' proportional share of the Lago Agrio judgment would place a heavy, if not impossible burden on this court," requiring it "to consider anew the complicated evidence introduced in the Ecuadorian court for a determination whether and to what extent plaintiffs were injured by Chevron's oil activities in Ecuador, and what portion of the corresponding Lago Agrio judgment plaintiffs are entitled to receive." Finally, "multiple United States courts have already concluded that the Ecuador courts are a suitable alternative forum." The Appellate Division has affirmed. "Ecuador is the forum more convenient to the parties and witnesses than New York; there is no unfairness in requiring plaintiffs to prosecute their claims in Ecuador where they reside; the underlying litigation took place there; the underlying judgment, to which plaintiff claim a proportional share, was issued there," and the defendant obligated by the judgment to distribute the proceeds of the judgment is domiciled there. Finally, "the motion court correctly rejected plaintiffs' contention that Ecuador is not a suitable forum. In any event, New York does not require an alternate forum for a *non conveniens* dismissal."

Hanwa Life Insurance v. UBS Securities, LLC, N.Y.L.J., 1202655833017 (Sup.Ct. N.Y.Co. 2014)(Ramos, J.) – In deciding a motion to dismiss on grounds of *forum non conveniens*, "although not one factor is controlling, courts should balance factors including the factual nexus between New York and the action, the burden on New York courts, the potential hardship to the defendant of litigating here, the availability of an alternative forum in which the plaintiff may bring suit, the residency of the parties [citation omitted], the forum's interest in litigating the controversy, and the need to apply foreign law [citation omitted]. The plaintiff's choice of forum is afforded great weight and should not be disturbed unless the balance strongly favors the jurisdiction in which the defendant seeks to litigate the claims [citation omitted]. Nonetheless, New York

courts have regularly dismissed actions on the grounds that they have an insufficient nexus with New York and would thus place an undue burden on the courts by adjudicating them here." Here, "Hanwa's claims arose almost entirely from events and transactions that took place outside of New York and mainly in Korea and Hong Kong." Moreover, "it is undisputed that the claims for fraud and aiding and abetting fraud will be governed by Korean law while English law applies to the unjust enrichment claim." Furthermore, "Korea provides an adequate, alternate forum to adjudicate this action." Therefore, "the Court determines, on balance, that it would be a greater hardship for defendants to litigate in New York than for Hanwa to litigate in Korea," and the action is dismissed.

FORUM SELECTION CLAUSES

Couvertier v. Concourse Rehabilitation and Nursing, Inc., 117 A D 3d 772 (2d Dept. 2014) – "Upon the decedent's admission to [defendant nursing home], the decedent signed an 'Admission Agreement.' The agreement contained a forum selection clause, which stated, in pertinent part, that 'any and all actions arising out of or related to this Agreement shall be brought in Westchester County, New York." Claiming that decedent sustained physical injuries as the result of defendant's negligent care, plaintiff commenced this action in Bronx County. The Appellate Division affirms the granting of a motion to change venue to Westchester. "The plaintiff's claim that the forum selection clause should not be upheld because this is a tort action and not a breach of contract action is without merit. The applicability of a forum selection clause does not depend on the nature of the underlying action." Rather, "it is the language of the forum selection clause itself that determines which claims fall within its scope." And, here, the claim is "predicated on the care rendered by Concourse to the decedent pursuant to the terms of the admission agreement."

VENUE

Elie v. Marathon REO Management, LLC, 119 A D 3d 890 (2d Dept. 2014) – "'Improper venue is not a jurisdictional defect requiring dismissal of the action.'"

Matter of Aaron v. The Steele Law Firm, P.C., 127 A D 3d 1385 (3d Dept. 2015) – "By failing to comply with the statutory procedure for changing venue, respondent was not entitled to a change of venue as of right. Where a respondent believes that a petitioner has chosen an improper venue, the respondent shall serve, with or before service of the answer, a written demand on the petitioner than venue be changed to a county that the respondent specifies as proper [citation omitted]. The petitioner has five days after service of the demand to serve a written consent to change venue [citation omitted]. If no such consent is served by the petitioner, the respondent must move to change venue

within 15 days of service of the demand [citation omitted]. If a respondent fails to comply with these procedures and time limits, the respondent is not entitled to have the motion granted as of right, even if the venue was improper; the motion instead becomes one addressed to the court's discretion [citations omitted]. Here, respondent served a cross motion seeking to change venue without having first served a demand for such relief. Accordingly, the motion was addressed to Supreme Court's discretion."

Jackson v. City of New York, 127 A D 3d 552 (1st Dept. 2015) – "Defendants' motion to change venue from Bronx County to Westchester County was untimely, and thus properly denied. Where a demand to change venue claiming the designation of an improper county is opposed by a plaintiff, any subsequent motion to transfer venue must be made within 15 days after service of the demand, in the county designated by plaintiff [citation omitted]. Here, after defendants' demand was opposed by two of the three plaintiffs in these joined actions, defendant improperly noticed their motion in Westchester County. After that motion was denied – approximately three months after service of the demand – defendants again moved to change venue, this time in Bronx County. However, that motion, 'while made in the proper county was brought more than 15 days after defendants filed their demand and the request for relief was thus intimely.'"

Xhika v. Rocky Point Union Free School District, 125 A D 3d 646 (2d Dept. 2015) – "Despite the seemingly unforgiving language" of CPLR 504, which provides that an action against a school district "shall be" in the County where the school district is situated, "venue may be changed to a non-mandated county upon a showing of special circumstances." Here, "convenience of material witnesses and the ends of justice outweigh the asserted governmental inconvenience."

King v. CSC Holdings, LLC, 123 A D 3d 888 (2d Dept. 2014) – "In response to the defendants' demand to change venue, the plaintiff timely served an affidavit of her attorney containing factual averments that were *prima facie* sufficient to show that the county designated by her was proper [citations omitted]. Accordingly, the defendants' motion pursuant to CPLR 510(1) should have been made in the Supreme Court, Kings County, where the action was pending, and the Supreme Court, Nassau County, erred in granting the motion."

Chehab v. Roitman, 120 A D 3d 736 (2d Dept. 2014) – "Here, the sole piece of evidence defendant submitted with respect to the issue of the plaintiff's residence [upon which plaintiff placed venue] was the police accident report referable to the subject accident. This evidence merely showed that, at the time the accident occurred, the plaintiff had a residence in Texas. This evidence did not demonstrate that the plaintiff did not maintain a residence in Kings County at the time when the action was commenced, two months after the accident [citations omitted]. Consequently, the defendant failed to meet his initial burden. Although a plaintiff may choose venue based solely on a defendant's

address, as set forth in a police accident report [citations omitted], a police accident report, standing alone, is not sufficient evidence to demonstrate that, on the date that an action is commenced, a plaintiff does not reside in the county where he or she elects to place the venue of trial. To the extent that this Court's decisions in *Samuel v. Green* (276 A D 2d 687 [2000]) and *Senzon v. Uveges* (265 A D 2d 476 [1999]) may be read to indicate to the contrary, they should not be followed."

Chung v. Kwah, 122 A D 3d 729 (2d Dept. 2014) – "'In the context of determining the proper venue of an action, a party may have more than one residence' [citations omitted]. Under CPLR 503(d), the county of an individual's principal office is a proper venue for claims arising out of that business [citations omitted]. Here, the plaintiff seeks to recover damages for medical malpractice allegedly committed by, among others, the defendant Jung Lack Lee in his capacity as a medical doctor. Accordingly, the county in which that defendant maintains his principal office is a proper venue in this case."

American Builders and Contractors Supply Co., Inc. v. Capitaland Home Improvement Showroom, LLC, 128 A D 3d 870 (2d Dept. 2015) – "The law is clear that 'for purposes of venue, the sole residence of a foreign corporation is the county in which its principal office is located, *as designated in its application for authority to conduct business filed with the State of New York*' [citation omitted; emphasis by the Court], regardless of where it transacts business or maintains its actual principal office [citations omitted]. We note that, since the plaintiff's response to the defendants' demand to change venue failed to set forth factual averments that were *prima facie* sufficient to show that its designation of Nassau County for trial of the action was proper, the defendants were authorized to notice their motion to change venue to be heard in Saratoga County."

Dyer v. 930 Flushing, LLC, 118 A D 3d 742 (2d Dept. 2014) – "The sole residence of a limited liability company for venue purposes is the county where its principal office is located as designated in its articles of organization [citations omitted]. Such office need not be a place where business activities are conducted by the limited liability company."

Sicignano v. Hymowitz, N.Y.L.J., 1202665198250 (Sup.Ct. Kings Co. 2014)(Demarest, J.) – "In an action for a judicial dissolution, business Corporation Law §1112 prescribes that 'an action or a special proceeding under this article shall be brought in the supreme court in the judicial district in which the office of the corporation is located at the time of the service on the corporation of a summons in such action or of the presentation to the court of the petition in such special proceeding." And, "'office of a corporation' means the office the location of which is stated in the certificate of incorporation of a domestic corporation." The principal office of the corporation as stated in the certificate "'is conclusive evidence of its residence.'"

Plavnik-Stybel v. Ionescu, N.Y.L.J., 1202735100693 (Sup.Ct. Kings Co. 2015)(Solomon, J.) – "The Second Department has not ruled on whether a member of an LLC bringing a derivative suit on behalf of an LLC may designate the county where he lives as the venue of said suit, and the Limited Liability Company Law does not address derivative suits." But, "under the circumstances presented here, this court sees no reason to deviate from the rules established for similar cases pertaining to other forms of business. Furthermore, the Ionescus present no reason why a member of an LLC suing derivatively should be treated differently from a stockholder or partner who designates the county that he resides in as venue in a derivative suit. Therefore, this court holds that a member of an LLC suing on behalf of the LLC may designate venue based on the county or counties where he actually lives."

Fitzsimons v. Brennan, 128 A D 3d 636 (2d Dept. 2015) – "Contrary to the defendants' contentions, the Supreme Court providently exercised its discretion in granting that branch of the Block plaintiffs' motion which was to place venue of the consolidated action in Suffolk County. 'Where actions commenced in different counties have been consolidated pursuant to CPLR 602, the venue should be placed in the county where the first action was commenced, unless special circumstances are present, which decision is also addressed to the sound discretion of the court.'"

Castro v. Durban, 129 A D 3d 652 (2d Dept. 2015) – "'When a trial court orders consolidation or joint trials under CPLR 602(a), venue should generally be placed in the county where jurisdiction was invoked in the first action' [citations omitted]. However, where special circumstances are present, the court, in its discretion, may place venue elsewhere." Here, such special circumstances exist, and *nisi prius* properly exercised discretion in placing venue of the consolidated action in Nassau County, the county where the second action was commenced. "The claims relate to treatment rendered at St. Francis Hospital, located in Nassau County. Many of the individual defendants resided in Nassau County. All of the individual defendants worked in Nassau County at the time of the alleged malpractice and lack of informed consent. The plaintiffs themselves resided in Nassau County at the time each action was commenced."

Medina v. Gold Crest Care Center, Inc., 117 A D 3d 633 (1st Dept. 2014) – "Since defendant moved to change venue based on the written agreement [between the parties designating Westchester County as the venue for any disputes][citation omitted], it was not required to serve a written demand for a change of venue with or prior to its answer before making the motion, and the motion needed only to be made 'within a reasonable time after commencement of the action.'"

Bailine v. Ski Windham Operating Corp., N.Y.L.J., 1202719990601 (Sup.Ct. Nassau Co. 2015)(McCormack, J.) – "Where a change of venue application is predicated upon a forum selection clause in a valid contract, the movant is not required to first make a

demand to change venue pursuant to CPLR 511 [citation omitted]. To render a forum clause of a contract invalid, it must be shown that enforcement of the clause would be unjust, would violate public policy or fraud or overreaching exists [citations omitted]. Absent a showing the clause is invalid, Plaintiff must establish that Defendant did not move to change venue 'within a reasonable time after commencement of the action.'" And "there is no bright line rule or cutoff between a reasonable and unreasonable period of time. For example, depending upon the circumstances, a three year delay was found both reasonable [citation omitted] and unreasonable [citations omitted]." Thus, "clearly, whether a delay is reasonable is dependent upon the circumstances of each particular case."

Karlsberg v. Hunter Mountain SKI Bowl, Inc., N.Y.L.J., 1202649005745 (Sup.Ct. Suffolk Co. 2014)(Pastoressa, J.) – Despite a forum selection clause in the equipment rental agreement designating Greene County as the exclusive forum for litigation, the injured plaintiff commenced this action in his county of residence – Suffolk. The parties engaged in discovery, and then, some nine months after the action was commenced, defendant moved to change venue to Greene County. The Court concludes that the motion is made "within a reasonable time," and grants it. "The forum selection clause is clear and discovery is still in progress and there was no discernible prejudice to the plaintiff other than some travel inconvenience. In any event the nine month delay in bringing the motion is outweighed by the factors favoring the transfer."

Rutherford v. Patel, 129 A D 3d 933 (2d Dept. 2015) – "'To obtain a change of venue pursuant to CPLR 510(2), a movant is required to produce admissible factual evidence demonstrating a strong possibility that an impartial trial cannot be obtained in the county where venue was properly pleaded.'" Under the circumstances here, "including the evidence demonstrating that the plaintiff has been employed at the Supreme Court, Queens County, since 2001, first as a court officer, and more recently as a senior court clerk, the Supreme Court providently granted the motions for a change of the venue of the action from Queens County to Nassau County, in order to avoid any appearance of impropriety."

Reitano v. New Tang Dynasty, N.Y.L.J., 1202649005809 (Sup.Ct. Suffolk Co. 2014)(Pines, J.) – "CPLR 510(3) permits a change of venue for the convenience of witnesses and the ends of justice. While the overriding consideration for the court is the convenience of principal nonparty witnesses, it is insufficient to simply state that the convenience of such witnesses would be served by the change; rather, the supporting affidavit must set forth the names, addresses and occupations of the potential witnesses, whether they have been contacted and are willing to testify, the substance of such testimony and why it is material and necessary in the action." Here, "there is not an affidavit by a single nonparty witness; there is no statement that the party affiant spoke to these people and ascertained either their willingness to testify nor the statement by such

of inconvenience. Finally, the general statements that each of these witnesses had seen various aspects of the construction project which is the subject of this action is simply insufficient to meet the requirements set forth above." The motion to change venue is denied.

Fitzsimons v. Brennan, 128 A D 3d 634 (2d Dept. 2015) – Citing, *inter alia*, its seminal decision in *O'Brien v. Vassar Brothers Hospital*, 207 A D 2d 169 (1995), the Court holds that "CPLR 510(3) provides that the court may, upon motion, change the place of the trial of an action where 'the convenience of material witnesses and the ends of justice will be promoted by the change' [citation omitted]. The party seeking the change, which is discretionary in nature, must set forth: (1) the names, addresses, and occupations of material witnesses, (2) the facts to which those witnesses will testify at trial, (3) a showing that those witnesses are willing to testify, and (4) a showing that those witnesses will be inconvenienced if the venue of the action is not changed." Here, *nisi prius* properly denied the motion, "since the defendants failed to meet their burden."

Wickman v. Pyramid Crossgates Company, 127 A D 3d 530 (1st Dept. 2015) – In prior decisions, the First Department had adopted the reasoning and holding of the Second Department's decision in *O'Brien v. Vassar Brothers Hospital*, 207 A D 2d 169 (1995), mentioned directly above, which had rejected a line of cases holding that, "all things being equal," a transitory cause of action should be tried where the cause of action arose, and, instead, interpreted CPLR 510 as imposing a burden on defendant to demonstrate the four elements described in the *Fitzsimons* decision above. Here, however, citing cites that pre-date *O'Brien*, and its own adoption of the *O'Brien* standards [*see, for example, Argano v. Scuderi*, 2 A D 3d 177 (1st Dept. 2003); *Jacobs v. Banks Shapiro Gettlinger & Brennan, LLP*, 9 A D 3d 299 (1st Dept. 2004); *Rosen v. Uptown General Contracting, Inc.*, 72 A D 3d 619 (1st Dept. 2010)], the First Department holds that "the situs of plaintiff's injury provides a basis for a discretionary change of venue to Albany County [citation omitted] in that, 'things being equal, a transitory action should be tried in the county where the cause of action arose.'" It then, however, proceeds to discuss the proof of convenience shown by defendants.

Schwartz v. Yellowbook, Inc., 118 A D 3d 691 (2d Dept. 2014) – "A motion to change venue on discretionary grounds, unlike motions 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 [citations omitted]. Schwartz was therefore required to make a motion pursuant to CPLR 510(3) in Nassau County, where the action was pending, in another county in the 10th Judicial District, or in a county contiguous to Nassau County [citation omitted]. Since Nassau County and Richmond Count are not contiguous, and Richmond County is not in the 10th Judicial District, the Supreme Court, Richmond County, erred in granting that branch of the motion which was pursuant to CPLR 510(3)."

SUBJECT MATTER JURISDICTION

Cayuga Nation v. Jacobs, 44 Misc 3d 389 (Sup.Ct. Seneca Co. 2014)(Bender, J.) – "'Although New York courts do not have subject matter jurisdiction over the internal affairs of Indian tribes [citation omitted], they do have subject matter jurisdiction over, *inter alia*, "private civil claims by Indians against Indians."'" Here, although framed as a suit for trespass, conversion, tortious interference with prospective business relations, replevin and ejectment, "this is not a simple case of 'private civil claims of Indians against Indians.'" The underlying dispute is "between factions regarding the proper identify of the [Cayuga] Nation's ruling council's membership as well as the federal representative to the BIA." The fundamental question, therefore, is "who is in charge, and resultantly who has the authority to speak for the Nation and control its property and businesses." Thus, "because the underlying allegations in this lawsuit are fundamentally founded upon the long-standing question of who has the right to lead the Nation, no determination could be made by this court without interfering with tribal sovereignty and self-government. Accordingly, this court lacks subject matter jurisdiction."

Matter of Tonawanda Seneca Nation v. Noonan, 122 A D 3d 1334 (4th Dept. 2014) – "Contrary to petitioner's contention, respondent is the duly elected Surrogate for Genesee County, a position not specifically delineated in CPLR 506(b)(1) and, therefore, a proceeding against him [pursuant to CPLR Article 78] must be commenced in Supreme Court. Even if we assume, arguendo, that respondent was elected as a County Court Judge and was thereafter assigned to 'be and serve as' a Surrogate [citation omitted], petitioner is seeking to prohibit respondent from acting in the role of Surrogate. We thus conclude that jurisdiction remains in Supreme Court."

Matter of Community Related Services, Inc. v. New York State Department of Health, N.Y.L.J., 1202663929250 (Sup.Ct. N.Y.Co. 2014)(Kornreich, J.) – "The purpose of the instant Article 78 proceeding was to adjudicate the legitimacy of respondents' withholding of approximately $7.5 million in Medicaid payments from petitioner." And, "it has long been held that where, as here, petitioner merely seeks a court order directing payment from the State where such payment naturally and unquestionably flows from the Article 78 decision, the Supreme Court, and not the Court of Claims, has jurisdiction [citation omitted]. In other words, the monetary judgment is considered 'incidental' under CPLR 7806."

Davis v. State of New York, 129 A D 3d 1353 (3d Dept. 2015) – "'Regardless of how a claim is characterized, one that requires, as a threshold matter, the review of an administrative agency's determination falls outside the subject matter jurisdiction of the Court of Claims' [citations omitted]. Although claimant framed his claim as one for money damages, he is, in essence, seeking judicial review of the Board's alleged failure

to follow proper procedures when denying him parole. Such challenge involves agency action that is reviewable in Supreme Court via a CPLR article 78 proceeding."

Borawski v. Abulafia, 117 A D 3d 662 (2d Dept. 2014) – "'The Court of Claims has limited jurisdiction to hear actions against the State itself, or actions naming State agencies or officials as defendants, where the action is, in reality, one against the State – i.e., where the State is the real party in interest' [citations omitted]. Generally, 'the Court of Claims has exclusive jurisdiction over actions for money damages against State agencies, departments, and employees acting in their official capacity in the exercise of governmental functions' [citations omitted]. 'Where, however, the suit against the State agent or officer is in tort for damages arising from the breach of a duty owed individually by such agent or officer directly to the injured party, the State is not the real party in interest – even though it could be held secondarily liable for the tortious acts under *respondeat superior*.'"

Matter of Escobar, N.Y.L.J., 1202644015471 (Surr.Ct. Kings Co. 2014)(Lopez Torres, J.) – "The Surrogate's Court is a court of limited subject matter jurisdiction. Its powers are those conferred on it by statute [citation omitted]. It is fundamental that the Surrogate's Court has exclusive jurisdiction where the issue before it relates to the affairs of a decedent or the proceeding relates to the administration of an estate." Indeed, "'for the Surrogate's Court to decline jurisdiction, it should be abundantly clear that the matter in controversy in no way affects the affairs of a decedent or the administration of his estate.' This seemingly broad subject matter jurisdiction is nevertheless limited as it does not include jurisdiction over a controversy between living parties 'independent' of any matter 'affecting' the estate of the decedent."

133 Plus 24 Sanford Ave. Realty Corp. v. Ni, 47 Misc 3d 55 (App.Term 2d Dept. 2015) – "'It is well settled that injunctive relief is generally not available in a summary proceeding brought in the Civil Court' [citations omitted]. 'Except for proceedings for the enforcement of housing standards [citation omitted] and applications for certain provisional remedies [citation omitted], the New York City Civil Court may not grant injunctive relief' [citations omitted]. Here, the order directed tenant to procure a certificate of occupancy after landlord removes and resolves all current existing violations, and provided that landlord shall allow tenant access to the basement for the installation of a gas-fired hot water heater, and that landlord shall present the monthly New York City Department of Environmental Protection (DEP) bill to tenant or to arrange to have these bills sent directly to tenant from DEP. The court was without authority to grant such relief."

Teachers Federal Credit Union v. Leal, N.Y.L.J., 1202654297616 (Dist.Ct. Nassau Co. 2014)(Ciaffa, J.) – "Pursuant to one section of the Uniform District Court Act (UDCA §202), this Court is granted jurisdiction over 'actions and proceedings for the recovery of

money where the amount sought to be recovered does not exceed $15,000.' A second section of the UDCA qualifies the general rule when a plaintiff joins 'several causes of action' in one complaint (UDCA §211). As long as 'each of them would be within the jurisdiction of the court if sued upon separately, the court shall have jurisdiction of the action' and it may render judgment in excess of $15,000 'if such excess result solely because of such joinder.'" Here, plaintiff pleads two causes of action; one for failing to make payments due under a credit line agreement – in the amount of "$12,964.82, with interest on $12,679.48 from 6/13/13 at the rate of 11.15 percent per annum" – and one for attorneys' fees, in accordance with the same agreement, in the amount of $1,935.17. Plaintiff does not have two separate causes of action. "'Inasmuch as plaintiff's claim for attorney's fees is interrelated with its breach of contract claim said claims comprise a single cause of action.'" However, without the claim for contractual interest, the principal claim for payments together with the attorneys' fee claim is within the Court's jurisdiction. Therefore, the question becomes whether the contractual interest claim should be included in the total for purposes of determining whether the amount demanded is within the Court's subject matter jurisdiction, an issue which, the Court states, "the appellate courts of this state have not yet addressed." The Court concludes that while "court-awarded" interest is not part of the calculus, "'interest that is part of the debt is included in the relief requested.'" Thus, while statutory interest would not be counted as part of the cause of action, interest that is based on the contract is counted. Therefore, the Court lacks subject matter jurisdiction over plaintiff's claim, as it exceeds $15,000. But the Court holds that it need not dismiss the action if plaintiff stipulates to "a reduction of its claimed damages to bring its claim within the Court's $15,000 jurisdictional limit."

Bay Crest Association v. Paar, 47 Misc 3d 9 (App.Term 2d Dept. 2015) – This action, commenced in District Court, "purported to state three separate causes of action: one for defendant's annual assessment for 2009 in the sum of $7,169.25; one for his 2010 annual assessment, in the sum of $7,169.25; and one for plaintiff's reasonable attorney's fees and expenses." While a judgment in the District Court "may exceed the court's [$15,000] jurisdictional limit where the judgment is based upon multiple separate and distinct causes of action, each of which would be within the monetary jurisdiction of the court if sued upon separately [citations omitted], this is not such a case." For, here, the by-laws providing for annual assessments and legal fees "are interdependent." Hence, they "were part of a single cause of action."

Conway v. DeJesu Maio and Associates, 44 Misc 3d 277 (Dist.Ct. Suffolk Co. 2014) (Hackeling, J.) – "The jurisdictional issue presented for disposition is whether a plaintiff can waive any recovery over $5,000 so as to fall within the $5,000 small claims jurisdictional limit" in District Court. Plaintiff's testimony established that her claim is for $5,341. But she seeks only $5,000, in order to come within the Small Claims Court jurisdictional limit. The Court holds that such a waiver is not allowable in Small Claims

Court, and dismisses the action. Section 1801 of the Uniform District Court Act "establishes a jurisdictional limit for a small claims action when it provides 'the term "small claims" shall mean and include *any cause of action* for money only not in excess of $5,000 exclusive of interest and costs'" [emphasis by the Court]. By contrast, Section 202 of the Act, which establishes the general jurisdiction of the District Court, "provides: 'the court shall have jurisdiction of actions and proceedings where *the amount sought to be recovered* does not exceed $15,000'" [emphasis by the Court]. The Court finds the distinction controlling. Since the "sought to be recovered" language "is omitted from section 1801 the court must infer that this waiver doctrine does not apply to small claims cases."

Perlmutter v. Fiore, 47 Misc 3d 62 (App.Term 2d Dept. 2015) – "Plaintiff commenced this small claims action [in Nassau County District Court] to recover the principal sum of $1,288.45, which sum, she claimed, constituted half of the unreimbursed expenses she had incurred in prenatal care and in her own medical and hospital costs associated with the birth of the parties' daughter." Defendant had previously, in a Family Court proceeding, acknowledged paternity. Family Court Act §416(a) authorizes recovery of such expenses. However, that award is "subject to the exclusive jurisdiction of the Family Court [citation omitted] and the Supreme Court [citations omitted]. Thus, plaintiff's cause of action was not subject to the District Court's jurisdiction."

Great American Restoration Services, Inc. v. Flaton, N.Y.L.J., 1202733687170 (AppTerm 2d Dept. 2015) – "In this commercial claims action to recover for unpaid services, defendant interposed a counterclaim alleging that plaintiff had filed a wilfully exaggerated mechanic's lien in connection with the services at issue. Defendant subsequently moved to transfer the action from the Commercial Claims Part of the District Court to the regular part of the District Court [citation omitted], arguing that the Commercial Claims Part did not have subject matter jurisdiction over his counterclaim." Defendant is correct that the Commercial Claims Part lacks jurisdiction over the counterclaim, since "'rights under a lien are enforced by means of foreclosure on the lien, which remedy is outside the limited jurisdiction of the Commercial Claims Part.'" However, "the fact that defendant improperly interposed his counterclaim in the Commercial Claims Part of the District Court is not a basis to transfer plaintiff's action from the Commercial Claims Part to the regular part of the District Court. Instead, the defendant should have brought his cause of action 'in a court of competent jurisdiction' [citation omitted]. Under the circumstances, the counterclaim must be dismissed."

266 Titusville Road, LLC v. Cazares, 47 Misc 3d 531 (Justice Ct. Town of LaGrange, Dutchess Co. 2015)(Hayes, J.) – "'Every court in which a special proceeding to enforce a money judgment may be commenced, shall have power to punish a contempt of court committed with respect to an enforcement procedure' [citation omitted]. Town and village justice courts do not have jurisdiction over special proceedings to enforce their

money judgments. Rather, a special proceeding to enforce a money judgment issued by a town or village court must be commenced in county court or supreme court." Thus, this "motion for an order holding respondent in contempt is denied because this court lack jurisdiction over a special proceeding to enforce a money judgment."

THE SUMMONS

Sanders v. 230FA, LLC, 126 A D 3d 876 (2d Dept. 2015) – "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 granteing 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]. 'However, "while CPLR 305(c) may be utilized to correct the name of an existing defendant it cannot be used by a party as a device to add or substitute a party defendant"' [citations omitted], and it may not be used 'to proceed against an entirely new defendant, who was not served, after the expiration of the statute of limitations.'"

Honeyman v. Curiosity Works, Inc., 120 A D 3d 1302 (2d Dept. 2014) – Plaintiff named "Summit Business Media" as a defendant, and purported to serve that defendant by service on an authorized agent for "Summit Business Media Holding Company." However, "Summit Business Media" is merely a trade name used by Summit Business Media, LLC, and Summit Business Media Holding Company is the parent corporation of the parent corporation of Summit Business Media, LLC. The attorney for the Holding Company forwarded the summons and complaint to the LLC, which moved to dismiss the action. The Appellate Division grants that motion, and denies plaintiff's motion to amend the summons and extend his time to serve the LLC. "A trade name is not a jural entity amenable to suit [citations omitted]. In addition, under CPLR 305(c), 'an amendment to correct a misnomer will be permitted "if the court has acquired jurisdiction over the intended but misnamed defendant provided that the intended but misnamed defendant was fairly apprised that it was the party the action was intended to affect and would not be prejudiced" by allowing the amendment.'" Here, because the LLC was not served with process, "Supreme Court lacked jurisdiction over them, and lacked the authority to grant leave to amend the summons and complaint."

Markey v. Metropolitan Transit Authority, N.Y.L.J., 1202654479844 (Sup.Ct. N.Y.Co. 2014)(Stallman, J.) – Injured in a New York City subway station, plaintiff named the "Metropolitan Transit Authority," as the defendant, and attempted service at the offices of the New York City Transit Authority. Service was there rejected "with the explanation that the NYCTA does not accept papers for the 'Metropolitan Transit Authority.'" Plaintiff then served the Metropolitan Transportation Authority, which does not own, operate or control the subways. After the statute of limitations had run, plaintiff sought to amend the summons to name the proper party – the New York City Transit Authority. The motion is denied. "'Such an amendment of a summons is justified where there is some apparent misdescription or misnomer of the process actually served which would justify the conclusions that the plaintiff issued the process against the correct party, but under a misnomer, and that the process fairly apprised the entity that plaintiff intended to seek a judgment against it' [citation omitted]. However, although CPLR 305(c) allows for the correction of the name of an existing defendant, it cannot be used as a device to add or substitute a defendant [citation omitted]. A plaintiff may not invoke CPLR 305(c) to proceed against a new defendant, who was not served, after the expiration of the statute of limitations." Here, plaintiff did not properly serve the Transit Authority before expiration of the statutory period. "It was plaintiff who caused the confusion in nomenclature by opting to sue the 'Metropolitan Transit Authority' instead of the NYCTA on whom she served a notice of claim. Given plaintiff's choice of 'Metropolitan Transit Authority' as the name of the defendant, it is understandable that the NYCTA told plaintiff's process server that it did not accept papers for the MTA. Given plaintiff's choice of nomenclature, the summons appeared to apply to the MTA, not the NYCTA. Neither the attempted service at the NYCTA nor the service on the MTA effected service on the NYCTA."

SERVICE OF PROCESS

CPLR 313 – WHO MAY SERVE PROCESS

Matter of Conti v. Clyne, 120 A D 3d 884 (3d Dept. 2014) – Petitioner himself served process here on respondent, "which runs afoul of the requirement that 'papers may only be served by any person *not* a party' [citation omitted; emphasis by the Court]. While there has been disagreement among the Appellate Divisions as to the effect of this type of error, this Court has consistently held that it 'is a mere irregularity which does not vitiate service' [citations omitted]. We perceive no reason to depart from our precedent, particularly in light of the Court of Appeals' holding that CPLR 2001, as amended in 2007, permits a court to overlook technical defects in the manner of service that do not prejudice the person or persons being served."

City of New York v. VJHC Development Corp., 125 A D 3d 425 (1st Dept. 2015) – The Court rejects defendant's contention "that he was entitled to be served by a licensed process server. He did not submit any proof that plaintiff's process server was not licensed. In any event, the process server's not being licensed would not invalidate service."

SERVICE ON INDIVIDUALS

Hall v. Wong, 119 A D 3d 897 (2d Dept. 2014) – "If a defendant resists service of process, service may be effected pursuant to CPLR 308(1) by leaving a copy of the summons in the defendant's general vicinity, provided that the defendant is made aware that this is being done [citations omitted]. Here, the plaintiffs' process server testified that after the defendant came to the front door and he explained that he wanted to give her legal papers, the defendant, speaking through the closed door, refused to open the door and told him to come back another time. The process server then placed the summons and complaint between the storm door and the interior brown door, and told the defendant what he was doing. The plaintiffs satisfied their burden of demonstrating that the defendant was properly served."

Washington Mutual Bank v. Murphy, 127 A D 3d 1167 (2d Dept. 2015) – "CPLR 308 sets forth the different ways in which service of process upon an individual can be effected in order for the court to obtain jurisdiction over that person. CPLR 308(2) provides, in pertinent part, that personal service upon a natural person may be made 'by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at *his or her last known residence*' [emphasis by the Court]. 'Jurisdiction is not acquired pursuant to CPLR 308(2) unless both the delivery and mailing requirements have been strictly complied with' [citations omitted]. It 'is a two-step form of service in which a delivery and mailing are both essential' [citation omitted]. Since, under the circumstances of this case, the Noyack property, although Murphy's vacation home, could properly be characterized as his dwelling place or usual place of abode [citation omitted], we agree with the Supreme Court that the plaintiff satisfied the first prong of CPLR 308(2) by a fair preponderance of the evidence by serving process upon a person of suitable age and discretion at the Noyack property [citations omitted]. However, the plaintiff failed to meet its burden of proof that its mailing of copies of the summons and complaint to that same address satisfied the second prong of CPLR 308(2). The undisputed evidence demonstrated that the plaintiff received notice from Murphy that the Reade Street address was to be used with respect to all notices concerning the Noyack property. Thereafter, from 2003 through December 2008, a period of time extending beyond the date of the mailing of copies of the summons and complaint to the Noyack property, the plaintiff actually utilized the Reade Street address to send Murphy all correspondence and notices

relating to the Noyack property, including those referable to the mortgage statements and Murphy's default thereunder. The only documents that the plaintiff mailed to the Noyack property were the summons and complaint, despite its knowledge that Murphy had given notice in accordance with the terms of the mortgage that his residence was the Reade Street address, and that it was at that address that he was to receive all mail. Further, Murphy demonstrated that his driver's license and his voter registration were based upon the Reade Street address, and that the Noyack property was not claimed as his primary residence for tax purposes. Thus, for the purpose of satisfying the objectives of CPLR 308(2), Murphy's 'last known residence' was not the Noyack property."

City of New York v. VJHC Development Corp., 125 A D 3d 425 (1st Dept. 2015) – "Plaintiff properly served [defendant] Thomas with the amended complaint pursuant to CPLR 308(2) by delivering it to his 47-year-old daughter Vera at his actual place of business and mailing it to his actual place of business in an envelope marked 'personal and confidential.' Thomas contends that Vera was not authorized to accept service on his behalf. However, authority is not a relevant criterion with respect to service on individuals [citations omitted]. Upon Vera's refusal to accept service, it was proper for the process server to leave the amended complaint in her 'general vicinity.'"

Edan v. Johnson, 117 A D 3d 528 (1st Dept. 2014) – "Plaintiff properly effected service upon defendant doctor at her actual place of business, defendant Hercules Medical, P.C., by leaving the summons and complaint with the receptionist at the practice, who was a person of suitable age and discretion [citations omitted]. That defendant doctor was temporarily out on maternity leave when the service was effectuated is of no moment, since she was clearly identified as a doctor working in the Hercules Medical practice, and resumed working there after her temporary four-month absence [citation omitted]. Further, the service of process at Hercules Medical was reasonably calculated to afford her with notice of commencement of the action, since the receptionist could reasonably be expected to convey the message or papers to her, as the intended party."

Olscamp v. Fasciano, 118 A D 3d 1472 (4th Dept. 2014) – For purposes of service under CPLR 308(2) or 308(4), the residence at which process is left, or affixed, must be "actual." Service at the "last known residence" does not suffice.

Ellis v. Fortune, N.Y.L.J., 1202667402623 (Sup.Ct. Suffolk Co. 2014)(Mayer, J.) – Plaintiff's process server attempted to make service at defendant's residence on three successive weekdays at 7:05 p.m., 2:20 p.m. and 6:05 a.m. "There is no indication that the process server attempted to inquire about or serve the defendant at a place of employment." The Court finds an absence of the "due diligence" required before resort to CPLR 308(4)'s "nail and mail" may be had. "What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality [citations omitted]. Attempting to serve a

defendant at his or her residence without showing that there was a genuine inquiry about the defendant's whereabouts and place of employment is fatal to a finding of due diligence as required by CPLR 308(4) [citations omitted]. Further, absent any evidence that the process server attempted to determine that the address where service was attempted was, in fact, the actual dwelling or usual place of abode of the defendants, such as by searching telephone listings or making inquiries of neighbors, the requirement of CPLR 308(4) that service under CPLR 308(1) and (2) first be attempted with 'due diligence' is not met."

JPMorgan Chase Bank, N.A. v. Baldi, 128 A D 3d 777 (2d Dept. 2015) – "The affidavit of the process server demonstrated that three visits were made to the appellant's residence on three different occasions and at different times, when the appellant could reasonably have been expected to be found at that location [citations omitted]. Further, the process server averred that he confirmed with a neighbor that the appellant resided at the premises at which service was attempted. The process server also described in detail his unsuccessful attempt to obtain an employment address for the appellant [citations omitted]. Contrary to the appellant's contention, under these circumstances, the Supreme Court properly concluded that the due diligence requirement [of CPLR 308(4)] was satisfied [so as to permit "nail and mail" service].

Pipinias v. J. Sackaris & Sons, Inc., 116 A D 3d 749 (2d Dept. 2014) – When service is made pursuant to CPLR 308(2) or (4), the statute requires that proof of service be filed within 20 days of the latter of the two required acts of service, and that service is "complete" 10 days after such filing. It is such completion of service that triggers defendant's obligation to appear in the action. The Court here holds that the "late filing of proof of service" is "a nullity." Therefore, even though proof was filed, since it was filed beyond the 20 day period, without Court sanction, defendant's time to appear never began to run.

Matter of Noel B. v. Anna Maria A., N.Y.L.J., 1202670317766 (Fam.Ct. Richmond Co. 2014)(Gliedman, Support Magistrate) – In describing his efforts to serve respondent, petitioner "stated that he is aware that the Respondent maintains an active social media account with Facebook. The Petitioner's current spouse maintains her own Facebook account, and has posted photos that have been 'liked' by the Respondent as recently as July, 2014." Thus, despite petitioner's inability to locate respondent physically, he "does have a means by which he can contact the Respondent and provide her with notice of the instant proceedings, namely the existence of an active social media account. While this court is not aware of any published decision wherein a New York state court has authorized service of process by means of social media, other jurisdictions have allowed such service." Accordingly, "pursuant to CPLR 308(5) the court authorizes substituted service by the following method: the Petitioner is to send a digital copy of the summons

and petition to the Respondent via the Facebook account, and follow up with a mailing of those same documents to the previously used last known address."

Baidoo v. Blood-Dzraku, 48 Misc 3d 309 (Sup.Ct. N.Y.Co. 2015)(Cooper, J.) – "As recently as ten years ago, it was considered a cutting edge development in civil practice for a court to allow the service of a summons by email. Since then, email has all but replaced ordinary mail as a means of written communication. And while the legislature has yet to make email a statutorily authorized method for the service of process, courts are now routinely permitting it as a form of alternative service." It "would appear that the next frontier in the developing law of the service of process over the internet is the use of social medial sites as forums through which a summons can be delivered." In this matrimonial action, plaintiff seeks to serve process via Facebook, having "easily met the requirement of demonstrating that she will be unable to effect personal service on defendant." The last address she has for him is four years out-of-date. Investigators hired by plaintiff have failed to find him. "The post office has no forwarding address for him, there is no billing address linked to his pre-paid cell phone, and the Department of Motor Vehicles has no record of him." Plaintiff has successfully addressed the Court's concerns about Facebook service in this instance. "The first is that the Facebook account that plaintiff believes is defendant's might not actually belong to him." For, "'anyone can make a Facebook profile using real, fake, or incomplete information." But plaintiff has "annexed copies of the exchanges that took place between her and defendant when she contacted him through his Facebook page, and in which she identified defendant as the subject of the photographs that appear on that page." The second concern "is that if defendant is not diligent in logging on to his Facebook account, he runs the risk of not seeing the summons until the time to respond has passed. Here too, plaintiff's affidavit has successfully addressed the issue. Her exchanges with defendant via Facebook show that he regularly logs on to his account. In addition, because plaintiff has a mobile phone number for defendant, both she and her attorney can speak to him or leave a voicemail message, or else send him a text message alerting him that a divorce action has been commenced that that he should check his account." The third concern "is whether a backup means of service is required under the circumstances." Here, "plaintiff does not have an email address for defendant and has no way of finding one. Nor does she have a street address for defendant that could constitute a viable 'last known address.'" And while "service by publication [is] something that is specifically authorized under CPLR 315," and "is probably the method of service most often permitted in divorce actions when the defendant cannot be served by other means," it "is almost guaranteed not to provide a defendant with notice of the action." Accordingly, the Court rules that "plaintiff is granted permission to serve defendant with the divorce summons using a private message through Facebook. Specifically, because litigants are prohibited from serving other litigants, plaintiff's attorney shall log onto plaintiff's Facebook account and message the defendant by first identifying himself, and then including either a web address of the summons or attaching an image of the summons. This transmittal shall be

repeated by plaintiff's attorney to defendant once a week for three consecutive weeks or until acknowledged by the defendant. Additionally, after the initial transmittal, plaintiff and her attorney are to call and text message defendant to inform him that the summons for divorce has been sent to him via Facebook."

Liberty Mutual Insurance Company v. Alberto, N.Y.L.J., 1202676582873 (Sup.Ct. Nassau Co. 2014)(Winslow, J.) – Vehicle and Traffic Law §253 permits service of process upon out-of-state drivers, in automobile accident cases, by means of service on the New York Secretary of State and mailing to defendant by certified or registered mail, return receipt requested, with a filing of proof of service within 30 days after plaintiff receives the return receipt. Here, "plaintiff has demonstrated substantial compliance with this statute. Although it appears that plaintiff filed the requisite proof of service in the Nassau County Clerk's office after the expiration of the thirty (30) day deadline imposed by VTL §253(2), such delay is not jurisdictional, and is not fatal to an application for a default judgment."

SERVICE ON CORPORATIONS

Cellino & Barnes, P.C. v. Martin, Lister & Alvarez, PLLC, 117 A D 3d 1459 (4th Dept. 2014) – "Although a corporation is 'free to choose its own agent for receipt of process without regard to title or position' [citation omitted], the process server is not expected to be familiar with the corporation's internal practices, and is thus entitled to rely upon the 'employees to identify the proper person to accept service.'" Here, the undisputed affidavit of the process server shows that defendant's receptionist "identified herself as a legal assistant and said that she was in charge of the office. When asked whether she was authorized to accept service, the receptionist answered in the affirmative." Under those circumstances, defendant's affidavit, which "merely stated that the receptionist was not authorized to accept service," is insufficient.

Matter of Jiggetts v. MTA Metro-North Railroad, 121 A D 3d 414 (1st Dept. 2014) – "The proceeding was properly dismissed on the basis that no personal jurisdiction was acquired over respondents. Petitioner failed to comply with CPLR 311(a)(1), which requires that the process server tender process directly to an authorized corporate representative, rather than an unauthorized person who later hands the process to an officer or other qualified representative [citation omitted]. Petitioner also failed to properly effectuate service of process by mail. Although he mailed the summons and petition to respondents, he did not include two copies of a 'statement of service by mail' and an 'acknowledgment of receipt' as required by CPLR 312-a(a) [citation omitted]. Petitioner's status as a *pro se* litigant does not excuse the defective service [citation omitted], and the fact that respondents received actual notice does not confer jurisdiction."

Ciafone v. Queens Center for Rehabilitation and Residential Healthcare, 126 A D 3d 662 (2d Dept. 2015) – When service upon a corporation is attempted by service on the Secretary of State, jurisdiction is not obtained when "the summons and complaint misstated" defendant's name.

Matter of Stony Creek Preserve, Inc., 121 A D 3d 1376 (3d Dept. 2014) – Back in 1986, the Court of Appeals, in *Raschel v. Rish*, 69 N Y 2d 694 (1986), dealt with a case in which plaintiff's process server, seeking to serve both a hospital and a doctor who was an employee of the hospital, gave but one copy of the summons and complaint to a hospital administrator, then mailed a copy to the doctor. The Court rejected plaintiff's argument that service was proper on the employee. "While the CPLR is silent as to the number of copies of a summons and complaint that must be served on a person conceivably acting in more than one representative capacity, the guiding principle must be one of notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections' [citation omitted]. Where only one copy of the summons and complaint was delivered to the hospital administrator, though he was also conceivably qualified to accept service for defendant doctor pursuant to CPLR 308(2), actual notice to the doctor depended upon several contingencies. The administrator had to know, for example, that service was being made on the doctor as well as the hospital, notify him, and furnish him with copies of the documents." The Court held that service on the doctor was invalid. Later, in *Brown v. Sagamore Hotel*, 184 A D 2d 47 (3d Dept. 1992), the Third Department distinguished *Raschel* in a case in which the process server delivered one summons and complaint to a person being served both individually and as a partner of defendant partnership. The difference between *Brown* and *Raschel*, the Court said, was that service of the summons on the individual partner was, by operation of law, service on the partnership. Last year's "Update" reported on *Fernandez v. Morales Brothers Realty, Inc.*, 110 A D 3d 676 (2d Dept. 2013), in which the Court, without citing *Raschel*, or *Brown*, held that "service of one copy of a summons and complaint upon an officer of a corporation constitutes service upon the corporation itself as well as upon the individual officer, where, as here, there was simultaneous compliance with CPLR 311(a)(1) and CPLR 308(1)." Here, in *Stony Creek*, a proceeding for corporate dissolution commenced by one 50% shareholder against the other, "personal service of a copy of the order to show cause upon Place was sufficient to effect service on both the corporation and Place, individually [citations omitted]. Considering that petitioner and Place were apparently the only two officers of the corporation at the time, we find that service upon Place constituted 'notice "reasonably calculated, under all the circumstances, to apprise Place and the corporation of the pendency of the proceeding and afford them an opportunity to present their objections"' [citations omitted]. No purpose would have been served by delivery of a separate copy of the order to show cause to Place for the corporation."

SERVICE ON OTHER ENTITIES

Ciafone v. Queens Center for Rehabilitation and Residential Healthcare, 126 A D 3d 662 (2d Dept. 2015) – Defendant "demonstrated that jurisdiction was not obtained by the alleged delivery of the summons and complaint to an employee at the facility's security desk because it is a limited liability company, and its four individual members are the only persons authorized to accept service on its behalf" pursuant to CPLR 311-a.

Matter of Bauman & Sons Buses, Inc. v. Ossining Union Free School District, 121 A D 3d 1110 (2d Dept. 2014) – "Pursuant to CPLR 311(a)(7), personal service upon a school district must be accomplished via personal delivery to 'a school officer, as defined in the education law.' The Education Law defines 'school officer' as 'a clerk, collector, or treasurer of any school district; a trustee; a member of a board of education; a superintendent of schools; a district superintendent; a supervisor or attendance officer; or other elective or appointive officer in a school district whose duties generally relate to the administration of affairs connected with the public school system' [citation omitted]. Thus, it is clear that a security guard does not qualify as a 'school officer' within the meaning of Education Law §2(13) [citations omitted], and this Court is without authority to permit service on an individual not authorized by the Legislature."

Matter of Puchalski v. Depew Free School District, 119 A D 3d 1435 (4th Dept. 2014) – In another case dealing with service upon a school district [*see*, *Matter of Bauman* discussed directly above], the Court holds that a school payroll clerk is not "a clerk" as intended by Education Law §2(13). Citing Education Law §2130(1), the Court finds that the "clerk" for purposes of the statute is the "clerk of the board of education of such district." And, "the reference to a singular clerk in section 2130(1) must apply to section 2(13), such that there cannot be more than one person who is 'a clerk' of the school district."

SERVICE PURSUANT TO THE HAGUE CONVENTION

Vikram J. v. Anupama S., 123 A D 3d 625 (1st Dept. 2014) – "Respondent's actual notice of the custody proceedings is insufficient to subject her to the court's jurisdiction [citation omitted]. She was not properly served with process. The Central Authority of India, where respondent resides, did not send a certificate of service to petitioner, as required by article 15 of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [20 UST 361, TIAS No. 6638 (1965)]. Nor has a showing been made that the Central Authority actually transmitted the documents to respondent or that a period of not less than six months had elapsed after the date of petitioner's transmission of the documents to the Central Authority. We note that the service attempted by petitioner's friend was ineffective. As India has objected to article 10 of the Convention, service is required to be effected pursuant to article 5, i.e. either by or at the behest of the Central Authority."

Matter of Genger, N.Y.L.J., 1202723666996 (Surr.Ct. N.Y.Co. 2015)(Anderson, J.) – Article 10 of the Hague Convention provides that, if the State of destination does not object, the Convention "shall not interfere with * * * the freedom to *send* judicial documents, by postal channels, directly to persons abroad" [emphasis added]. The issue that divides the Appellate Divisions in their interpretation of that provision is whether Article 10's use of the word "send" includes documents "served." Here, "in view of the First Department's decision in *Sardanis v. Sumitomo Corp.* (279 A D 2d 225 [1st Dept. 2001]), ruling that Article 10(a) of the Hague Convention does not permit service of process by mail, this court must grant the motion to dismiss, notwithstanding contrary authority in the Appellate Divisions, Second, Third and Fourth Departments [citations omitted]. In *Sardanis* [citation omitted], the First Department held that service of process by mail is improper under Article 10(a) of the Hague Convention because such provision does not apply to the 'service' of documents for jurisdictional purposes."

PROOF OF SERVICE

Machovec v. Svoboda, 120 A D 3d 772 (2d Dept. 2014) – "A process server's affidavit of service gives rise to a presumption of proper service [citations omitted]. To be entitled to vacatur of a default judgment and dismissal of a complaint under CPLR 5015(a)(4), a defendant must overcome the presumption raised by the process server's affidavit of service. A sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit will defeat the presumption of proper service [citations omitted]. If the presumption is rebutted, a hearing to determine the propriety of service of process is necessary. At the hearing, the burden is on the plaintiff to prove jurisdiction by a preponderance of the evidence [citations omitted]. Here, the defendant expressly denied that he had ever been served with legal papers. Additionally, the defendant stated that he did not meet the description of the person described in the affidavit of service of the summons and complaint, and he cited specific, significant discrepancies between his appearance and the description of the person served in the process server's affidavit of service." Thus, "Supreme Court should have held a hearing before deciding that branch of the motion."

Henderson v. Navaro, N.Y.L.J., 1202717729715 (App.Term 2d Dept. 2015) – "A process server's affidavit of service gives rise to a presumption of proper service [citations omitted]. To be entitled to vacatur of a default judgment and dismissal of a complaint under CPLR 5015(a)(4), a defendant must overcome the presumption raised by the process server's affidavit of service. A sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit will refute the presumption of proper service [citations omitted]. If the presumption is rebutted, a hearing to determine the propriety of service of process is warranted to prove jurisdiction by a preponderance of the evidence [citations omitted]. In the present case, defendant expressly denied that he had ever been personally served with process. Indeed, defendant

stated that he did not meet the description of the person set forth in the affidavit of service of the summons and complaint, as there were specific discrepancies between his appearance and the process server's description of the person he had served. In light of defendant's unequivocal denial that he had been personally served, the District Court should have held a hearing before deciding defendant's motion."

77 Commercial Holding, LLC v. Central Plastic, Inc., 46 Misc 3d 80 (App.Term 2d Dept. 2014) – Once a Court determines that a traverse hearing is necessary, "it is the petitioner's burden to establish jurisdiction by a preponderance of the evidence, and, except in circumstances not present here (*see* CPLR 4531), a process server's affidavit alone is not sufficient to support a finding of jurisdiction [citations omitted]. Since petitioner's process server did not testify at the traverse hearing, it was improper for the Civil Court to consider the affidavit, and, thus, petitioner did not meet its burden."

Moret Partnership v. Spickerman, 125 A D 3d 729 (2d Dept. 2015) – After conducting a traverse hearing, "the Supreme Court [Nassau County] erred in concluding that the process server failed to comply with General Business Law §89-u, by not maintaining a log book, and erred in granting the Spickerman defendants' motion [to dismiss] on this basis. General Business Law §89-u, which applies to process servers outside of the City of New York, requires process servers to 'maintain a legible record of all service made by him or her as prescribed in this section' [citation omitted]. Unlike General Business Law §89-cc(1), which is applicable in the City of New York, General Business Law §89-u, which is applicable outside the City of New York, does not expressly require that the 'legible record' be 'kept in chronological order in a bound, paginated volume' [citation omitted], i.e., a log book. 'Pursuant to the maxim of statutory construction *expressio unius est exclusio alterius*, where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded' [citations omitted]. Since the legislature did not include a log book requirement for process servers in counties outside of the City of New York, the Supreme Court erred in determining that the process server in Nassau County was required to maintain such log book."

APPEARANCE BY COUNSEL

Schoenefeld v. State of New York, 25 N Y 3d 22 (2015) – In this federal lawsuit seeking to declare Judiciary Law §470 unconstitutional, the Second Circuit certified to the New York Court of Appeals the question of "the minimum requirements necessary to satisfy the statutory directive that nonresident attorneys maintain an office with the State 'for the transaction of law business.'" The Court holds "that the statute requires nonresident attorneys to maintain a physical office in New York." The defendant State of New York, "recognizing that there may be a constitutional flaw if the statute is interpreted as

written," urged the Court "to construe the statute narrowly in accordance with the doctrine of constitutional avoidance [citations omitted]. In particular, they suggest that the provision can be read merely to require nonresident attorneys to have some type of physical presence for the receipt of service – either an address or the appointment of an agent within the State. They maintain that interpreting the statute in this way would generally fulfill the legislative purpose and would ultimately withstand constitutional scrutiny." However, the language and legislative history of the statute make it "difficult to interpret the office requirement as defendants suggest. As the Second Circuit pointed out, even if one wanted to interpret the term 'office' loosely to mean someplace that an attorney can receive service, the additional phrase 'for the transaction of law business' makes this interpretation much less plausible."

LVN Corporation v. Khan, N.Y.L.J., 1202674912426 (Sup.Ct. Bronx Co. 2014) (Thompson, J.) – "'No authority has been presented which would permit a lay person by virtue of his capacity as attorney-in-fact for his principal to appear on his principal's behalf and act as legal counsel in a court of law unless admitted to so practice. Under the applicable statutes of this state, only those persons duly admitted to practice before the courts of this state may act as a legal representative of another person in a court proceeding or in the further capacity of a practicing attorney [citations omitted]. The seriousness with which the legislature views this requirement is manifest since a violation of the statutory proscription is punishable as a misdemeanor [citation omitted]. Moreover, the potential problems created by the use of this device as a means of encouraging the unauthorized practice of law is obvious.'"

Ernest & Maryanna Jeremias Family Partnership, L.P. v. Sadykov, 2015 WL 1565779 (App.Term 2d Dept. 2015) – After losing at the trial of this landlord-tenant proceeding, petitioner landlord claimed that the proceeding was a nullity because petitioner, a limited partnership, had appeared by one of its partners, rather than an attorney. "The general rule in New York is that 'when the party to an action is a fictional person – a legal entity with limited liability – it cannot represent itself but must be represented by a licensed practitioner." The requirement of representation by counsel has been extended to limited liability companies. However, "unlike a limited liability company, a partnership is generally not considered to be a fictional entity." Nonetheless, "given that partnerships and limited partnerships were largely subsumed within the definition of voluntary associations when Civil Practice Act §236 was enacted, and because partnerships and limited partnerships are equivalent to the 'artificial' or 'juridical' entities recognized in federal and many state courts as requiring representation, as a matter of policy and uniformity of practice, the rule should be the same in New York. This result is consistent with the general rule against lay practice in the courts [citation omitted] and the preference for representation by someone accountable to the court and other parties for his or her malpractice or misconduct." However, here, "it is only after a trial of the merits resulting in an adverse determination that landlord seeks to have its action

dismissed *ab initio* and without prejudice. We see no reason why the rule against penalizing an adverse party for the opposing party's misconduct, essentially one of estoppel, should not likewise be applied to landlord, which improperly commenced the action without counsel."

DEFENDANT'S RESPONSE TO BEING SERVED

Ryan v. High Rock Development, LLC, 124 A D 3d 751 (2d Dept. 2015) – Plaintiff commenced this action by filing a summons with notice. The next day, plaintiff not having yet served the summons, defendants served a notice of appearance and demand for complaint. A month later, no complaint having been served, defendants moved to dismiss the action. The Appellate Division reverses the granting of that motion. "'No provision is made for an appearance or a demand for a complaint before the summons is served' [citation omitted]. A demand for a complaint pursuant to CPLR 3012(b) prior to service of the summons is premature and does not invoke the time limitations of CPLR 3012(b)." Thus, here, "the demand for a complaint was a nullity and the 20-day period within which the complaint had to be served pursuant to CPLR 3012(b) had not begun to run."

Roberts v. Northington, 128 A D 3d 1487 (4th Dept. 2015) – When plaintiff fails to timely serve a complaint upon being served with a notice of appearance and demand for complaint, the action will be dismissed unless plaintiff demonstrates an excuse for the delay, and a meritorious cause of action. Here, in support of the motion to vacate an order of dismissal, plaintiff, to show a meritorious cause of action "submitted only the affirmation of her attorney, who has no personal knowledge of the relevant facts, and plaintiff thus failed to meet her burden [citations omitted]. Although plaintiff thereafter submitted a verified complaint, she improperly did so for the first time in her reply papers [citations omitted]. We conclude that 'plaintiff's failure to demonstrate the merit of the cause of action in response to the CPLR 3012(b) motion [to dismiss] compels the unconditional dismissal of the action and it was reversible error for the court to hold otherwise.'"

Tsionis v. Eriora Corp., 123 A D 3d 694 (2d Dept. 2014) – "The appellant was not required to file his notice of appearance with the Supreme Court. There is no statutory or other requirement that a notice of appearance, timely served upon a plaintiff, must also be filed with the clerk of the relevant court in order for a defendant to appear in the action."

Khan v. Hernandez, 122 A D 3d 802 (2d Dept. 2014) – CPLR 320(a) provides that when service is made in any manner other than by personal delivery within the State, a defendant's time to appear in the action is "thirty days after service is complete." And CPLR 308(2) and (4) provide that when service on an individual is made by "leave and

mail" or "nail and mail," service "shall be complete ten days after" proof of service is filed with the Clerk of the Court. Here, defendant was served pursuant to CPLR 308(4) on October 13, 2012, but proof of service was not filed, and Supreme Court therefore denied plaintiff's motion for a default judgment on the ground that defendant's time to appear never commenced. Plaintiff then filed proof of service, and moved to renew and reargue, "and to deem the affidavit of service that was filed on May 29, 2013, timely filed *nunc pro tunc*." The Appellate Division holds that "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]. Here, in light of the plaintiff's prompt action in moving to correct the irregularity following the denial of his motion for leave to enter a default judgment and the lack of prejudice to Hernandez, the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was to deem the filing of proof of service on Hernandez timely *nunc pro tunc*." However, "contrary to the plaintiff's contention, a court may not grant such relief retroactive to Hernandez's prejudice by placing him in default as of a date prior to the order [citation omitted]. In other words, service will not be deemed complete as of October 23, 2012, as the plaintiff argues [citation omitted]. Rather, Hernandez must be afforded an additional 30 days after service upon him of a copy of this decision and order to appear and answer."

Bennett v. Patel Catskills, LLC, 120 A D 3d 458 (2d Dept. 2014) – "The plaintiffs did not waive the issue of the late service of the answer and the alleged default when they failed to reject the answer in a timely manner. Since the plaintiffs notified the defendant that it was in default prior to service of an answer and promptly moved for leave to enter a default judgment after receiving the answer, the plaintiffs could not be deemed to have thereafter waived the issue of late service and the alleged default."

Strumpf v. Massachusetts Mutual Life Insurance Company, 125 A D 3d 1239 (3d Dept. 2015) – "Pursuant to CPLR 3012(d), Supreme Court may – upon application of a party – 'extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for the delay or default.'" When, as here, the delay was "relatively short," no affidavit of merit is required to avoid a default.

Cadlerock Joint Venture, L.P. v. Kierstedt, 119 A D 3d 627 (2d Dept. 2014) – "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 person jurisdiction in an answer or pre-answer motion to dismiss [citations omitted]. A defendant may also waive lack of personal jurisdiction by entering into a stipulation of settlement of the action [citations omitted]. Additionally, a defendant may waive lack of personal jurisdiction by making payments pursuant to a judgment or wage garnishment for a substantial period of time [citation omitted]. However, where the defendant's only

participation in the action is the submission of a motion to vacate a default judgment for lack of personal jurisdiction, the defense of lack of personal jurisdiction is not waived." Here, the defendant's "making voluntary installment payments" on the subject loan, and "attempting to settle the dispute with the plaintiff" after the default was entered, "did not constitute a waiver of the defense of lack of personal jurisdiction, since those payments were made pursuant to the loan agreement, not a stipulation entered into in the instant action."

Deutsche Bank National Trust Company v. Gordon, 129 A D 3d 769 (2d Dept. 2015) – "Although the defendant served a notice of appearance, under the circumstances of this case, she was not obligated to challenge the defective service at that time, but, instead, was free to thereafter raise her objection to personal jurisdiction by a motion to dismiss pursuant to CPLR 3211(a)(8) or by setting it forth as a defense in her answer as provided for in CPLR 3211."

Langhorne v. Aerofin Corp., N.Y.L.J., 1202642487637 (Sup.Ct. N.Y.Co. 2014)(Heitler, J.) – The Court of Appeals has long held that the failure to raise a jurisdictional defense in either a pre-answer motion, or, if no pre-answer motion is made, as an affirmative defense in the answer, waives the defense. For example, when defendant moved to dismiss only on grounds of failure to state a cause of action, then plaintiff amended the complaint, defendant could not then raise a jurisdictional defense in its answer to the amended complaint [*Adesso v. Shemtob*, 70 N Y 2d 689 (1987)]. The one exception drawn by the Court of Appeals is when defendant at first failed to assert the jurisdiction defense in the answer, but, *within the time for amending the answer as of right*, amended the answer to include the jurisdictional defense [*Iacovangelo v. Shepherd*, 5 N Y 3d 184 (2005)]. The First Department has specifically held that when permission must be sought to amend the answer, it is too late to assert a defense of lack of jurisdiction [*McGowan v. Hoffmeister*, 15 A D 3d 297 (1st Dept. 2005)]. Last year's "Update" reported on *Deutsche Bank Trust Company v. Cox*, 110 A D 3d 760 (2d Dept. 2013), in which, despite these authorities, the Second Department held that the failure to assert the defense waived it "at that point." However, "defenses waived under CPLR 3211(e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b) so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay and is not palpably insufficient or patently devoid of merit [citations omitted]. 'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine.'" The Court cited neither *Iacovangelo* nor *McGowan*. Here, in *Langhorne*, the Court reiterates the otherwise well-established rule: "'The law is settled that a jurisdictional defense not asserted in the first responsive pleading, whether answer or pre-answer dismissal motion pursuant to CPLR 3211, is waived. By appearing in the action and electing to answer the complaint without an objection to jurisdiction, defendants conferred jurisdiction upon the court and waived the defense.'" That waiver

"'cannot be nullified by a subsequent amendment to a pleading adding the missing affirmative defense.'"

COMMENCING THE ACTION

McCord v. Ghazal, 43 Misc 3d 767 (Sup.Ct. Kings Co. 2014)(Demarest, J.) – Last year's "Update" reported on *Grskovic v. Holmes*, 111 A D 3d 234 (2d Dept. 2013). There, on May 4, 2001, shortly before the running of the statute of limitations, plaintiff's counsel established a temporary e-filing user account, and "using what it believed to be a valid and operational e-filing account, then electronically purchased an index number using credit card information and 'filed' the summons and complaint. The filing was confirmed in an email message from the court," which "contained the word 'confirmation' in large bold typeface and further stated that 'the NYSCEF web site has received document(s) from the filing user for case/claim number not assigned,' and instructed counsel to 'please print this as a confirmation of your filing(s).' The filed documents were specifically identified in the confirmatory email message as a 'summons and complaint.'" Counsel thereafter searched in vain for the assignment of an index number. It was only after the statute of limitations had run that counsel discovered that the May 4 e-filing "had been within NYSCEF's 'practice/training' system and not in its 'live' system and, therefore, the plaintiff's summons and complaint were never actually filed." Under the circumstances, the Court concluded that plaintiff's counsel "could reasonably be viewed" as having been misled. But, "that said, the question remains, under these discrete circumstances, whether the Supreme Court should have granted the plaintiff's motion pursuant to CPLR 2001 to deem the summons and complaint filed on May 4, 2001, *nunc pro tunc*." For, "legislative history makes clear that although the purpose of the 2007 amendment [to CPLR 2001] was to 'fully foreclose dismissal of actions for technical, non-prejudicial defects,' it was not intended to 'excuse a complete failure to file within the statute of limitations' [citation omitted]. The measure affords the court the discretion to correct 'a mistake in the method of filing, as opposed to a mistake in what is filed.'" And here, "contrary to the defendant's contention and the Supreme Court's determination, the plaintiff's mistake constitutes a mistake in the *method* that was used in filing in a 'practice' system instead of in a 'live' system" [emphasis by the Court]. The Court also rejects defendant's argument "that the plaintiff's e-filing error cannot be corrected, as doing so would prejudice the defendant by depriving her of a viable statute of limitations defense." Properly construed, the Court holds, CPLR 2001 does not require a showing of lack of prejudice in order to correct a mistake. "CPLR 2001 recognizes two separate forms of potential relief to address mistakes, omissions, defects, or irregularities in the filing of papers. The statute distinguishes between the 'correction' of mistakes and the 'disregarding' of mistakes, and each invokes a different test. Courts may 'correct' mistakes 'upon such terms as may be just' (CPLR 2001). The

statute then says, set off by an 'or,' that mistakes may be 'disregarded' if a substantial right of a party is not prejudiced (*id.*). Thus, a 'correction' of a mistake appears to be subject to a broader degree of judicial discretion without necessary regard to prejudice, whereas a complete 'disregarding' of a mistake must not prejudice an opposing party." This distinction "makes sense, as a party seeking to wholly disregard a filing mistake may understandably be expected to bear a higher burden than a party seeking a mere correction." Here, granting relief to plaintiff involves the "'correction' of the 'practice' filing that had, in fact, been timely undertaken by the plaintiff's counsel." That "'filing' was performed in a mistaken *manner and method*, which courts are permitted to correct on terms that may be just [citation omitted; emphasis by the Court]. Therefore, the plaintiff was under no burden to demonstrate an absence of prejudice to the defendant. In contrast, excusing a clearly untimely filing would constitute the disregarding of an error, which could not be permitted because it would be prejudicial to a defendant to deprive it of a legitimate statute of limitations defense. That, however, is a circumstance that we find not to exist here." Here, in *McCord*, in the course of electronically filing the summons and complaint, plaintiff mistakenly attached the summons with notice in a related action instead. Defendant Ghazal was not named as a party in that action. Plaintiff served the correct summons upon Ghazal. When the error was discovered, plaintiff re-e-filed the correct summons. "The Court takes judicial notice that the procedure in the Kings County Clerk's office is for a clerk to personally review each document filed when a new action is commenced by e-filing. In certain circumstances, the Kings County Clerk requires a correction and/or the resubmission of corrected documents, *nunc pro tunc*, when documents are improperly filed [citations omitted]. The Kings County Clerk's review of the Initial Filing, without notification to plaintiff of the need to submit the correct Summons With Notice, was an error and the uploaded document in the Initial Filing should have been returned for correction as it does not contain the same caption as the case under which it is filed in the e-filing system. It is further noted that had the County Clerk properly returned the uploaded document for correction on November 11, 2013, when the Initial Filing was reviewed by a clerk, plaintiffs would have promptly received notice of the error and been given the opportunity to upload the proper document prior to the service of the Summons with Notice on November 12, 2013." Thus, "the only error in commencing this action was the selection of the wrong file on plaintiffs' counsel's computer when prompted by the e-filing system to select the file to be uploaded. Accordingly, the plaintiffs' counsel's uploading of the Summons with Notice was performed in a mistaken manner and method and, pursuant to CPLR 2001, the court may correct the mistake [citing *Grskovic*]. Alternatively, since defendant has not articulated any prejudice that would result, the Court may be required to disregard the error."

O'Brien v. Contreras, 126 A D 3d 958 (2d Dept. 2015) – "Under CPLR 304, an action in Supreme Court is ordinarily commenced 'by filing a summons and complaint or summons with notice' [citation omitted]. The failure to file the initial papers necessary to

institute an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity.'" And, "although CPLR 2001, as amended in 2007, gives the court broad discretion to correct or disregard mistakes, omissions, defects, or irregularities at any stage of an action, including mistakes in the filing process, appellate courts, guided by the legislative history, have made it clear that the 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."

Dreckette v. New York City Health and Hospitals Corporation, 45 Misc 3d 752 (Sup.Ct. Kings Co. 2014)(Steinhardt, J.) – CPLR 2001, and its interpretation by the Second Department in *Grskovic v. Holmes*, 111 A D 3d 234 (2d Dept. 2013), does not save the claim of a plaintiff who e-filed a notice of claim with the wrong municipal entity. CPLR 2001 "allows courts to correct or disregard technical defects, occurring at the commencement of an action that do not prejudice the opposing party [citation omitted]. The provision may not be used to correct defects which relate to actual notice to a defendant, which is more than just a technical irregularity [citations omitted]. Thus, this section is inapplicable here, as the filing defect affects a substantial right of the defendant and is more than a technical irregularity. Furthermore, CPLR 2001 may be used to correct defects in pleadings, however, a notice of claim is not a pleading but a condition precedent to suit."

Wells Fargo Bank, NA v. Gonsalves, 44 Misc 3d 531 (Sup.Ct. Westchester Co. 2014)(Connolly, J.) – The day after plaintiff's counsel commenced a foreclosure action, by electronic filing, an employee of plaintiff's counsel e-mailed the County Clerk, stating, "I E-filed a case yesterday afternoon but it was not yet ready to be filed. I checked this morning and found an index number already assigned to it. Is it too late to cancel it and get a refund?" The County Clerk issued the refund, deleted the case from its records, but did not notify the Court Clerk's office. Meanwhile, plaintiff's counsel "continued to file numerous papers on the New York State Court Electronic Filing (NYSCEF) system, eventually moving for the order of reference. Notably, the papers filed in support of the motion annexed copies of the complaint and the notice of pendency, even though the Court Clerk's Office had deleted these documents from its records and from the NYSCEF document list. When this Court granted the order of reference on January 14, 2014, it was unaware that the plaintiff had sought and obtained a refund for its index number." When the Court learned the facts, it issued a *sua sponte* order staying the action, and directing that "unless the plaintiff moves for corrective action within a time certain, the action would be dismissed." Plaintiff now moves, pursuant to CPLR 2001, to reinstate the action. Citing the Second Department's decision in *Grskovic*, discussed above, the Court held that "here, the relief sought by the plaintiff with respect to its index number and the deletion of its summons and complaint is in the nature of the correction of a mistake and, therefore, the Court's discretion is broad [citation omitted]. The plaintiff in this case did in fact file a summons and complaint and

due to an error or miscommunication, a refund was obtained for the filing fee. The Court is satisfied that the plaintiff's error was unintentional. Under these circumstances, the plaintiff should be permitted to correct the error with regard to its summons and complaint and, upon payment of the applicable filing fee, the summons and complaint should be restored under the original index number."

Dong v. Kao, 115 A D 3d 839 (2d Dept. 2014) – "Contrary to the plaintiff's contention, service of the summons and complaint upon Chen Mao Kao and Dickman was not made within 120 days of the commencement of the action as required by CPLR 306-b. Although the summons and complaint were delivered to persons of suitable age and discretion and the actual places of business of those defendants on November 4, 2011, one day before the expiration of the 120-day period, service was not completed within that time frame because the second act required by CPLR 308(2), the mailing, was not performed within the 120-day period [citations omitted]. Also contrary to the plaintiff's contention, considering all of the circumstances of this case, the Supreme Court providently exercised its discretion in denying her cross motion to extend the time to serve the summons and complaint upon Chen Mao Kao and Dickman, *nunc pro tunc*, in the interest of justice."

HSBC Bank USA v. Carvalho, 128 A D 3d 471 (1st Dept. 2015) – Plaintiff served a summons on defendant's old address, "even though defendant had previously notified plaintiff of her new address." It then obtained a default judgment. Thereafter, its assignee, Cadlerock, notified defendant – at her correct address – that it had purchased the loan, but it "did not inform defendant that a judgment had been obtained against her." Now, apparently recognizing that the judgment was obtained without proper service, Cadlerock moves to extend its time to make service. "Given the extreme lack of diligence shown by plaintiff and Cadlerock, and the long delay (more than five years after the claim accrued) before defendant received any notice of the action, the court below abused its discretion is granting Cadlerock an extension of time to serve defendant [citation omitted]. Cadlerock has not shown good cause for such an extension, nor is an extension warranted in the interest of justice."

Garrison Contracting, Inc. v. Medina, Torrey, Mamo & Camacho, P.C., N.Y.L.J., 1202727375843 (Sup.Ct. Putnam Co. 2015)(Lubell, J.) – This legal malpractice action was commenced against a law firm and one of its partners on March 19, 2013. The firm was served on June 7, 2013. It was only after discovery demonstrated that the firm was essentially without assets, and had no malpractice insurance, that, on November 20, 2014, it served process on the individual partner. The Court grants the individual partner's motion to dismiss for lack of timely service, and denies plaintiff's cross-motion for a *nunc pro tunc* extension of the time to serve pursuant to CPLR 306-b. First, there was no "good cause shown" for the 20-month delay. "Plaintiffs failed to exercise due diligence in attempting to serve the summons and complaint upon Torrey within 120 days of the

filing of the complaint, nor ever for that matter." It was only after learning that the law firm was essentially judgment-proof "that Plaintiffs turned their attention to Torrey," despite "Plaintiffs' ongoing knowledge of Torrey's whereabouts, availability and participation in the underlying lawsuit as a member of the Firm." Furthermore, "Plaintiffs' cross-motion for leave to extent time to effectuate service upon Torrey was only made in response to Torrey's motion to dismiss." Second, "even though the granting of an extension in the 'interest of justice' does not require a showing of 'reasonably diligent efforts at service as a threshold matter' [citations omitted], the Court denied Plaintiffs' motion on an 'interest of justice' ground as well." In addition to the factors the Court considered with regard to the "good cause" argument, "perhaps most compelling in this matter, and even though Plaintiffs will be precluded from timely recommencing an action against Torrey, is the fact that the failure to have served Torrey was voluntary and was not due, in any part, to any action or inaction on the part of Torrey."

Matter of Bauman & Sons Buses, Inc. v. Ossining Union Free School District, 121 A D 3d 1110 (2d Dept. 2014) – Despite finding service of process to have been improper, "we decline to dismiss the petition/complaint," because "petitioners cross-moved pursuant to CPLR 306-b for a *nunc pro tunc* extension of the time in which to serve process upon the school district." Noting that, under CPLR 306-b, a Court may extend a plaintiff's time to serve "upon good cause shown or in the interest of justice," the Court continued, "the Court of Appeals has made clear that these are two distinct standards and that, while 'good cause' requires a showing of reasonable diligence, 'the interest of justice' has a broader scope, which can encompass late service due to 'mistake, confusion or oversight, so long as there is no prejudice to the defendant' [citations omitted]. In determining whether an extension of time is warranted in the interest of justice, a court may consider, *inter alia*, 'diligence or lack thereof, 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.'"

Hollowell v. Decaro, 118 A D 3d 749 (2d Dept. 2014) – "Because a plaintiff is unable to commence an action during the period of time between the death of a potential defendant and the appointment of a representative of the estate, the purported action commenced on June 8, 2012 was a nullity." And the statute of limitations for this action expired on June 17, 2012. Thus, Supreme Court "properly denied the plaintiff's cross motion pursuant to CPLR 306-b to extend the time to serve the summons and complaint. While this provision allows for the extension of time to serve the summons and complaint after an action has been properly commenced, it does not allow a court to extend the time limited by law for the commencement of an action."

STATUTE OF LIMITATIONS

SUSPENSION OF THE STATUTE OF LIMITATIONS

Matter of Parietti v. Sampson, 117 A D 3d 830 (2d Dept. 2014) – Last year's "Update" reported on Governor Cuomo's 2012 "suspension" of the statute of limitations in the wake of Hurricane Sandy. Section 29-a of the Executive Law authorizes the Governor of the State of New York, upon declaration of a "disaster emergency," to "temporarily suspend specific provisions of any statute, local law, ordinance or orders, rules or regulations, or parts thereof." The last time a Governor had exercised that power was on September 11, 2001, when, among other statutes, all statutes of limitation were "suspended" by Governor Pataki from that date until October 12, 2001 (and for those "directly affected" by the disaster emergency, until January 7, 2002). On October 26, 2012, a few days in advance of the devastation caused by Hurricane Sandy, Governor Cuomo declared a "disaster emergency," and, by further order issued on October 31, 2012, again suspended, *inter alia*, statutes of limitation. By further Executive Order dated November 20, 2012, the Governor declared that that suspension "shall continue through December 25, 2012." Here, in *Matter of Parietti*, the Second Department deals with an issue spawned directly by the language of the 2012 suspension. As noted above, Executive Order 47, declaring the disaster emergency was issued on October 26, 2012. Executive Order 52, suspending the statute of limitations, was issued on October 31. The October 31 Order provides in one paragraph that "I temporarily suspend [, *inter alia*, the statute of limitations], for the period from *the date of this Executive Order* until further notice" [emphasis added]. The next paragraph states that the statute is suspended "commencing *from the date that the disaster emergency was declared* pursuant to Executive Order Number 47, issued on October 26, 2012" [emphasis added]. The statute of limitations in this election law matter would have expired on October 26, 2012. If the suspension of the statute was effective as of that date, the proceeding is timely. If the suspension was effective October 31, the proceeding is time-barred. The Court holds that the action is timely. "Although these two provisions appear to be facially in conflict with each other, 'the rules of statutory construction require that, where it is possible to do so, the various parts of the statutory scheme be harmonized, reading and construing them together [citation omitted], and reconciling the apparently conflicting provisions in the manner most consistent with the overall legislative intent [citations omitted]. Interpreting Executive Order No. 52 as suggested by the appellants would undermine its purpose. If the suspension of limitations periods took effect on October 31, 2012, those individuals who were unable to initiate actions on the day Hurricane Sandy struck New York would be unable to benefit from the suspension. This would be an unreasonable result."

Williams v. MTA Bus Company, 44 Misc 3d 673 (Sup.Ct. N.Y.Co. 2014)(Stallman, J.) – Last year's "Update," in discussing Governor Cuomo's suspension of the statute of limitations in the wake of Hurricane Sandy, suggested one issue that might be raised by

the Executive Orders: whether such a suspension is a "toll," which simply tacks on the suspension period to any statute of limitations running during that time. That argument was rejected in cases spawned by the 2001 World Trade Center suspension [*see*, *Scheja v. Sosa*, 4 A D 3d 410 (2d Dept. 2004)]. The "suspension," the Court there ruled, means that in any case in which the statute would normally have *expired* during the suspension period, the statute is extended until the last date of the suspension. Here, in *Williams*, plaintiff claims that she was injured while a passenger in a bus that stopped short, on July 19, 2012. Thus, under the law as it then existed, the statute of limitations expired on August 19, 2013. This action was commenced on September 3, 2013. Plaintiff claims that the suspension of the statute of limitations contained in the Governor's Executive Order No. 52, suspending the statute from October 26, 2012 to December 25, 2012, in the wake of Hurricane Sandy, should add two months to the statutory period in which to commence this action. Plaintiff's counsel "states that the law office suffered significant damage from Hurricane Sandy, which required a massive reconstruction project [citation omitted]. According to plaintiff's attorney, the office had its grand opening on June 24, 2013 [citation omitted]. Plaintiff's attorney argues that the purpose of Executive Order No. 52 'was to help businesses and people get back on their feet.'" The Court rejects plaintiff's argument. "Executive Order No. 52 may not be read as enacting a 'blanket toll,' in the sense that it suspended the running of all limitations periods." The suspension "applied only to those actions whose limitation period ended during the period from October 26, 2012 (when the disaster emergency was declared) through December 25, 2012."

PROFESSIONAL MALPRACTICE

New York State Workers' Compensation Board v. SGRisk, LLC, 116 A D 3d 1148 (3d Dept. 2014) – Plaintiff sues its predecessor in interest's accountant, claiming that defendant breached its agreement with the predecessor in interest by "failing to originate, follow, and/or consistently apply generally accepted accounting principles and generally accepted auditing standards in its analysis of the trusts' reserve liabilities and financial conditions," by "failing or refusing to offer an accurate analysis of the trusts' financial conditions," and by "failing or refusing to identify the dangers the trusts' liabilities posed to their solvency." While "a breach of contract cause of action generally must be commenced within six years of the breach," when "a plaintiff seeks 'to recover damages for malpractice, other than medical, dental or podiatric malpractice,' the cause of action must be commenced within three years 'regardless of whether the underlying theory is based in contract or tort.'" Here, plaintiff's "allegations are couched as breaches of contract, but could be construed as essentially a professional malpractice claim to the extent that the allegations are that [defendant] failed to perform its contractual services in a professional, nonnegligent manner." Those claims are time-barred. However, "to the extent that plaintiff alleged that [defendant] breached the contracts through intentional actions, such as by 'refusing' to perform certain obligatory functions, these allegations

are not in essence a malpractice claim. Professional malpractice 'is but a species of negligence' [citations omitted], and, thus, does not generally encompass intentional acts. Accordingly, the portion of the complaint alleging breach of contract through intentional conduct is subject to a six-year statute of limitations."

Alizio v. Ruskin Moscou Faltischek, P.C., 126 A D 3d 733 (2d Dept. 2015) – "The statute of limitations for a cause of action alleging legal malpractice is three years [citation omitted]. A cause of action to recover damages for legal malpractice accrues when the malpractice is committed, not when it is discovered [citation omitted]. 'Causes of action alleging legal malpractice which would otherwise be barred by the statute of limitations are timely if the doctrine of continuous representation applies' [citations omitted]. The continuous representation doctrine tolls the statute of limitations where 'there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim.'" Here, defendant firm represented plaintiff in litigation until "sometime in early April 2010, the plaintiff discharged the defendant and retained new counsel to represent him in the actions. The defendant subsequently prepared consents to change attorneys (hereinafter the consents), which were executed by the defendant, the plaintiff, and new counsel on April 20, 2010. Sometime thereafter, new counsel prepared and distributed revised consent forms for certain of the actions on the ground that there were errors in the captions of the consents pertaining to those actions." The "revised consent" was executed on May 12, 2010. The Court holds that continuous representation by defendant ended no later than April 20, 2010. "The defendant took no acts on behalf of the plaintiff in the actions after the consents were signed on April 20, 2010." The execution of the consents "demonstrated the end of the defendant's representation of the plaintiff and the parties' mutual understanding that any future legal representation in the actions would be undertaken by the plaintiff's new counsel." The execution of the "revised consent" constituted "'a mere memorialization of what had already occurred.'"

Dischiavi v. Calli, 125 A D 3d 1435 (4th Dept. 2015) – "'In the context of a legal malpractice action, the continuous representation doctrine tolls the statute of limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice.'" And, "'an attempt by the attorney to rectify an alleged act of malpractice,'" would "constitute continuing representation sufficient to toll the statute of limitations."

Melnick v. Farrell, 128 A D 3d 1371 (4th Dept. 2015) – "'An action to recover damages for legal malpractice accrues when the malpractice is committed' [citation omitted]. It is undisputed that defendants represented plaintiffs with respect to the agreement, executed on December 31, 2004 and the first amendment of the agreement, executed on June 28, 2005, and that the action was commenced on October 10, 2010. Defendants thus met their initial burden with respect to the statute of limitations by establishing that the action

was commenced more than three years after the alleged malpractice [citation omitted]. We nevertheless conclude that plaintiffs raised an issue of fact whether the continuous representation doctrine tolled the statute of limitations [citation omitted]. Plaintiffs established that, in May 2008, [plaintiffs] Boehm and Melnick discussed with Paul J. Farrell, Esq. (defendant) their concerns regarding whether certain events would occur so as to trigger the future payments provisions of the first amendment of the agreement."

Town of Amherst v. Weiss, 120 A D 3d 1550 (4th Dept. 2014) – Plaintiff retained defendant lawyers to investigate and do the legal work for charges brought by plaintiff against a Town employee. The claimed malpractice was the failure "to advise the Town of the appropriate method for appointing a hearing officer for a Civil Service Law §75" hearing, which resulted in a reversal of the outcome of the hearing, costing the Town the expenses of the wasted hearing and review. The Town then retained defendants again for the legal work for a second hearing. And then it retained them a third separate time to handle the Article 78 proceeding brought by the employee. The Court concludes that plaintiff has "raised a triable issue of fact whether there were 'clear indicia of an ongoing, continuous, developing, and dependent relationship between the Town and defendants, which included an attempt by defendants to rectify an alleged act of malpractice,'" sufficient to reverse the granting of summary judgment to defendants. "While there were three separate and distinct retainer agreements, we conclude that there are triable issues of fact whether defendants were retained for separate and distinct legal proceedings or, rather, 'ongoing and developing phases of the same litigation' [citations omitted]. We cannot say as a matter of law that all of defendants' acts 'were not interrelated so that representation on the second section 75 hearing and the subsequent CPLR article 78 proceeding were not part of a continuing, interconnected representation' to perform the specific task of terminating a town employee." The Court further found "that there are triable issues of fact whether the gaps in the legal services that defendants performed for the Town were 'merely periods absent expectations, rather than periods when representation formally ended.'" For, "the Town 'immediately returned to defendants once an issue arising from the alleged malpractice was detected.'"

Johnson v. Proskauer Rose LLP, 129 A D 3d 59 (1st Dept. 2015) – "Plaintiffs do not dispute that, ordinarily, a legal malpractice claim accrues when the injury to the client occurs, regardless of the client's awareness of the malpractice [citation omitted]. According to that principle of law, the statute of limitations would have begun to run, at the latest, on June 8, 2001, when Proskauer delivered the opinion letter. Plaintiffs argue that the continuous representation doctrine tolled the limitations period. That doctrine 'appreciates the client's dilemma if required to sue the attorney while the latter's representation on the matter at issue is ongoing' [citation omitted]. However, the tolling it allows only applies to the specific matter out of which the malpractice claim arises; it does not apply merely because the lawyer and client had a continuing relationship pursuant to which they would have occasion to deal with each other from time to time

[citation omitted]. Plaintiffs content that their retainer agreement with Proskauer establishes continuous representation since it preserved the firm's right to represent TDG 'in unrelated matters notwithstanding its *ongoing representation* of plaintiffs' [emphasis by the Court]. However, what controls is not what a retainer agreement might say, but rather whether a client is 'acutely aware of the need for further representation on the specific subject matter underlying the malpractice claim.'" Here, "notwithstanding the 'ongoing representation' language, there was no concrete task defendants were likely to perform after they delivered the opinion letter. Accordingly, while there was certainly the *possibility* that the need for future legal work would be required with respect to the tax strategy, plaintiffs could not have 'acutely' anticipated the need for further counsel from defendants that would trigger the continuous representation toll" [emphasis by the Court].

McDonald v. Edelman & Edelman, P.C., 118 A D 3d 562 (1st Dept. 2014) – "Plaintiff relies on the continuous representation doctrine. However, in June 2008, defendants sent him a letter enclosing the Second Department's affirmance of the underlying judgment and formally closing their representation of him. The letter, which plaintiff did not object to, demonstrates that the parties lacked 'a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim' [citation omitted]. Even accepting that defendants concealed from plaintiff the fact that his appeal was dismissed as abandoned, their letter placed him on notice that his attorney-client relationship with them had ended."

Farage v. Ehrenberg, 124 A D 3d 159 (2d Dept. 2014) – "The essence of a continuous representation toll is the client's confidence in the attorney's ability and good faith, such that the client cannot be expected to question and assess the techniques employed or the manner in which the services are rendered [citations omitted]. 'One of the predicates for the application of the doctrine is continuing trust and confidence in the relationship between the parties' [citations omitted]. What constitutes a loss of client confidence is fact specific, varying from case to case, but may be demonstrated by relevant documentary evidence involving the parties, or by the client's actions." The formal substitution of counsel need not be the act triggering the end of continuous treatment where, as here, the client's conduct prior to such substitution demonstrates that the relationship had ended. Thus, here, plaintiff told defendant "to stop handling the matter," and referred to him as "her discharged attorney." That conduct terminated continuous treatment.

Matter of Lawrence (Lawrence v. Graubard Miller), 24 N Y 3d 320 (2014) – A divided (4-1) Court of Appeals holds that the continuous representation doctrine does not apply to this dispute between lawyer and client with respect to the client's claim for the return of gifts made to the lawyer. "The two prerequisites for continuous representation tolling are the claim of misconduct concerning the manner in which professional services were

performed, and the ongoing provision of professional services with respect to the contested matter or transaction." But "the rule does not apply to a continuing general relationship between a client and professional." There is "a difference between an attorney's alleged malfeasance in the provision of professional services on his client's behalf, and a dispute between an attorney and his client over a financial transaction, such as legal fees or, in this case, accepting a gift. Simply put, when an attorney engages in a financial transaction *with* a client, by charging a fee or, as in this case, accepting a gift, the attorney is not representing the client in that transaction *at all*, much less representing the client continuously with respect to 'the particular problems (conditions) that gave rise to plaintiff's malpractice claims' against the attorney [citation omitted]. The attorney and client are engaging in a transaction that is separate and distinct from the attorney's rendition of professional services on the client's behalf [citation omitted]. We have never endorsed continuous representation tolling for disputes between professionals and their clients over fees and the like, as opposed to claims of deficient performance where the professional continues to render services to the client with respect to the objected-to matter or transaction. Nor do the rationales underlying continuous representation tolling support its extension beyond current limits." The dissenter argued that there was a "nexus" between the gifts complained of and the subject of the attorneys' representation. Indeed, the claims "involve self-dealing at the expense of a client in connection with a particular subject matter."

Alksom Realty LLC v. Baranik, N.Y.L.J., 1202731567452 (Sup.Ct. Kings Co. 2015) (Demarest, J.) – "'Under the continuous treatment doctrine, "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint," the limitations period does not begin to run until the end of the treatment' [citations omitted]. Although the continuous representation doctrine originally derived from the continuous treatment concept in medical malpractice cases, it has been applied to other professionals, such as accountants [citation omitted]. For the continuous representation doctrine to apply, plaintiff must 'assert more than simply an extended general relationship between the professional and the client in that the facts are required to demonstrate continued representation in the specific matter directly in dispute' [citation omitted]. After filing the Original [tax] Return in 2008, [defendant] Roman filed an amended return in 2012 in order to correct the erroneous information in the Original Return. Here, plaintiff has demonstrated continuous representation by defendants relating to the specific matter of the inaccuracies reported by Roman and [defendant] Rom Bar in the Original Return such that the statute of limitations is tolled."

797 Broadway Group, LLC v. Stracher Roth Gilmore Architects, 123 A D 3d 1250 (3d Dept. 2014) – "'A claim for professional malpractice against an engineer or architect accrues upon the completion of performance under the contract and the consequent termination of the parties' professional relationship.'" Here, defendant's invoices

indicated that the last work it performed was in January 2009, and the parties signed a "certificate of substantial completion" in April 2009. Thus, "in the absence of any contractual obligation extending beyond issuance of the certification of substantial completion, the running of the statute of limitations commenced in April 2009, at the latest."

MEDICAL MALPRACTICE VS. NEGLIGENCE

Perez v. Fitzgerald, 115 A D 3d 177 (1st Dept. 2014) – The Court holds that CPLR 214-a, which provides a shortened 2 1/2 year statute of limitations for "medical, dental or podiatric malpractice actions," does *not* apply to actions for "chiropractic malpractice." For, "the fact that defendant provided treatment to the human body to address a physical condition or pain, which may be within the broad statutory definition of practicing medicine [citation omitted], does not, by itself, render the treatment 'medical' within the meaning of CPLR 214-a, since the use of such a broad definition would result in the inclusion of many 'alternative and nontraditional approaches to diagnosing and treating human disease' which are clearly nonmedical in nature [citation omitted]. The common thread in the cases finding that CPLR 214-a applies is that the services were provided at the direction or request of a physician who was providing medical treatment to the particular patient, thus meeting the *Bleiler* [*v. Bodnar*, 65 N Y 2d 65 (1985)] standard and bringing them within the parameters of CPLR 214-a. Here, there is no doubt that Dr. Fitzgerald's treatment was separate and apart from any other treatment provided by a licensed physician and was not performed at a physician's request."

Andrews v. Renaissance Chiropractic, P.C., 128 A D 3d 1517 (4th Dept. 2015) – Citing the First Department decision in *Perez v. Fitzgerald* – discussed directly above – with approval, the Court holds that defendant chiropractors "are not entitled to invoke the benefit of the shortened limitations period applicable to medical, dental and podiatric malpractice, and they are subject to the three-year statute of limitations of CPLR 214(6)." For, "plaintiff was not referred to Dr. Insinna by a licensed physician, and Dr. Insinna's chiropractic treatment was not an integral part of the process of rendering medical treatment to a patient or substantially related to any medical treatment provided by a physician."

Annunziata v. Quest Diagnostics Incorporated, 127 A D 3d 630 (1st Dept. 2015) – "Plaintiffs' claims against Quest, a provider of clinical laboratory services, stem from its alleged misreading of a Pap smear tissue sample. The complaint alleges that Quest was negligent in misreading the tissue sample. It is settled that a negligent act or omission 'that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician constitutes malpractice' [citation omitted]. Laboratory services, such as Quest's, performed at the direction of a physician are an integral part of the process of rendering medical treatment [citation omitted]. Accordingly, a claim stemming from the rendition of such services is a medical

malpractice claim [citation omitted]. Plaintiffs however make additional claims that Quest failed to properly employ a plan for error reduction and failed to adequately implement, maintain or supervise quality assurance. These claims cannot be distinguished from allegations of medical malpractice. In applying the statute of limitations, courts must look to the reality or essence of a claim rather than its form [citation omitted]. The critical factor in distinguishing whether conduct may be deemed malpractice or ordinary negligence is the nature of the duty owed to the plaintiff that the defendant allegedly breached [citations omitted]. The additional claims put forth in this case would not be actionable in the absence of the misreading of the tissue sample, the basis of the malpractice claim. All of the regulatory infractions alleged by plaintiffs bear a substantial relationship to the rendition of medical treatment."

Newell v. Ellis Hospital, 117 A D 3d 1139 (3d Dept. 2014) – Plaintiff sues for injuries suffered when she fell from an operating table either while or after being extubated. While some medical records "indicate that plaintiff's fall from the operating table may have been substantially related to the rendition of medical treatment, one medical note indicates that plaintiff rolled off the table due to the failure to remove an obstruction that prevented a stretcher from being placed next to the operating table. Plaintiff's causes of action would sound in medical malpractice if she fell off the table due to improper pressure or movement in the removal of the breathing tube, or the failure to properly evaluate her safety and restraint needs while she was under anesthesia [citations omitted]. On the other hand, her causes of action would sound in ordinary negligence if she never received any safety assessment if the hospital staff failed to remove an obstruction between the operating table and stretcher and allowed her to fall between them, or if she was simply dropped by the staff members when they were transferring her from the operating table to the stretcher." Given the lack of definitive evidence, defendant's motion to dismiss is denied "without prejudice to renewal when further factual information is available."

Toledo v. Mercy Hospital of Buffalo, 45 Misc 3d 973 (Sup.Ct. Erie Co. 2014)(Curran, J.) – Five days after undergoing heart surgery, "while she was still a patient at the hospital, plaintiff slipped and fell on urine when attempting to ambulate to the bathroom, thereby sustaining a fractured ankle. Plaintiff alleges that prior to the fall, she had been assessed as a moderate risk for falls. Despite that assessment, on the date in question, plaintiff alleges that defendants' staff left her unattended and failed to respond to her repeated requests for assistance." The Court holds that "'a private hospital is required to exercise reasonable care and diligence in safeguarding a patient, measured by the capacity of the patient to provide for his or her own safety. Failure to "restrain, supervise and exercise care for a patient's safety" in an adequate manner constitutes common law negligence.'" And "where a fall in a hospital has been deemed to be medical malpractice, the allegations involved a challenge to the physician's assessment of a postoperative patient's risk, which 'requires some knowledge of the effects of sedative, the type of surgery that

was conducted, a knowledge of how long before effects of anesthesia wear off and when a patient is ready to sit up, or walk unaccompanied or be left without side rails' [citation omitted]. Alternatively, it seems that where a fall in a hospital has been deemed to be simple negligence, the allegations involved primarily patients (many of whom were elderly) who 'were recognized risks and no special skills or knowledge were necessary to assess the risk of harm in leaving such obviously frail patients unsupervised.'" Here, "it is undisputed that plaintiff's fall occurred five days after surgery, following defendants' prior and unchallenged assessment that plaintiff (who was almost 75 years old) was at moderate risk for falls. The incident did not occur during the 'postoperative period' discussed above where a physician's specialized knowledge would be involved." Thus, "the court cannot conclude that plaintiffs' allegations sound in medical malpractice."

THE FOREIGN OBJECT RULE

Walton v. Strong Memorial Hospital, ___ N Y 3d ___, 2015 WL 3593821 (2015) – In its first significant application of the foreign object rule in almost 20 years, the Court of Appeals has, if not reversed its prior course with respect to that rule, at least significantly shifted its emphasis. Last year's "Update" reported on the Appellate Division decision in this matter [114 A D 3d 1289 (4th Dept. 2014)], which affirmed the Supreme Court decision reported on in the prior year's "Update" [37 Misc 3d 539 (Sup.Ct. Erie Co. 2012)]. In 1986, at the age of three, plaintiff underwent surgical repair of his heart. During the surgery, catheters and drainage tubes were placed in his body, to be removed days later. When they were removed, a "nursing progress note" recorded that the left atrial line "possibly broke off with a portion remaining" in plaintiff's body. Some 17 years later, plaintiff suffered symptoms that ultimately led doctors to discover the piece of catheter that had been left in his body. Supreme Court rejected defendants' argument that the piece of catheter was a "fixation device," and hence an exception to the "foreign object" extension of the statute of limitations. For, "defendants make no argument that the catheter provided any securing function." Indeed, "it served no fixative or fixation purpose. Its nature is not one which closes or fixates anything within a patient's body." However, the Court agreed with defendants that the piece of catheter is not a "foreign object," although "the Court of Appeals has defined the term 'foreign object' without any legislative guidance or any reference to a technical or commonly understood meaning of the term. The court instead appears to speculate as to what the Legislature intended and it did so with very scant evidence of legislative intent." Nevertheless, in *LaBarbera v. New York Eye and Ear Infirmary*, 91 N Y 2d 207 (1998), the Court of Appeals held that an object initially left in the patient's body for a continuing medical purpose cannot become a "foreign object" by being negligently left behind when it was later supposed to be removed. And "the Court is required to follow its understanding of the holding" of the Court of Appeals. The Appellate Division affirmed, "but our reasoning differs from that of the court [below]." The Appellate Division concluded that the catheter *was* a "fixation device." For, "fixation devices are 'placed in the patient with the intention that they will

remain to serve some continuing treatment purpose' [citation omitted], while foreign objects are 'negligently left in the patient's body without any intended continuing treatment purpose.'" Here, the catheter "was a fixation device and was not a foreign object because it was intentionally placed inside plaintiff's body to monitor atrial pressure for a few days after the surgery, i.e., it was placed for a continuing treatment purpose." The Court of Appeals has reversed. The Court agreed with *nisi prius* that the catheter was not a "fixation device." For, it "performed no securing or supporting role during or after surgery." The catheter "functioned like a sentinel, allowing medical personnel to monitor atrial pressure so that they might take corrective measures as required; the catheters were, in the words of plaintiff's expert, 'a conduit for information from plaintiff's cardiovascular system.'" Thus, like clamps or "other surgical paraphernalia," the catheter was "introduced into a patient's body solely to carry out or facilitate a surgical procedure." Since, therefore, the catheter was not a fixation device, it was "not categorically excluded from the foreign object exception in CPLR 214-a." What remained was for the Court to distinguish this case from its prior holding in *LaBarbera*. There, at the end of nasal surgery, the patient left the operating room with a plastic stent and packing in his nose, which was supposed to be removed some days later. By mistake, the stent was not removed. The Court held in *LaBarbera* that, because the stent was intended to have a continuing function during the several days after surgery, it was not initially left in the body inadvertently, and was therefore not a foreign object. Now, the Court says that the stent in *LaBarbera* was "undeniably" a fixation device, and leaving it in the body did not convert "a fixation device into a foreign body." And, here, "leaving the catheter in plaintiff's body post-surgery did not convert a surgical device into a fixation device."

CONTINUOUS TREATMENT

Sow v. New York City Health and Hospitals Corporation, N.Y.L.J., 1202720236504 (Sup.Ct. N.Y.Co. 2015)(Schoenfeld, J.) – "Under the continuous treatment doctrine, in malpractice actions both the time to file the notice of claim and the statute of limitations are tolled 'until the end of the course of treatment "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint"' [citations omitted]. The policy behind this doctrine is the maintenance of the doctor-patient relationship 'in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure' [citations omitted]. Whether treatment is continuous is an issue of fact. 'A patient remains under the "continuous treatment or care" of a physician between the time of the last visit and the next scheduled one where the latter's purpose is to administer ongoing corrective efforts for the same or a related condition' [citation omitted]. Both the physician and the patient must 'reasonably intend the patient's uninterrupted reliance upon the physician's observation, directions, concern, and responsibility for overseeing the patient's progress' [citation omitted]. Where the gap between treatments is in

question, 'the focus is on whether the patient believed that further treatment was necessary.'" Here, while there were increasingly longer gaps between plaintiff's visits to defendant's hospital for post-operative care of his eye, "gaps between appointments alone do not mean that continuous treatment has ended." The record shows "that Mr. Sow sought treatment for pain in his left eye – the eye in which he had surgery – three times in 2011 and 2012. Moreover he testified that he did not seek or receive treatment from any other doctors for his eye problems during that time [citation omitted]. Nor did HHC present evidence that Harlem Hospital doctors believed Mr. Sow's post-surgery care had ended. On the contrary, each time Mr. Sow returned with complaints of pain in his left eye, doctors instructed him to schedule a follow up appointment, indicating that they anticipated providing further care."

Martens v. St. Luke's-Roosevelt Hospital Center, N.Y.L.J., 1202659447476 (Sup.Ct. N.Y.Co. 2014)(Lobis, J.), *aff'd*, 128 A D 3d 487 (1st Dept. 2015) – Plaintiff began treating with defendant gynecologist in 2002, and defendant diagnosed plaintiff with fibroids. A few months later, plaintiff discovered that she was pregnant, and defendant gave her prenatal and post-partum care. Plaintiff again saw defendant in late 2003 for a routine examination. Supreme Court found that, "at each visit, Ms. Martens and Dr. Wu discussed Ms. Martens' fibroids. Ms. Martens denied complaints related to the fibroids at each of those visits." In January, 2005, Ms. Martens returned to see defendant because of another pregnancy. After that birth, in August, 2005, she did not see defendant again until April, 2007, when defendant suggested a pelvic sonogram to evaluate the fibroids. The sonogram, defendant reported, revealed no change in the fibroids. After May, 2007, plaintiff last saw defendant in September, 2009 for a routine examination. In March, 2010, plaintiff learned that, in addition to the fibroids, she had a gastro-intestinal tumor. This malpractice action was commenced in June, 2010. Plaintiff gets the benefit of the continuous treatment doctrine because, starting in 2002, and with every visit thereafter, defendant was, in part, monitoring the fibroids. "Gaps in treatment do not necessarily preclude application of the doctrine where further treatment was contemplated." And, "Ms. Martens' visits were not sporadic and did not involve mere discussions of potential treatment options [citation omitted]. Rather, Dr. Wu's discussions of fibroids with Ms. Martens were part of Dr. Wu's ongoing monitoring to ensure that the fibroids did not increase in size or affect any internal organs. After Ms. Martens initially declined to have the fibroids removed, monitoring became the alternative treatment and is sufficient to toll the statute of limitations." The Appellate Division has affirmed. "In this action, plaintiffs allege that, during doctor's appointments spanning June 16, 2002 to September 21, 2009, defendant misdiagnosed a cancerous tumor as fibroids." Plaintiff demonstrated that "defendant and plaintiff Michaela Martens agreed in June 2002 to monitor plaintiff's fibroids in lieu of removing them, so as not to disrupt plaintiff's fertility. Further, defendant directed plaintiff to return for follow-up visits generally within a year, or sooner if she had fibroid-related symptoms. Defendant inquired about plaintiff's fibroids at each visit, ordered ultrasounds specifically for the fibroids, and monitored them

through physical exams and in ultrasounds. When plaintiff ultimately sought surgery to remove the fibroids, she returned and consulted with defendant. Given the foregoing, there is at least a triable issue of fact whether defendant's monitoring of plaintiff amounted to continuous treatment."

Devadas v. Niksarli, 120 A D 3d 1000 (1st Dept. 2014) – Defendant performed Lasik surgery on plaintiff in April, 2004. At follow-up visits, during April and May of 2004, plaintiff complained blurry vision in one eye. Defendant told him that this was normal and that he needed to give his eye time to heal. "Defendant told plaintiff to follow up 'as needed,' and that he could come back any time. According to plaintiff, although 'there was no definite time he had to come back to him,' he considered Dr. Niksarli his 'ophthalmologist for life.' This was based on plaintiff's recollection that defendant had assured him that the procedure came with a lifetime guarantee," and that defendant "stated that he was plaintiff's 'doctor for life' for that purpose." Plaintiff's next contact with defendant was in February, 2007. The blurry vision had continued, but had recently gotten worse. Defendant conducted tests, and diagnosed plaintiff with a genetic condition that he said was unrelated to the Lasik surgery. Plaintiff commenced this malpractice action in May, 2007. A divided Appellate Division affirms a verdict for plaintiff, rejecting defendant's statute of limitations claim. Defendant argued that the treatment for plaintiff's myopia condition ended in 2004, with his final post-operative visit, and that "the February 2007 visit arose not out of the myopia condition, but rather out of the keratoconus that plaintiff alleges was brought on by the surgery." But, "although the CPLR defines 'continuous' treatment as treatment '*for* the *same* illness, injury or condition' out of which the malpractice arose [citation omitted; emphasis by the Court], the controlling case law holds only that the subsequent medical visits must 'relate' to the original condition [citations omitted]. Here, plaintiff initially engaged defendant to correct his blurry vision, and the 2007 visit was motivated by continued blurriness in plaintiff's eye, thus making the two visits 'related.'" Moreover, "we must also address defendant's argument that because plaintiff pursued no treatment for over 30 months after May 2004, he is not entitled to a tolling based on his single visit in February 2007. This, again, ignores plaintiff's belief that he was under the active treatment of defendant at all times, so long as the Lasik surgery did not result in an appreciable improvement in his vision. In determining whether continuous treatment exists, the focus is on whether the patient believed that further treatment was necessary, and whether he sought such treatment [citation omitted]. Further, this Court has suggested that a key to a finding of continuous treatment is whether there is 'an ongoing relationship of trust and confidence between' the patient and physician [citation omitted]. Plaintiff's testimony that he considered defendant to be his 'doctor for life,' and that the efficacy of the Lasik was guaranteed, was a sufficient basis for the jury to conclude that such a relationship existed." The dissenter argued that "the majority's sustaining of a finding that a course of 'continuous treatment' persisted over a period longer than the limitation period, in which no physician-patient contact whatsoever occurred, appears to be without precedent in this

state." And the "'guarantee' was nothing more than a promise that plaintiff would not be charged for additional treatment or follow-up procedures relating to the Lasik surgery." In sum, "I cannot see how plaintiff's knowledge of the alleged 'guarantee,' by itself, can be deemed to support a finding that 'continuous treatment' persisted over a 33-month period in which there was neither any actual physician-patient contact nor any definite plans or expectations for such contact to resume. That plaintiff believed he could return to defendant's office at any point in the future to seek treatment relating to his Lasik surgery, on an 'as-needed basis,' does not distinguish this case from any situation in which a course of treatment concludes without either a definite breach in the physician-patient relationship or the patient's switching to a different doctor."

Ceglio v. BAB Nuclear Radiology, P.C., 120 A D 3d 1376 (2d Dept. 2014) – "To establish that the continuous treatment doctrine applies, a plaintiff is 'required to demonstrate that there was a course of treatment, that it was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice' [citations omitted]. It is undisputed that the radiology defendants were monitoring the plaintiff Robert Ceglio (hereinafter Robert) for postsurgical changes after he had a pituitary tumor removed. The plaintiffs allege that Robert suffered injuries as a result of a colloid cyst, which the radiology defendants failed to notice on his MRI scans when they were monitoring him for postsurgical changes. However, the plaintiffs presented no evidence to suggest that the colloid cyst, which allegedly caused the injuries complained of, was in any way connected to the pituitary changes for which the radiology defendants were monitoring Robert. Consequently, the plaintiffs failed to raise a question of fact as to whether Robert received continuous treatment for the same condition underlying the claim of malpractice."

Cole v. Karanfilian, 117 A D 3d 670 (2d Dept. 2014) – Plaintiff's decedent presented to defendant surgeon in November, 2002 with a lump on his forearm. Defendant diagnosed it as a calcification or hematoma, and said that decedent could have it removed, but that surgery was unnecessary. When decedent opted not to have surgery, defendant told him to "keep his eye on it for the next few weeks and see if it goes away in a month or so." He advised decedent that "if the lump started to cause him pain or increased in size, he should return to the surgeon's office." The next contact was in May, 2005, when decedent's new dermatologist was concerned about the size of the lump, and decedent went to defendant to have it removed. It was cancerous. Plaintiff does not get the benefit of the continuous treatment doctrine. "The plaintiffs failed to show that there was a continuous course of treatment. There was no showing that Karanfilian ever undertook to continue to treat the decedent's lump condition. Nor was there any showing of any contemplation of further treatment for the lump condition, as evidenced by the fact that the decedent did not schedule any other appointment with Karanfilian until he returned to see him in 2005, because his new dermatologist expressed concern and suggested he see a surgeon. Karanfilian's statement to the decedent to return if there were any changes in

his condition does not indicate that further treatment was contemplated." The visit in 2005 was not part of continuous treatment, since "decedent initiated this return visit" at his dermatologist's suggestion. Thus, "under these circumstances, where the decedent had no knowledge of a medical condition and, therefore, had no reason to expect ongoing treatment for it from Karanfilian, there is no reason to apply the continuous treatment doctrine."

Miccio v. Gerdis, 120 A D 3d 639 (2d Dept. 2014) – "The failure to make the correct diagnosis as to the underlying condition while continuing to treat the symptoms does not mean, for purposes of continuity, that there has not been treatment [citations omitted]. Thus, a physician or hospital cannot defeat the application of the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, where it treated the patient continuously over the relevant time period for symptoms that are ultimately traced to that condition."

Torchia v. Garvey, 118 A D 3d 426 (1st Dept. 2014) – Continuous treatment "cannot apply to the derivative claim of plaintiff husband."

PRODUCT LIABILITY

Vincent v. New York City Housing Authority, 129 A D 3d 466 (1st Dept. 2015) – "Plaintiff alleges that she suffered exacerbation of her asthma as the result of exposure to mold in her apartment, which resulted from a leak that had been ongoing since May of 2010. She was required to file a notice of claim within 90 days after 'the date of her discovery of the injury' or the date on which 'through the exercise of reasonable diligence the injury should have been discovered' [citations omitted]. NYCHA established that plaintiff's claim accrued no later than February 2011, by relying on plaintiff's testimony that her asthma symptoms worsened, resulting in more frequent attacks and hospital visits, starting in September or December of 2010, or January or February of 2011, when she was prescribed additional medications, as reflected in her hospital records. Thus, the notice of claim, filed over 90 days later in June 2011, without leave of court, was late and without effect [citation omitted]. Plaintiff argues that her claim did not accrue until March 2011, when a doctor noted a connection between her symptoms and the mold in her apartment. However, a 'cause of action for damages resulting from exposure to toxic substances accrues when the plaintiff begins to suffer the manifestations and symptoms of his or her physical condition, i.e., when the injury is apparent, not when the specific cause of the injury is identified.'"

Suffolk County Water Authority v. The Dow Chemical Company, 121 A D 3d 50 (2d Dept. 2014) – A prior "Update" reported on Supreme Court's determination in this action [35 Misc 3d 307 (Sup.Ct. Suffolk Co. 2012)]. This action seeks to recover for injury to property resulting from toxic chemical contamination. CPLR 214-c provides that the statute of limitations for actions for property damage resulting from the "latent effects" of

"exposure to any substance" is 3 years from "discovery of the injury." This action was commenced more than 3 years from the first discovery of contamination, although the contamination continued to occur beyond that date. Plaintiff, therefore, is in the unusual position of arguing that CPLR 214-c – which usually extends the general three-year-from-injury rule of CPLR 214 – is inapplicable. That is because a claim for a "continuing tort" will, under CPLR 214, permit a 3-year look back from the date the action was commenced. But that concept is inapplicable to cases covered by CPLR 214-c. Supreme Court rejected plaintiff's argument that the injury was not due to the "latent effects" of exposure, and concluded that CPLR 214-c governs. However, Supreme Court found the existence of *bona fide* issues of fact with respect to plaintiff's claim that its injuries occurred "from separate and distinct releases of the chemicals" – the so-called "two injury rule." For, Supreme Court held, "CPLR 214-c does not prevent application of the 'two injury' rule in cases where a plaintiff alleges distinct acts of tortious conduct that are not merely 'an outgrowth, maturation or complication' of a prior contamination,'" and are, instead, the result of chemical releases that "were multiple and at separate times, each one constituting a separate injury for purposes of fixing the statute of limitations under CPLR 214-c." To get the benefit of the rule, plaintiff will be required to "prove, as a matter of fact, that there were separate and distinct releases of PCE and/or TCE causing damage to SCWA wells within the three-year period prior to commencement of this action." For, "to hold otherwise would lead to the absurd result of essentially immunizing defendants from liability for further contamination caused by future releases, discharges, etc. of PCE." The Appellate Division has reversed. First, the Court agreed with Supreme Court that CPLR 214-c applies here, rejecting plaintiff's argument that "water contamination is a patent injury because there is 'no interval between the water's exposure' to the contaminant and the resulting harm.'" For, "a latent injury occurs at the time of exposure: the reason that the injury is latent is that the injury is concealed, and not visible or otherwise apparent [citation omitted], and the property damage 'results from the seepage or infiltration of a toxic foreign substance over time." A "patent injury, on the other hand, is immediately apparent [citation omitted], and there is no interval between the alleged exposure and the resulting harm." Here, "the alleged harm to the SCWA's wells occurred over time, and was not immediately apparent." However, the Appellate Division disagreed with *nisi prius*'s application of the "two injury" rule. First, the Court noted that, "while the rule has been recognized by intermediate appellate courts, including this Court [citations omitted], it has never been recognized by the New York Court of Appeals." Moreover, "the two-injury rule does not apply to an injury which is the 'outgrowth, maturation or complication of the original contamination' [citations omitted]. Rather, the second injury must be 'separate and distinct' and arise independently of prior injuries [citation omitted], and must be 'qualitatively different from that sustained earlier' [citations omitted]. The plaintiff bears the burden of coming forward with a 'factual substantiation' of a new injury occurring within the period of limitations which was 'qualitatively different from that sustained

earlier.'" Here, plaintiff failed to provide "any evidence raising an issue of fact as to whether the damages sustained during the period of limitations were separate and distinct, and 'qualitatively different from that sustained earlier.'" Hence, "the two-injury rule was not applicable." Finally, the Appellate Division concluded that plaintiff failed to raise a *bona fide* issue of fact with respect to its claim of "multiple distinct acts of tortious conduct." It recognized that, "while the two-injury rule is based upon allegations of a second injury resulting from 'the continuing effects of earlier unlawful conduct' [citation omitted], additional wrongful conduct could give rise to additional wrongful releases of contamination, resulting in new wrongs and the accrual of new causes of action." However, "it was incumbent upon the SCWA to come forward with evidence in admissible form that there was new wrongful conduct, giving rise to new causes of action not barred by CPLR 214-c," and plaintiff failed to do so.

Semenza v. Lilly's Nails, 116 A D 3d 409 (1st Dept. 2014) – "On January 9, 2010, plaintiff, Christine Semenza, allegedly sustained a cut to her foot during a pedicure at defendant's salon. Plaintiff sought treatment from several medical providers, and retained an attorney who wrote a letter to defendant on or about February 5, 2010 asserting that she had a claim against it for injuries. However, plaintiff claims she did not learn what caused her pain until March 17, 2010, when an orthopedist found a sliver of a razor embedded in her foot. Plaintiff commenced an action on February 18, 2013, more than three years after the incident." Plaintiff's claim is time-barred. "Plaintiff may not avail herself of the tolling provision of CPLR 214-c(2), as the 'types of substances intended to be covered by that section are toxic substances' [citation omitted]. A razor is not a 'substance' within the meaning of the statute. In any event, the action is untimely even if CPLR 214-c(2) applies, as plaintiff was aware of the 'primary condition' for which she seeks damages more than three years before the commencement of the action, when she went to doctors and retained an attorney."

Clendenin v. Town of Milo, 129 A D 3d 1480 (4th Dept. 2015) – Plaintiffs seek damages for an allegedly defective septic system on the residential property they purchased from defendants. Their claim is untimely, unless the discovery rule of CPLR 214-c applies. The Court rules that it does not. "CPLR 214-c(1) provides that 'the three-year period within which an action to recover *damages for personal injury or injury to property* 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 must be commenced shall be computed 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' [emphasis by the Court]. Here, plaintiffs do not seek 'damages for personal injury or injury to property' [citation omitted]; rather, they seek to be compensated for the cost of replacing an allegedly defective septic system. Thus, section 214-c is inapplicable to this action."

FRAUD

Loeuis v. Grushin, 126 A D 3d 761 (2d Dept. 2015) – "The elements of a cause of action sounding in actual fraud are that the defendant knowingly misrepresented or concealed a material fact for the purpose of inducing another party to rely upon it, and the other party justifiably relied upon such misrepresentation or concealment resulting in injury [citations omitted]. The statute of limitations for actual fraud is six years from the commission of the fraud or two years from the time the plaintiff discovered, or could with reasonable diligence have discovered, the fraud, whichever is later."

CIFG Assurance North America, Inc. v. Credit Suisse Securities (USA) LLC, 128 A D 3d 607 (1st Dept. 2015) – "'Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.'"

Mills v. Whosoever Will Community Church of Christ, N.Y.L.J., 1202728217461 (Sup.Ct. N.Y.Co. 2015)(Engoron, J.) – Plaintiff's claim of the fraudulent conveyance of real property "is barred by the six year Statute of Limitations contained in CPLR 213(8), which expired on January 24, 2014, six years from the January 24, 2008 no-consideration transfer. Because real property records are readily available to and easily accessible by the general public, plaintiff could have detected the transfer with 'reasonable diligence' as on March 2008 when [defendant] Johnson filed the Quitclaim Deed with the City Register's Office. Therefore, plaintiff cannot avail himself of the toll contained in CPLR 213(8), which would have extended the limitations period to two years from thye date of discovery of the fraud."

Matter of Estate of LaForgia, N.Y.L.J., 1202733469394 (Surr.Ct. Richmond Co. 2015) (Gigante, J.) – "Defendants claim that the fraud cause of action accrued in 2006 when JRL took title to the property as evidenced by the public record, and, as a result, this action commenced in 2014 is barred by the six year statute of limitations. Furthermore, they argue that since JRL's ownership of the property is part of the public record, the two year 'discovery rule' does not save the fraud claim. This court disagrees with the latter contention. A liberal reading of the complaint allows the possibility that the decedent reasonably relied on Joseph's assurance that the former owned the property, obviating the need to confirm this by examining the public record. This is sufficient to survive a dismissal motion."

Faison v. Lewis, 25 N Y 3d 220 (2015) – Last year's "Update" reported on the Appellate Division decision in this matter [106 A D 3d 1047 (2d Dept. 2013)]. The Appellate Division held that "the statute of limitations for a fraud cause of action applies to a cause of action alleging forgery." Here, "the forgery allegedly occurred in 2000, and the plaintiff's own filing in an earlier action showed that she knew of the alleged fraud by

2003. Thus, she was required to commence an action by 2006, at the latest." A narrowly-divided Court of Appeals has reversed. The majority holds that "it is well-settled that a forged deed is void *ab initio*, meaning a legal nullity at its inception. As such, any encumbrance upon real property based on a forged deed is null and void. Therefore, the statute of limitations set forth in CPLR 213(8) does not foreclose plaintiff's claim against defendant." For, "a forged deed lacks the voluntariness of conveyance [citation omitted]. Therefore, it holds a unique position in the law; a legal nullity at its creation is never entitled to legal effect because 'void things are as no things' [citation omitted]. A forged deed that contains a fraudulent signature is distinguished from a deed where the signature and authority for conveyance are acquired by fraudulent means. In such latter cases, the deed is voidable." Thus, "a claim against a forged deed is not subject to a statute of limitations defense." The dissenters argued that, "while a deed *proven* to have been a forgery cannot operate to affect ownership rights, this does not compel the result that the opportunity to challenge such conveyance is without limit" [emphasis by the Court]. And, "forgery is closely related to and essentially a type of fraud. We have previously observed that forgery was 'defined by the common law to be the fraudulent making of a writing to the prejudice of another's rights, or the making *malo animo* of any written instrument for the purpose of fraud and deceit' [citation omitted]. It is therefore logical and reasonable to apply the statute of limitations for fraud to forgery claims."

Glassman v. AJF Financial Services, Inc., N.Y.L.J., 1202645338086 (Sup.Ct. N.Y.Co. 2014)(Rakower, J.) – ''The courts of this State have consistently held that a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract' [citation omitted]. Here, Plaintiff's complaint alleges that Defendant intentionally generated false rent statements in order to induce Plaintiff's reliance thereon, and that Plaintiff relied on those misrepresentations and was damaged as a result. Accordingly, even accepting these allegations as true, the allegations contained in the four corners of Plaintiff's complaint do not plead with particularity facts sufficient to support a cause of action for fraud that is distinct from Plaintiff's breach of contract claim."

New York State Workers' Compensation Board v. SGRisk, LLC, 116 A D 3d 1148 (3d Dept. 2014) – In this accounting malpractice action, plaintiff also includes a claim of fraud, in that defendant "fraudulently misrepresented to the [plaintiff's predecessor in interest] that it would 'accurately identify, and accurately disclose any changes in, the [predecessor's] financial statuses, including the danger of incurring operating deficits.' Because these allegations are essentially duplicative of the allegations that [defendant] intentionally breached the contracts, they do not give rise to a separate fraud cause of action and must be dismissed."

Postiglione v. Castro, 119 A D 3d 920 (2d Dept. 2014) – "As a general rule, where a cause of action alleging breach of contract or fraud arises from the same facts as a legal

malpractice cause of action and does not allege distinct damages, the breach of contract or fraud cause of action must be dismissed as duplicative of the legal malpractice cause of action." But, here, "the cause of action alleging fraud makes no claim of inadequate or negligent legal representation. Rather, the fraud cause of action essentially alleges that the defendants made material misrepresentations concerning the money that the plaintiff owed them. Thus, the fraud cause of action was not duplicative of the legal malpractice cause of action."

Neckles Builders, Inc. v. Turner, 117 A D 3d 923 (2d Dept. 2014) – In contrast to the decisions noted above, and the many reported on in prior years' "Updates," the Second Department here holds that, "where the gravamen of the alleged fraud does not arise from the mere failure of a promisor to perform his or her obligations under a contract, but arises from a promisor's successful attempts to induce a promisee to enter into a contractual relationship despite the fact that the promisor harbored an undisclosed intention not to perform under the contract, a proper cause of action sounding in fraud may be stated. 'A false statement, promissory in nature, "may be deemed the statement of a material existing fact, because it falsely represents the declarant's state of mind and the state of his or her mind is a fact"' [citations omitted]. 'There is no doubt that a misrepresented intention to perform a contract may constitute actionable fraud' [citation omitted], and 'a statement of present intention is deemed a statement of a material existing fact, sufficient to support a fraud action.'"

Freely v. Donnenfeld, N.Y.L.J., 1202716069525 (Sup.Ct. Nassau Co. 2015)(Feinman, J.) – "In the context of a medical malpractice action, the concealment by, or failure of the physician, to disclose his own malpractice does not give rise to an action in fraud, separate from the customary malpractice action." Thus, "'it is only when the alleged fraud occurs separately from and subsequent to the malpractice that a plaintiff is entitled to allege and prove the intentional tort, and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the malpractice.'"

BREACH OF CONTRACT

ACE Securities Corporation v. DB Structured Products, Inc., ___ N Y 3d ___, 2015 WL 3616244 (2015) – Last year's "Update" reported on both the Supreme Court and Appellate Division decisions in this matter [40 Misc 3d 562 (Sup.Ct. N.Y.Co. 2013), *rev'd*, 112 A D 3d 522 (1st Dept. 2013). Supreme Court held that, "pursuant to CPLR 213(2), breach of contract claims are subject to a six year statute of limitations [citation omitted]. The claim accrues at the time of breach, even if plaintiff does not suffer damages until a later date [citation omitted]. 'Knowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the Statute of Limitations' [citations omitted]. Additionally, CPLR 206(a) provides that 'where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is

complete' [citation omitted]. 'However, where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to filing of the suit.'" This is 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. Supreme Court rejected defendant's argument that the statute of limitations on plaintiff's claim ran from the execution of the contract, as the representations were false as of that moment. Instead, Supreme Court held that defendant only breached the contract when it failed to repurchase in accordance with its obligation. The Appellate Division reversed. "The claims accrued on the closing date of the [contract], on March 28, 2006, when any breach of the representations and warranties contained therein occurred." The Court of Appeals has affirmed the Appellate Division. "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].

U.S. Bank National Association v. DLJ Mortgage Capital, Inc., 121 A D 3d 535 (1st Dept. 2014) – "If a contractual representation or warranty is false when made, a claim for its breach accrues at the time of the execution of the contract [citation omitted]. This is true even where the contract states that its 'effective date' is earlier. The claim cannot accrue earlier, because until there is a binding contract, there can be no claim for breach of warranty."

Glassman v. AJF Financial Services, Inc., N.Y.L.J., 1202645338086 (Sup.Ct. N.Y.Co. 2014)(Rakower, J.) – "'In New York, a breach of contract cause of action accrues at the time of the breach' [citation omitted]. 'However, where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to filing of the suit' [citation omitted]. Nevertheless, accrual does not occur continuously 'in the context of a dispute involving a computational methodology that remained constant over the years for which the computation is being challenged' [citation omitted]. An overcharge claim may accrue

upon receipt of the first statement if, at that time, the plaintiff had all of the information it needed to contest the manner in which the computation at issue was made."

CF Notes, LLC v. Goldman, N.Y.L.J., 1202677226885 (Sup.Ct. N.Y.Co. 2014) (Scarpulla, J.), *aff'd*, 128 A D 3d 561 (1st Dept. 2015) – Cantor Fitzgerald hired defendant as its President and CEO in June 2003. In 2006, as Supreme Court described it, plaintiff CF Notes made a $2,000,000 loan to defendant "in order to retain and incentivize him to perform his duties diligently. The note provided, in its first paragraph, that repayment would be made "on such date as Payee may demand." The second paragraph provided that "'this Note shall immediately become due and payable without notice or demand' upon the occurrence of a number of events, including but not limited to such time as Goldman 'shall cease to be employed by Payee or any of its affiliates,' and if Goldman should 'default in payment or performance on this Note or any of the obligations of this Note.'" The statute of limitations on a demand note begins to run from the time the lender is able to make a demand – typically upon issuance. This note "appears to have two conflicting contractual provisions which require, on the one hand, that payment shall be made on a date that 'Payee may demand,' and on the other hand, that the note shall become immediately due and payable upon certain specified events 'without demand or notice.'" Supreme Court, however, found that these provisions "can be reconciled." Thus, "by its express terms, the note was a demand note, up until the occurrence of one of the specified events, after which the note became immediately due and payable without demand." Since, therefore, no demand was made until one of the specified events occurred, the note was transformed from a demand note to a "note payable upon a contingency." Thus, the Court ruled, the statute of limitations began to run at the time the contingency occurred – when defendant left plaintiff's employ. The Appellate Division has affirmed. "The motion court properly harmonized these conflicting provisions," in finding that "the note is a 'demand note' that converted to a contingent note upon the happening of one of the enumerated events listed in the second paragraph. Thus, as the motion court determined, defendant's note was payable upon his resignation from Cantor Fitzgerald on October 22, 2007, and it was on this date that the statute of limitations began to run."

Loiodice v. BMW of North America, LLC, 125 A D 3d 723 (2d Dept. 2015) – On November 10, 2007, plaintiff leased a BMW automobile manufactured by defendant, which provided a four-year limited warranty, agreeing to "repair or replace any defective part." In October 2010, plaintiff purchased the vehicle. "On several occasions over the next year, the plaintiff took the vehicle to authorized dealers for repairs on certain defects and nonconformities, but the problems persisted." Plaintiff then commenced this action for damages pursuant to General Business Law §349, and the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [15 U.S.C. §2301 *et seq.*]. Claims brought under the federal statute "are covered by the four-year statute of limitations prescribed by UCC 2-725." And "that statute specifically defines the date of

accrual to be 'when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered." Here, where the warranty "did not guarantee future performance but only promised to repair or replace defective parts for a specified period of time," the federal claim accrued in 2007, and is now time-barred. However, the action pursuant to General Business Law §349, although it has a three-year statute of limitations, is timely. The claim under that section accrues "when the plaintiff has been injured by a deceptive act or practice." Here, "this cause of action is predicated on the sale of the vehicle, which took place in October 2010."

Wikiert v. City of New York, 128 A D 3d 128 (2d Dept. 2015) – Plaintiff's property was confiscated when he was arrested, and was destroyed while in possession of defendant. Plaintiff claims that the statute of limitations on his claim for breach of an implied bailment is the 6-year statute for breach of contract. The Court concludes that the correct statute is the 1 year, 90 day statute of limitations for tort claims against a municipality. "Case law illustrates that when confronted with the issue of whether the essential nature of a claim lies in contract or tort for purposes of determining the applicable limitations period, an essential consideration is whether the plaintiff's claim has its origins in the contractual relationship of the parties." Here, "the evidence submitted by the City in support of its motion established, *prima facie*, that the claim between the parties did not originate by virtue of a contractual relationship. The City took control of the plaintiff's property only in connection with his arrest." And, "a contract cannot be implied *in fact* where the facts are inconsistent with its existence." Thus, "while the City's act of taking possession of the plaintiff's personal property created a bailment, it has been recognized that a bailment does not necessarily and always arise from a contractual relationship [citations omitted]. Thus, as General Municipal Law §50-i(1) applies to all causes of action against the City seeking to recover damages for injury to property because of negligence or a wrongful act, and the complaint asserts that the City destroyed the plaintiff's property, the one-year-and-90-day statute of limitations, not the six-year limitations period, applies to this action."

INTENTIONAL TORTS

Sneider v. AB Green Gansevoort, LLC, N.Y.L.J., 1202719288857 (Sup.Ct. N.Y.Co. 2015)(Bannon, J.) – Defendant moves to dismiss this assault case, as it was commenced more than one year after the event. "However, CPLR 215(8) provides that in a civil action against a criminal defendant arising from the same event, the plaintiff shall have 'at least one year from the termination of the criminal action as defined in CPL 1.20 in which to commence the civil action.' CPL 1.20(16) provides that a criminal action is terminated upon 'imposition of sentence or some other final disposition.' As stated

above, Nayak's sentence was imposed on March 4, 2014, and the instant action was commenced two months later. Further, the conditional discharge agreed to by Nayak terminates on March 3, 2015, when it is sealed upon proof of him fulfilling all requirements of that sentence, including no re-arrests for one year. That year has not yet passed. Thus, the instant action is far from time-barred. The same analysis applies to the co-defendants."

McDonald v. Riccuiti, 126 A D 3d 954 (2d Dept. 2015) – "In determining which limitations period is applicable to a given cause of action, the court must look to the substance of the allegations rather than to the characterization of those allegations by the parties." Here, the essence of plaintiff's claims are for intentional tortious conduct. "The plaintiff could not avoid the running of the [one-year] limitations period merely by attempting to couch the causes of action as sounding in negligence."

LIABILITY CREATED BY STATUTE

Melcher v. Greenberg Traurig, LLP, 23 N Y 3d 10 (2014) – The issue in this case is whether a claim against an attorney pursuant to Judiciary Law §487, for "deceit or collusion" with intent "to deceive the court or any party," and which provides, *inter alia*, for treble damages, is a liability or penalty created by statute, and, thus, subject to a 3-year statute of limitations pursuant to CPLR 214(2), or is a cause of action for which no period of time is specifically prescribed by statute, and therefore subject to the 6-year "'catch-all' or residual provision" of CPLR 213(1). The Court concludes that the latter provision applies. Section 487 "descended from the first Statute of Westminster, adopted by the Parliament summoned by King Edward I of England in 1275." However, "an action for attorney deceit is not necessarily an action to recover under a statute just because it may be traced back to the first Statute of Westminster rather than common-law fraud." Because of its ancient English roots, the cause of action "existed as part of New York's common law before the first New York statute governing attorney deceit was enacted in 1787 [citation omitted]. The 1787 statute enhanced the penalties for attorney deceit by adding an award for treble damages, but did not create the cause of action." Thus, "even if a claim for attorney deceit *originated* in the first Statute of Westminster rather than preexisting English common law * * *, liability for attorney deceit existed at New York common law prior to 1787. As a result, claims for attorney deceit are subject to the six-year statute of limitations in CPLR 213(1)" [emphasis by the Court].

People ex rel. Schneiderman v. Credit Suisse Securities (USA) LLC, N.Y.L.J., 1202717344324 (Sup.Ct. N.Y.Co. 2014)(Friedman, J.) – 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. "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. The court accordingly holds that, even in the absence of allegations of scienter, the claims are subject to the six year statute of limitations."

ACCRUAL AND LIMITATIONS PERIODS

Loeuis v. Grushin, 126 A D 3d 761 (2d Dept. 2015) – "The statute of limitations for a cause of action alleging a breach of fiduciary duty does not begin to run until the fiduciary has openly repudiated his or her obligations or the relationship has been otherwise terminated." And, "where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214(4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies. Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)."

New York State Workers' Compensation Board v. Consolidated Risk Services, Inc., 125 A D 3d 1250 (3d Dept. 2015) – For claims of breach of fiduciary duty, the "repudiation rule" provides "that 'the applicable statutory period does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated.'" Under that rule, "'the time starts running when a successor fiduciary is put in place' [citation omitted]. After the fiduciary 'has yielded to a successor, the running of the statute of limitations then begins, and only actual or

intentional fraud will be effective to suspend it.'" Fraud, may "result from a fiduciary's failure to disclose material facts when the fiduciary had a duty to disclose and acted with the intent to deceive.'"

Rye Police Association v. Chittenden, 43 Misc 3d 471 (Sup.Ct. Westchester Co. 2014)(Connolly, J.) – "CPLR 213(7) provides for a six-year statute of limitations for any 'action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith." Thus, while "an action to recover damages for 'conversion' is generally treated as an action for 'injury to property,' which is governed by a three-year statute of limitations," conversion actions brought pursuant to CPLR 213(7) get the benefit of a six-year provision. For, "'a special statute which is in conflict with a general act covering the same subject matter controls the case and repeals the general statute insofar as the special act applies."

Mueller v. Morrell & Company, Inc., 116 A D 3d 598 (1st Dept. 2014) – A bailment cause of action does not accrue until demand is made for return of plaintiff's property. However, laches may be an appropriate defense when defendant can show an unreasonable delay in making the demand, and resulting prejudice.

Williams v. MTA Bus Company, N.Y.L.J., 1202663098476 (Sup.Ct. N.Y.Co. 2014) (Stallman, J.) – "Public Authorities Law §1276(1) requires that the complaint 'contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action is founded were presented to a member of the authority.' Thus, 'it has been held that the effect of such a statute is to extend the general period of limitation by an additional 30 days." Here, "on July 19, 2012, the date of the alleged incident, Public Authorities Law §1276(2) provided that, 'An action against the Metropolitan Transportation Authority founded on tort, except an action for wrongful death, shall not be commenced more than one year after the cause of action therefor shall have accrued.' However, prior to the commencement of this action, the Legislature amended Public Authorities Law §1276(2) to provide for a statute of limitations of one year and 90 days." With the addition of 30 days, this action would be timely if the amended provision applies, but time-barred if the original provision applies. The amendment, which the Governor, upon signing it, declared to be for the purpose of uniformity, provides that it "shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to all actions and proceedings accruing on or after such date." Accordingly, this action is subject to the original statute in effect at the time the cause of action accrued, and is time-barred.

Wells Fargo Bank, N.A. v. Klausner, N.Y.L.J., 1202664231025 (Sup.Ct. Nassau Co. 2014)(Winslow, J.) – Having mistakenly issued a satisfaction of mortgage, plaintiff seeks

a judgment directing the County Clerk to accept a copy of the mortgage for recording, or declaring plaintiff to be the owner of an equitable mortgage on the property, and to expunge the satisfaction. Defendants, the mortgagors, "contend that the action is time barred pursuant to the six year statute of limitations set forth in CPLR 213 as an action based upon a mistake." The Court rejects that argument. "The Court finds that this action is one not based on mistake but rather is an action to quiet title to the Property pursuant to which a ten year statute of limitations applies [RPAPL Article 15]."

Capitol Records, LLC v. Harrison Greenwich, LLC, 44 Misc 3d 428 (Sup.Ct. N.Y.Co. 2014)(Kornreich, J.) – The applicable statute of limitations for a "New York common law copyright infringement claim" is CPLR 213(1), which provides for a 6-year limitation period when "no limitation is specifically prescribed by law." The Court rejects defendant's argument that CPLR 214(4) – which "sets a three-year statute of limitations for actions 'to recover damages for an injury to property" – applies. Defendant "likens its use of Capitol's copyright as a trespass to chattel. Yet, by analogizing between copyright infringement and trespass to chattel, [defendant] itself implicitly recognizes that no specific limitations period exists. To be sure, if CPLR 213(1) did not exist, and the CPLR was entirely silent on what limitations period applies to claims not provided for by statute, analogizing to limitations periods for other claims might be appropriate." But, in enacting CPLR 213(1), "the Legislature foreclosed courts from employing the very sort of argument-by-analogy [defendant] proffers."

Matter of County of St. Lawrence v. Shah, 124 A D 3d 88 (3d Dept. 2014) – In 2012, the Legislature amended the Social Services Law, to impose a retroactive statute of limitations upon counties' claims for Medicaid reimbursement by the State. "Although potential litigants have no right or vested interest in any specific limitations period, when a 'limitations period is statutorily shortened, or created where none existed before,' due process requires a reasonable grace period before the time bar takes effect [citations omitted]. While the Legislature did not expressly set a grace period in the 2012 amendment, this Court 'may uphold the constitutional validity of the retrospective application of the new statute by interpreting it' as permitting the filing, 'within a reasonable time after the statute's effective date,' of claims that would otherwise be time-barred [citation omitted]. This Court can either make an individualized assessment on a case-by-case basis to determine whether the delay in interposing the claim was reasonable under the particular facts, or we can set a generally-applicable period that would afford a reasonable opportunity for anyone to file a claim [citation omitted]. Because the case-by-case approach results in uneven application and does not provide clear guidance to potential claimants, we deem a flat grace period to be preferable [citation omitted]. The grace period would normally run from the enactment of the statute but, due to possible reliance by potential claimants on Supreme Court's declaration that the 2012 amendment was unconstitutional, we will begin the grace period from the date of this decision reversing that declaration. We deem six months to be a

reasonable time for any social services district to file a claim for reimbursement of any pre-2006 overburden expenditures, with the 2012 amendment barring as untimely any claims submitted thereafter."

ACKNOWLEDGMENT

Mosab Construction Corp. v. Prospect Park Yeshiva, Inc., 124 A D 3d 732 (2d Dept. 2015) – "'General Obligations Law §17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt' [citation omitted]. 'To constitute an acknowledgment of a debt, a writing must recognize an existing debt and contain nothing inconsistent with an intention on the part of the debtor to pay it.'" Here, "the writing submitted by the plaintiff neither acknowledged a debt owed to the plaintiff, nor indicated that the defendants intended to pay the plaintiff. Rather, it set forth various claims asserted by the defendants against the plaintiff. Thus, as the Supreme Court properly determined, the writing did not constitute an acknowledgment under General Obligations Law §17-101 so as to restart the statute of limitation period."

CONTRACTUAL LIMITATIONS PERIOD

Baluk v. New York Central Mutual Fire Insurance Company, 126 A D 3d 1426 (4th Dept. 2015) – Last year's "Update" reported on *Executive Plaza, LLC v. Peerless Insurance Company*, 22 N Y 3d 511 (2014), which involved "a fire insurance policy that contains a clause limiting the time in which the insured may bring suit under the policy. The limitation period is two years, running from the date of the fire. The policy also says that the insured may recover the cost of replacing destroyed property – but only after the property has already been replaced. Thus, if (as happened in this case) the process of replacing the property takes more than two years, the insured's claim will be time-barred before it comes into existence." The Court of Appeals held that "such a contractual limitation period, applied to a case in which the property cannot reasonably be replaced in two years, is unreasonable and unenforceable." The Court agreed that "there is nothing inherently unreasonable about a two-year period of limitations. In fact, we have enforced a contractual limitation period of one year [citations omitted]. The problem with the limitation period in this case is not its duration, but its accrual date. It is neither fair nor reasonable to require a suit within two years from the date of the loss, while imposing a condition precedent to the suit – in this case, completion of replacement of the property – that cannot be met within that two-year 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." Here, in *Baluk*, "the record fails to establish whether plaintiffs were able to satisfy the condition precedent in the loss settlement provision of their policy prior to commencing this action, *i.e.*, completion of repairs within two years after the loss. Thus, an issue remains 'whether the plaintiffs had a reasonable opportunity to commence their action within the period of limitation' [citation omitted], and that issue

must be resolved before it is determined whether the contractual limitation period is enforceable in this case."

Smile Train, Inc. v. Ferris Consulting Corp., 117 A D 3d 629 (1st Dept. 2014) – "'An agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable provided it is in writing' [citation omitted]. In addition, it must not be 'so vague and ambiguous that it is unenforceable.'"

John v. State Farm Mutual Automobile Insurance Company, 116 A D 3d 1010 (2d Dept. 2014) – "'The parties to a contract may agree to limit the period of time within which an action must be commenced to a period shorter than that provided by the applicable statute of limitations. Absent proof that the contract is one of adhesion or the product of overreaching, or that the altered period is unreasonably short, the abbreviated period of limitations will be enforced' [citations omitted]. 'Where the party against which an abbreviated Statute of Limitations is sought to be enforced does not demonstrate duress, fraud, or misrepresentation in regard to its agreement to the shortened period, it is assumed that the term was voluntarily agreed to.'"

State of Narrow Fabric, Inc. v. UNIFI, Inc., 126 A D 3d 881 (2d Dept. 2015) – "While UCC 2-725(1) generally provides that a cause of action alleging breach of a sales contract must be commenced within four years after it has accrued, that provision also allows the parties to a sales contract to 'reduce the period of limitation to not less than one year' [citations omitted]. Here, the defendants met their initial burden by demonstrating that their invoices containing the one-year limitation period constituted an acceptance that, together with the plaintiff's purchase order, was effective in forming a contract, and that the one-year limitation period, an additional term set forth in the invoices, was presumed to have become part of this contract between the parties unless one of the exceptions in UCC 2-207(2) applied." And, "contrary to the plaintiff's contention, the abbreviated period of limitation was not against public policy [citations omitted]. 'Absent proof that the contract is one of adhesion or the product of overreaching, or that the altered period is unreasonably short, the abbreviated period of limitation will be enforced' [citations omitted]. 'Where the party against which an abbreviated Statute of Limitations is sought to be enforced does not demonstrate duress, fraud, or misrepresentation in regard to its agreement to the shortened period, it is assumed that the term was voluntarily agreed to.'"

ESTOPPEL

Rich v. Orlando, 128 A D 3d 1330 (4th Dept. 2015) – "The doctrine of equitable estoppel requires 'three elements on the part of the party estopped: (1) conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intent that such conduct (representation) will be acted upon; and (3) knowledge, actual or constructive, of the true

facts. The elements pertaining to the party asserting estoppel are (1) lack of knowledge of the true facts; (2) good faith reliance; and (3) a change of position."

Plain v. Vassar Brothers Hospital, 115 A D 3d 922 (2d Dept. 2014) – In opposition to defendant hospital's motion to dismiss this malpractice action, plaintiff urged that "with further discovery, the plaintiff hoped to establish that Vassar possessed knowledge of [Dr.] Panos's medical malpractice, and that this knowledge, coupled with Vassar's 'allowing' Panos 'to continue' his malpractice to the detriment of other patients, was a fraud perpetrated by Vassar on the public that should have estopped it from asserting a statute of limitations defense. Even if the plaintiff were able to establish these facts, however, they would not give rise to an estoppel. Where the alleged concealment consists of 'nothing but defendants' failure to disclose the wrongs they had committed, the defendants are not estopped from pleading a statute of limitations defense' [citation omitted]. A plaintiff must allege a 'later fraudulent misrepresentation' made 'for the purpose of concealing the former tort' [citations omitted]. Since the facts that the plaintiff hoped to establish after discovery would not estop Vassar from asserting a statute of limitations defense, the Supreme Court should have granted Vassar's motion pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against it as time-barred."

Torrance Construction, Inc. v. Jaques, 127 A D 3d 1261 (3d Dept. 2015) – Plaintiff claims that defendant, a former employee, embezzled by charging personal purchases to plaintiff's business accounts. Plaintiff argues that defendant should be estopped from relying on the statute of limitations because the surreptitious conduct prevented plaintiff from discovering the defalcations. But, "although the doctrine precludes a defendant from relying on a 'statute of limitations defense when the plaintiff was prevented from commencing a timely action by reasonable reliance on the defendant's fraud, misrepresentation or other affirmative misconduct, equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of the plaintiff's underlying substantive causes of action' [citations omitted]. To support its estoppel argument here, plaintiff is relying on the same underlying conduct that forms the basis of the substantive causes of action – namely, defendant's acceptance of delivery at defendants' home of good charged to plaintiff, which arguably would have concealed Jaques' theft from plaintiff. Thus, equitable estoppel should not be applied to prevent defendant from asserting a statute of limitations defense."

Matter of Atlantic States Legal Foundation, Inc. v. New York State Department of Environmental Conservation, 119 A D 3d 1172 (3d Dept. 2014) – "It is axiomatic that the doctrine of equitable estoppel cannot generally be invoked against governmental agencies in the exercise of their governmental function [citations omitted]. However, estoppel may apply in certain 'exceptional cases in which there has been a showing of

fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon.'" Erroneous advice, here alleged as to the applicable limitations period in which to challenge the granting of a permit, "does not rise to the level necessary to implicate the exception." Nor, on these facts, showing that petitioner was at least "aware of the likelihood" that the shorter period applied, could it be said that petitioner "reasonably relied" on the alleged statement.

THE RELATION BACK DOCTRINE

Torchia v. Garvey, 118 A D 3d 426 (1st Dept. 2014) – 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." Here, the Court holds that a "proposed claim of lack of informed consent" does not "relate back to the original claim for medical malpractice."

Cooper v. Sleepy's LLC, 126 A D 3d 664 (2d Dept. 2015) – "The 'relation-back doctrine' 'permits a plaintiff to interpose a claim or cause of action which would ordinarily be time-barred, where the allegations of the original complaint gave 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' [citations omitted]. The relation-back doctrine is inapplicable where causes of action sought to be added are based on events that occurred after the filing of the initial pleading, rather than upon the transactions giving rise to the causes of action in the initial pleading."

Gandica v. Sibilio, 46 Misc 3d 85 (App.Term 2d Dept. 2014) – In this action for battery, defendant counterclaims for personal injury caused in the same altercation, alleging that plaintiff's conduct was "willful and negligent." To the extent it alleges an intentional tort, the counterclaim was already time-barred when plaintiff's action was commenced. Pursuant to CPLR 203(d), however, since "defendant's counterclaim arose out of the same occurrence upon which a claim asserted in the complaint depends," the "cause of action in defendant's counterclaim based on assault and battery is not time barred to the extent of the demand in the complaint [citation omitted], notwithstanding that it was barred at the time the claims asserted in the complaint were interposed [citation omitted]. However, we note that 'the provisions of CPLR 203(d) allow a defendant to assert an otherwise untimely claim which arose out of the same transaction alleged in the complaint only as a shield for recoupment purposes, and do not permit the defendant to obtain affirmative relief' [citations omitted]. We further not that, to the extent defendant's counterclaim asserts a cause of action for personal injury based on negligence, it was timely, as it was interposed within three years from the time it accrued [citation omitted]. Thus, should defendant be able to establish such a cause of action, any recovery thereon would not be limited by CPLR 203(d)."

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DEFENDANTS "UNITED IN INTEREST"

Reyes v. Katari, N.Y.L.J., 1202677913024 (Sup.Ct. Kings Co. 2014)(Steinhardt, J.) – 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 suggested 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." Here, in *Reyes*, a medical malpractice action, plaintiff, having already sued defendant hospital, and several of its doctors, seeks to amend the complaint to add several other doctors as defendants, after the running of the statute of limitations. "Joint tortfeasors are generally not united in interest, since they frequently have different defenses, in that one tortfeasor usually will seek to show that he or she is not at fault, but that it was the other tortfeasor who is liable." However, "joint tortfeasors will be deemed to be united in interest where one is vicariously liable for the other [citation omitted], such as where one tortfeasor is the agent of the other." Here, plaintiff claims to come within that exception to the general rule. But the hospital, the current defendant, "allegedly would be vicariously liable for the proposed defendants, not the other way around. The defendant physicians cannot be held vicariously liable for the negligence of the hospital and liability cannot be transferred backwards to the physicians to establish the united in interest prong."

Smolian v. Port Authority of New York and New Jersey, 128 A D 3d 796 (2d Dept. 2015) – "While a hospital would not ordinarily be vicariously liable for the malpractice of a physician who is not an employee, 'an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing.'"

Brunero v. City of New York Department of Parks and Recreation, 121 A D 3d 624 (1st Dept. 2014) – Plaintiff was injured by a park maintenance vehicle while biking in Central Park. Only after the statute of limitations had run did plaintiff learn from defendant City that the driver of the vehicle was employed by the Central Park Conservancy. Under the agreement between the City and the Conservancy, the City is required to indemnify the Conservancy for its acts of negligence, though not of gross negligence. Moreover, the City has a non-delegable duty to maintain the parks in a reasonably safe condition. Accordingly, the parties are "united in interest" with respect to plaintiff's claim of ordinary negligence, but not with respect to his claim of gross negligence.

Matter of Ayuda Re Funding, LLC v. Town of Liberty, 121 A D 3d 1474 (3d Dept. 2014) – "Unity of interest is demonstrated where 'the interest of the parties in the subject-matter is such that they will stand or fall together and that judgment against one will similarly affect the other' [citations omitted]. Here, the original respondents consist of the municipality that enacted the zoning law at issue and the entities that purportedly sought the zoning changes, whereas the later-added respondents are the owners of the real property affected by the zoning changes. Thus, it is apparent that the original respondents do not have the same interests in the zoning changes as the later-added respondents."

Rosenman v. Baranowski, 120 A D 3d 482 (2d Dept. 2014) – "'The "linchpin" of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period." That prong of the test "focuses, *inter alia*, on 'whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all "and that the matter has been laid to rest as far as he or she is concerned."'" In this medical malpractice case, plaintiff's claim is that his deceased was prematurely released from the hospital. The decedent's medical records demonstrate that the late-sued defendant, one Dr. Persky, was "the physician who discharged the decedent from the hospital." Thus, "it was not reasonable for Persky to conclude that the plaintiff intended to proceed only against the defendants named in the original summons and complaint, especially since the decedent died soon after she was discharged from the hospital, and the complaint asserted specific allegations of negligence relating to the decedent's premature hospital discharge."

Wilson v. Southampton Urgent Medical Care, P.C., 129 A D 3d 531 (1st Dept. 2015) – In this medical malpractice action, plaintiff sought to add a new defendant after the expiration of the statute of limitations. But "plaintiff failed to satisfy the third prong of the *Buran* test. There is no evidence Libutti [the late-added defendant] was aware of this lawsuit until she was served with the complaint after the expiration of the statute of limitations [citations omitted]. Similarly, plaintiff failed to show that Lubutti knew, or should have known that plaintiff intended to sue her [citation omitted]. Libutti stated that she was unaware of this action until she was served, and nothing in the record contradicts her statement."

Crawford v. City of New York, 129 A D 3d 554 (1st Dept. 2015) – The court improvidently granted plaintiff's motion to amend to add the individual defendants, pursuant to the relation-back doctrine, after the statute of limitations expired. Plaintiff does not deny that he was aware of the proper identity of these defendants 4 1/2 months prior to the expiration of the statute of limitations. He nevertheless waited another two years to move to amend the complaint, after he had filed a note of issue. Under these circumstances, there was no 'mistake' by plaintiff as to the proper identity of the parties, within the meaning of the relation-back doctrine, and these defendants had every reason

to believe that plaintiff had no intent to sue them and that the matter had been laid to rest as far as they were concerned."

TOLL FOR ARBITRATION

Matter of Randles v. State of New York Unified Court System, 128 A D 3d 478 (1st Dept. 2015) – CPLR 204(b) provides in part that "where it shall have been determined that a party is not obligated to submit a claim to arbitration, the time which elapsed between the demand for arbitration and the final determination that there is no obligation to arbitrate is not a part of the time within which an action upon such claim must be commenced." Here, after petitioner demanded arbitration, it was determined that her remedy was by Article 78 proceeding. She did not, however, get the benefit of CPLR 204(b), "since she did not make her demand for arbitration until after the expiration of the four-month statute of limitations" for Article 78 proceedings.

TOLL FOR DEATH OF A PROSPECTIVE PARTY

JPMorgan Chase, National Association v. McDonald, 46 Misc 3d 315 (Sup.Ct. Madison Co. 2014)(Faughnan, J.) – Defendant defaulted on his mortgage in 2006. In 2007, plaintiff commenced a foreclosure action. During the pendency of that action, defendant died, and his estate was made a party. Thereafter, plaintiff voluntarily discontinued the action. In 2013, plaintiff commenced the same action, which would be untimely but for the toll provided by CPLR 210(b), which states that "'the period of eighteen months after the death of a person against whom a cause of action exists is not part of the time within which the action must be commenced against his executor or administrator.'" The Court holds that CPLR 210(b) is inapplicable here. "In this case, the mortgagor was not just a potential party, he actually was a party in the 2007 case. The estate and/or heirs were always identifiable and amenable to service, as they had been identified and made parties in the 2007 case. They were the parties of interest when the motion to discontinue was made. The extension under CPLR 210(b) is clearly to protect the plaintiff who may not be able to identify the proper defendants where the defendant has passed away. That is clearly not the situation in the present case, where the estate and heirs had been identified and named in the 2007 action. The extension is not intended to be used on the offensive to revive an expired statute of limitations."

CPLR 205(A)

Malay v. City of Syracuse, 25 N Y 3d 323 (2015) – CPLR 205(a) provides that when an action is timely commenced, and "terminated" for any reason *other* than on the merits, for lack of personal jurisdiction, for want of prosecution, or upon voluntary discontinuance, the same action may be recommenced, notwithstanding the running of the statute of limitations, within six months of the original action being "terminated." For purposes of CPLR 205(a), "'"termination" of the prior action occurs when appeals as of right are exhausted' [citation omitted], or, when discretionary appellate review is granted,

upon 'final determination' of the discretionary appeal." The Court of Appeals had not previously "addressed the issue of when a prior action terminates for purposes of CPLR 205(a) where, as here, an appeal is taken as of right, but is dismissed by the intermediate appellate court due to the plaintiff's failure to perfect." The Court holds that "where an appeal is taken as of right, the prior action terminates for purposes of CPLR 205(a) when the nondiscretionary appeal is truly 'exhausted,' either by a determination on the merits or by dismissal of the appeal, even if the appeal is dismissed as abandoned. This interpretation of CPLR 205 is in keeping with the statute's remedial purpose of allowing plaintiffs to avoid the harsh consequences of the statute of limitations and have their claims determined on the merits where, as here, a prior action was commenced within the limitations period, thus putting defendants on notice of the claims."

Guzy v. New York City, N.Y.L.J., 1202662722931 (Sup.Ct. N.Y.Co. 2014)(Stallman, J.), *aff'd*, 129 A D 3d 614 (1st Dept. 2015) – Supreme Court held that "'the six months-extension period [of CPLR 205(a)] will not append to an action brought in either a state or federal court outside New York' [citations omitted]. The rationale is that 'limitations of actions are matters within the concern of the forum. Commencement of suit in another state will not toll or otherwise affect the provisions for limitation of actions in the state of the forum.'" The Appellate Division has affirmed. "CPLR 205(a) does not apply when the initial action was commenced in a state or federal court outside of New York."

THE BORROWING STATUTE

Norex Petroleum Limited v. Blavatnik, 23 N Y 3d 665 (2014) – This action involves "the interplay of CPLR 202, New York's 'borrowing' statute, and CPLR 205(a), New York's 'savings' statute. When a cause of action accrues outside New York and the plaintiff is a nonresident, section 202 'borrows' the statute of limitations of the jurisdiction where the claim arose, if shorter than New York's, to measure the lawsuit's timeliness. New York's 'savings' statute, section 205(a), allows a plaintiff to refile claims within six months of a timely prior action's termination for reasons other than the merits or a plaintiff's unwillingness to prosecute the claims in a diligent manner. This appeal calls upon us to decide whether a nonresident plaintiff who filed a timely action in a New York federal court may refile claims arising from the same transaction in state court within six months of the federal action's non-merits termination, even though the suit would be untimely in the out-of-state jurisdiction where the claims accrued. We hold that such a lawsuit is not time-barred." Here, the law where the cause of action accrued, Alberta, Canada, "provides a two-year statute of limitations for the torts alleged by Norex, and does not have a 'savings' statute akin to CPLR 205(a)." In short, "Norex would have the courts apply section 202 only once, to determine whether its initial action would have been timely in Alberta when filed in federal court in New York, while defendants would ask us to apply section 202 a second time, to assess whether Norex's follow-on action was timely in Alberta when commenced in state court." The Court agreed with plaintiff.

"Once it timely commenced its federal court action in New York, the borrowing statute's purpose to prevent forum shopping was fulfilled, and CPLR 202 had no more role to play. Because Norex's 'prior' federal court action was timely under the borrowing statute, the 'new' action that it brought pursuant to the savings statute 'would have been timely commenced at the time of the commencement of the prior action' (CPLR 205[a]). Stated another way, it is irrelevant that Alberta law does not have a savings statute similar to CPLR 205(a) because at the point in time when Norex filed its 'new' action in Supreme Court, the borrowing statute's requirements had already been met. In our view, this reading of the way in which CPLR 202 and CPLR 205(a) interrelate best comports with statutory language, and honors both the borrowing statue's purpose to prevent forum shopping and the savings statute's goal to 'implement the vitally important policy preference for the determination of actions on the merits.'"

Loreley Financing (Jersey) No. 28, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith Incorporated, 117 A D 3d 463 (1st Dept. 2014) – "Defendants contend that plaintiff, who is a resident of Jersey in the Channel Islands, is time-barred from raising the fraud claims pursuant to New York's borrowing statute (CPLR 202) and Jersey law. A cause of action for fraud accrues where the loss was sustained [citation omitted]. Generally, the loss is sustained 'where the investors resided' [citation omitted]. However, a court can consider all relevant factors in determining the situs of the loss, including 'how and where plaintiff paid for the securities, where plaintiff maintained the trading account in which the loss was reflected, and the manner in which the securities were handled.'"

PARTIES TO AN ACTION

JOINDER

Duran v. Bautista, N.Y.L.J., 1202725608844 (Sup.Ct. N.Y.Co. 2015)(Ramos, J.) – In *Swezey v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 19 N Y 3d 543 (2012) the Court of Appeals affirmed a ruling of a divided Appellate Division [87 A D 3d 119 (1st Dept. 2011)] dismissing the proceeding for failure to join a necessary party. Petitioner class representatives sought to enforce a judgment against the estate of Ferdinand Marcos, late President of the Philippines. They sought a turnover of a fund held by respondent. However, the Republic of the Philippines claimed "that the fund comprises the proceeds of assets corruptly acquired and removed from its territory" by Marcos, and claimed to be the true owner of the fund. And the Republic declined to waive its sovereign immunity. The Appellate Division majority concluded that the Republic is not "merely another creditor of the Marcos estate." Its claim was that it is rightful owner of the fund at issue. And, "'conflicting claims to a common fund present a textbook example of a case where one party may be severely prejudiced by a decision in his absence.'" Thus, while some of the factors to be considered under CPLR 1001(b) "weigh in favor of petitioner, they

cannot overcome the weight to which the 'comity and dignity interests' [citation omitted] protected by sovereign immunity are entitled." In sum, "we recognize that this proceeding and the issues it has placed before us raise a troubling moral dilemma. There is no question that the members of the class have suffered grievous wrongs – wrongs for which basic human decency would mandate compensation by the wrongdoer. On the other hand, there is reason to believe that the funds that are within our jurisdiction may be the fruit of misdeeds against the Republic and, as such, property of the Republic under Philippine law. We cannot disregard this substantial claim of ownership, which has already been endorsed by a Philippine tribunal. Further, it is not the role of this Court to sit in judgment on the official actions of the current Philippine government or to tell that government how it should exercise its sovereign prerogative to determine whether and when to participate in litigation in the courts of New York. Given that petitioner seeks to execute the class's judgment against a fund of which the Republic claims to be the true owner, we are bound to give effect to the doctrine of sovereign immunity by dismissing this proceeding." The dissenter argued that the Republic, having declined to intervene in this action, has not asserted its immunity. The Court of Appeals affirmed. The Court agreed that the Republic is a necessary party pursuant to CPLR 1001, and agreed with the Appellate Division majority that the important CPLR 1001(b) factors weigh in favor of dismissal. "The Republic's declaration of sovereign immunity in this case is entitled to recognition because it has a significant interest in allowing its courts to adjudicate the dispute over property that may have been stolen from its public treasury and transferred to New York through no fault of the Republic. The high courts of the United States, the Philippines and Switzerland have clearly explained in decisions related to this case that wresting control over these matters from the Philippine judicial system would disrupt international comity and reciprocal diplomatic self-interests. Since only the Republic can decide whether it should submit to New York's jurisdiction, it would be inappropriate to force the Republic to litigate in our State court system contrary to an otherwise valid invocation of the sovereign prerogative." Here, in *Duran*, the same class plaintiffs seek to enforce their judgment against Ferdinand and Imelda Marcos "against assets that were identified and recovered in a criminal trial of Vilma Bautista, the personal secretary to Imelda Marcos. Bautista was criminally charged with having illegally conspired to possess and sell valuable works of art acquired by Imelda Marcos during her husband's presidency and keeping the proceeds for herself." During the course of the investigation of Bautista, "the District Attorney seized more than 170 items of property from Bautista including over $15 million in cash, six insurance policies with a face value of $1,430,000," and two valuable paintings. The District Attorney commenced an interpleader action in federal court, naming, *inter alia*, the Republic of the Philippines. The Republic also commenced an action in federal court for the amounts obtained by Bautista in the sale of another painting. Here, in this enforcement proceeding, respondents, as in *Swezey*, contend that "the action must be dismissed for failing to join a necessary party, the Republic of the Philippines." The Court concludes that analysis of

the five factors set forth in CPLR 1001(b) "do not warrant dismissal." First, dismissal here would leave plaintiffs without a remedy. Second, there would be prejudice to plaintiffs. "To dismiss this proceeding when the foreign sovereign asserts a claim to the property but refuses to appear or intervene, would allow the Republic to utilize its immunity from litigation as a sword to preclude a judgment creditor from exercising the right to the property." The Republic's absence "is voluntary, it was not denied the opportunity to be heard, it simply declined to intervene. Consequently, as the Republic has chosen not to participate in the proceeding, their participation is not necessary to render an effective judgment." Third, any prejudice can be avoided by the Republic. Here, unlike *Swezey*, "the Republic's declaration of sovereign immunity is not based on the assertion that its own courts be permitted to adjudicate the dispute over allegedly stolen property." And "the Republic has brought its own action in federal court regarding the Water Lily Painting and is a named Respondent in the Interpleader Action. The Republic may pursue its interests in those actions." Fourth, there is no feasible protective provision. Finally, an effective judgment can be rendered without the Republic as a party. "The Respondents rely upon the decision in *Swezey* stating that 'allowing the turnover proceeding to go forward would create the possibility of multiple conflicting judgments." But, here, the "fear of duplicate liability is not applicable in this case as the District Attorney has immunity from further liability since it is not a stakeholder to the Levied Property, but merely a custodian."

Suffolk County Water Authority v. The Dow Chemical Company, 44 Misc 3d 569 (Sup.Ct. Suffolk Co. 2014)(Pines, J.) – In this action, plaintiff has sued manufacturers and distributors of perchloroethylene, which it claims has contaminated its water supply. Plaintiff admits its inability "to identify each precise defendant whose allegedly defective product injured the plaintiff and how the conduct of such party was the 'cause-in-fact' of such injury." Thus, plaintiff seeks to amend its complaint to assert "what is known as 'market share liability' with regard to the chemical manufacturing Defendants in this case based upon, *inter alia*, the Plaintiff's assertion that identification of the exact defendant whose product caused the environmental property damages alleged, is impossible." The Court of Appeals has only once applied market share liability, and that was in *Hymowitz v. Eli Lilly & Co.*, 73 N Y 2d 487 (1989) with respect to DES. The Court there noted that DES was "a singular case, with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later, and which has evoked a legislative response reviving previously barred actions." In the years since *Hymowitz*, the Court of Appeals has rejected application of market share liability to handgun manufacturers [*Hamilton v. Beretta USA Corp.*, 96 N Y 2d 222 (2001)], and the Fourth Department rejected it with respect to manufacturers of lead pigment used in paints [*Brenner v. American Cyanamid Co.*, 263 A D 2d 165 (4th Dept. 1999)]. But, here, the Court finds the facts closer to *Hymowitz*, and allows the amendment. For, here, "taking as true the allegations set forth by Plaintiff in its amended complaint along with the accompanying experts' affidavits, the SCWA has set forth that perchloroethylene is

defective from the moment of its manufacture, that it is a generically fungible product, and that it takes many years from the point of its 'ingestion' through seepage into the ground until it appears in one of the water purveyor's wells, causing extensive environmental harm, in the form of serious property damage. The allegations continue with excerpts from Defendants' witnesses to the effect that the fungible product of one manufacturer of perc becomes commingled with that of another over time and that it is essentially impossible to locate which manufacturer contributed to what extent to the contamination of which particular Water Authority well. In addition, the Plaintiff herein has asserted that without application of the market share theory for determining liability, it, like the DES plaintiffs, will be left without remedy for the harm assertedly caused by the chemical manufacturers herein. Plaintiff has further alleged that the product was not only dangerous from the point of manufacture; but, also, that it was reasonably foreseeable that it would cause harm to the groundwater system wherever it was ultimately used. It has assertedly named the entire chemical manufacturing market for the relevant time period and states that its experts are able to track the time periods from product use to resultant property damage."

Intelligent Product Solutions, Inc. v. Morstan General Agency, Inc., N.Y.L.J., 1202678549653 (Sup.Ct. Suffolk Co. 2014)(Whalen, J.) – "It is well settled law that claims for the imposition of liability against a defendant that rest upon allegations that such defendant is liable to the plaintiff because it is an alter ego of another entity who has not been joined as a defendant, renders the non-joined entity a necessary party [citations omitted]. Indeed, a stand alone claim for recovery from a purportedly dominant alter ego entity is considered legally insufficient since New York does not recognize a separate cause of action to pierce the corporate veil." However, "dismissal for failure to join a necessary party is proper only in very limited circumstances as a motion for such dismissal necessarily invokes application of the joinder provisions set forth in CPLR 1003 and 1001. These rules authorize a court to dismiss a complaint where a necessary party has not been joined only after it has determined that such party is indeed necessary and that it is not subject to the jurisdiction of the court except upon its voluntary submission thereto or consent [citations omitted]. If jurisdiction can be obtained only by the entity's consent or voluntary appearance 'the court when justice requires, may allow the action to proceed without the entity being made a party' [citations omitted]. Any such determination to proceed must be based upon the court's consideration of five numerated statutory factors set forth in CPLR 1001(b) [citation omitted]. Here, the defendant established that SES, which is the allegedly dominated dummy corporation and the party in purported breach of its obligations under its contract with the plaintiff, is a necessary party under the theories advanced against its alter ego, defendant Morstan. However, the record is devoid of any evidence tending to establish that the non-joined entity, SES, is beyond the jurisdiction of this court due to the filing of a bankruptcy petition or otherwise [citation omitted]. Pursuant to the mandates of CPLR 1001, this court is required to declare that SES is a necessary party defendant and to summon it to

appear before the court [citation omitted]. It hereby does so by directing the plaintiff to effect its joinder by service of its initiatory process papers and pleading, together with a copy of this order, within forty-five days of the date of this order. Of course, the joinder of SES, if available, may result in its invocation of the arbitration clause in its contract with the plaintiff as a contingent defense in bar to this action. The fact that the party to be joined has one or more defenses in bar to the claims of the plaintiff does not deprive the court of jurisdiction over such party and is thus not a ground upon which the court may decline to declare the joinder of such party as necessary and to summons it to court, and the party so summoned may, upon its appearance, waive such defense or be unsuccessful in its assertion thereof."

CONSOLIDATION AND SEVERANCE

Katz v. Mount Vernon Dialysis, LLC, 121 A D 3d 856 (2d Dept. 2014) – "Where a defendant in an action files for chapter 11 bankruptcy relief, the automatic stay provisions of 11 USC §362(a) do not extend to the nonbankrupt defendants [citations omitted]. Therefore, in such circumstances, it is within the discretion of the trial court to direct a severance of the action as against the bankrupt defendant [citations omitted]. Generally, the balance of the equities lies with plaintiffs when severance is sought because the case against one defendant is stayed pursuant to 11 USC §362(a), and that is particularly so in this personal injury action where a delay would be prejudicial to the plaintiffs."

SUBSTITUTION OF PARTIES

Kim v. Smith, N.Y.L.J., 1202714668208 (Sup.Ct. Nassau Co. 2015)(Marber, J.) – This personal injury action was commenced on September 2, 2011, and service was effectuated by "nail and mail" pursuant to CPLR 308(4). An answer was served on November 18, 2011. Apparently unbeknownst to either attorney, defendant had died on December 16, 2009, and an administrator had been appointed on April 11, 2011. Plaintiff now seeks to substitute an administrator as defendant in the action. "Upon reviewing the instant motion, the Court's Principal Law Clerk contacted Lana Ahreum Song, Esq., the Plaintiff's counsel, to ascertain whether the Court was perhaps missing something since it appeared that this action was a nullity, having been commenced against a dead person. Ms. Song acknowledged that the action is a nullity but chose not to withdraw the motion and requested that the Court render a decision." The Court obliges. "This action is dismissed as a nullity."

Kilmer v. Moseman, 124 A D 3d 1195 (3d Dept. 2015) – "'Ordinarily the death of a party results in a stay of the proceedings and, absent substitution of a proper legal representative," any subsequent orders of the Court "would be void." But, here, a co-executor of the estate of the deceased plaintiff is already a plaintiff in the action, and all of the other plaintiffs have inherited shares of his estate "and were motivated to protect

its interests." Thus, "Supreme Court was free to act prior to the formal substitution of the estate as a party plaintiff."

Riedel v. Kapoor, 123 A D 3d 996 (2d Dept. 2014) – "CPLR 1021 requires a motion for substitution to be made within a reasonable time [citation omitted]. The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit."

SUING UNKNOWN PARTIES

Katzman v. John Does No. S1-10, N.Y.L.J., 1202718867081 (Sup.Ct. Queens Co. 2015) (Elliot, J.) – "In order for plaintiff to be permitted to utilize CPLR 1024 and to rely on a complaint against an unknown party in the first instance, he must establish that he made a timely diligent effort to identify the correct party before the statute of limitations expired and before commencement of the action [citations omitted]. Failure to establish such efforts prior thereto results in dismissal of the complaint, irrespective of the 120-day time period within which the plaintiff has to serve those defendants after filing the complaint."

INTERVENTION

Wallach v. Town of Dryden, 23 N Y 3d 728 (2014) – Last year's "Update" reported on the Appellate Division decision in this matter [decided *sub. nom Matter of Norse Energy Corp. USA v. Town of Dryden*, 108 A D 3d 25 (3d Dept. 2013)]. Petitioner, a driller and developer of oil and natural gas, commenced this Article 78 proceeding challenging respondent Town's zoning amendment which bans hydrofracking. Appellant, the Dryden Resources Awareness Coalition, sought unsuccessfully to intervene to defend the zoning amendment. The Appellate Division affirmed the denial of the DRAC's motion. "Although members of DRAC submitted affidavits identifying effects that hydrofracking may have on their daily lives, these claimed impacts were largely speculative and failed to demonstrate a substantial interest in the outcome of the action different from other residents of the Town. Further, as noted by Supreme Court, the Town is the preeminent party in defending the validity of the zoning ordinance amendment which it enacted [citations omitted]. Under the circumstances, we find no abuse of discretion and, like Supreme Court, grant DRAC *amicus curiae* status and consider its arguments in that context." The Court of Appeals has affirmed the Appellate Division, but without comment on this issue.

Mavente v. Albany Medical Center Hospital, 126 A D 3d 1090 (3d Dept. 2015) – The Appellate Division affirms an order denying the motion of a union welfare fund to intervene in this medical malpractice action to protect its claims to reimbursement of medical expenses paid to plaintiff. "Supreme Court correctly found that plaintiff is adequately representing the Fund's interests, and any argument that plaintiff may not do

so in the future is pure speculation." Moreover, "although the Fund's asserted claim has common questions of law and fact with plaintiff's claims, intervention was properly denied. Intervention would cause some delay because it would lead to duplicative discovery and motion practice, as the Fund and plaintiff could each separately seek demands and relief from the multiple defendants." Indeed, "the Court of Appeals has even acknowledged that allowing a provider of medical benefit payments to intervene could create tension between the injured party and his or her insurer, and 'inevitably complicates settlement negotiations.'"

CLASS ACTIONS

Vasquez v. National Securities Corp., 48 Misc 3d 597 (Sup.Ct. N.Y.Co. 2015) (Kornreich, J.) – "New York law requires notice to the class where, as here, an individual settlement is reached prior to a decision on the merits of a motion to dismiss or a motion for class certification." While "the wisdom of this rule has been questioned by many, including the CPLR commentary," and defendants "urge the court to follow modern federal case law," since, "as defendants correctly observe, it is well established that our state courts look to Rule 23 of the Federal Rules of Civil Procedure to inform New York's class action law," nonetheless, "this action is brought under Article 9, and this court must follow the Appellate Division's clear precedent." However, "in light of the early posture of this case and the relatively small size of the purported class, the court will only approve a cost effective, electronic notice, such as the emails plaintiff recently sent to the purposed class via LinkedIn (albeit without prior court approval). Most importantly, the costs shall be incurred by plaintiff's counsel. The public policy underlying the significant class notice expense a defendant is usually compelled to pay, such as upon certification, or after a class settlement is reached, is inapplicable in this case where only plaintiff and his counsel benefit."

Stecko v. RLI Insurance Company, 121 A D 3d 542 (1st Dept. 2014) – "As we have previously held, a class action is the 'superior vehicle' for resolving wage disputes 'since the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court.'" Moreover, "the motion court was not required to apply the 'rigorous analysis' standard utilized by the federal courts in addressing class certification motions under rule 23(b) of the Federal Rules of Civil Procedure, given this Court's recognition that CPLR 901(a) 'should be broadly construed' and that 'the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it.'"

Borden v. 400 East 55th Street Associates, L.P., 24 N Y 3d 382 (2014) – Last year's "Update" reported on the unanimous Appellate Division decision in this action [105 A D 3d 630 (1st Dept. 2013)], as well as its 3-2 decision in *Gudz v. Jemrock Realty Company, LLC*, 105 A D 3d 625 (1st Dept. 2013). A divided Court of Appeals affirms

both. The Appellate Division held, in *Borden*, that "CPLR 901(b), which prohibits a class action to recover a penalty or minimum damages, imposed by statute where the statute does not explicitly authorize a class recovery thereof, does not bar plaintiff's putative class action. Plaintiff has waived her right to treble damages under Rent Stabilization Law of 1969 [citation omitted], and individual class members will be allowed to opt out of the class to pursue their treble damages claims, should they believe there is a lawful basis for doing so [citations omitted]. Although plaintiff did not waive her right to reimbursement for alleged overcharges and interest, and for attorneys' fees, those claims do not render her action an action to recover a penalty for purposes of CPLR 901(b)." The dissenters in *Gudz* argued that to permit a waiver of statutorily permitted treble damages in order to secure class certification "would be to circumvent the clear intent of CPLR 901(b), which is to preclude the maintenance of a class action suit seeking a penalty. Plaintiff's waiver of treble damages is moreover void under Rent Stabilization Code (9 NYCRR) §2520.13, which provides that 'an agreement by the tenant to waive the benefit of *any* provision of the RSL or this Code is void' [citations omitted; emphasis by the Court]." The dissent was "unpersuaded by the majority's reasoning that there is no statutory violation because an individual class member may opt out of the class to pursue his or her treble damages claim. By allowing a class action to proceed seeking only actual damages, we permit the class to effectively rewrite RSL §26-516(a) and undermine the legislature's purpose in enacting the statute." Finally, "the unilateral waiver of a statutorily imposed penalty by a class representative adversely affects his or her ability to act as an adequate class representative." The majority in the Court of Appeals holds that "CPLR 901(b) permits otherwise qualified plaintiffs to utilize the class action mechanism to recover compensatory overcharges * * * even though Rent Stabilization Law §26-516 (RSL) does not specifically authorize class action recovery and imposes treble damages upon a finding of willful violation. We find the recovery of the base amount of rent overcharge to be actual, compensatory damages, not a penalty, within the meaning of CPLR 901(b). We also do not believe it contravenes the letter or the spirit of the RSL or CPLR 901(b) to permit tenants to waive treble damages in these circumstances – when done unilaterally and through counsel." The dissenters argued that, "even without trebling, the remedy provided by RSL §26-516(a) is a penalty," precluding class certification. The Court of Appeals decision in *Borden* also affirms *Downing v. First Lenox Terrace Associates*, 107 A D 3d 86 (1st Dept. 2013), also reported on in last year's "Update," in which the First Department held that, although Rent Stabilization Law §26-516(a) refers to "reimbursement of rent overcharges plus interest" as a "penalty," that designation does not preclude a class action to recover such overcharges with interest. For, "'the determination of whether a certain provision constitutes a penalty may vary depending on the context' and 'the nature of the problem' [citation omitted]. 'A statute imposes a penalty when the amount of damages that may be exacted from the defendant would exceed the injured party's actual damages' [citation omitted]. 'By any reasonable measure, treble damages amount to a substantial penalty.

It is punitive in nature and obviously designed to severely punish owners who deliberately and systematically charge tenants unlawful rents, while deterring other owners of stabilized premises who might be similarly inclined' [citation omitted]. In contrast, 'interest is not a punishment arbitrarily levied upon a culpable party. Instead, an award of interest is simply a means of indemnifying an aggrieved person. It represents the cost of having the use of another person's money for a specified period' [citations omitted]. Thus, while treble damages under Rent Stabilization Law §26-516(a) is a true penalty, allowable only where the overcharge is willful, the award of interest on the overcharge is compensatory in nature in that a tenant is only getting a return on the actual amount he or she was overcharged, which would correspond to the landlord's reasonable use of the money while it was in the landlord's possession."

Pires v. The Bowery Presents, LLC, 44 Misc 3d 704 (Sup.Ct. N.Y.Co. 2014)(Scarpulla, J.) – Arts and Cultural Affairs Law §25.33 provides that a consumer injured by a violation of Section 25.30(1)(c) of the Act may bring an action "to recover his or her actual damages or fifty dollars, whichever is greater." In this proposed class action, plaintiff seeks to waive the minimum damage provided for in the statute, and to claim only her actual, lesser, damages. The Court concludes that plaintiff "may waive the statutory minimum level of recovery, and seek the lesser amount of actual damages in a class action."

Kolb v. Bankers Conseco Life Insurance Company, N.Y.L.J., 1202663548752 (Sup.Ct. Nassau Co. 2014)(Feinman, J.) – Plaintiff seeks to certify a class of all of defendant's employees who were "commission-based individuals, other than managers, corporate officers, directors, clerical and office workers, who performed work for Bankers between April 2007 and the present selling and marketing insurance and/or financial products in positions including 'Agent' and 'Financial Sales Representative.'" The claim is for earned but unpaid wages. "In order to acquire class action status five prerequisites must be satisfied: numerosity; common questions of law and fact; typicality of named petitioner's claim; fair and adequate representation by petitioner; and the superiority of the class action format." Here, numerosity is not at issue, since the putative class consists of some 2,259 agents. As to commonality, "'the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action.'" As long as class treatment "will 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated,'" the "need for individualized proof solely on damages issues will not defeat a finding of predominance." Here, the common questions predominate. The named plaintiff's claims are typical of the class, as he was employed by defendant as an agent. "'Typical' does not mean 'identical.'" Adequacy of representation focuses "essentially on three factors, to wit, potential conflicts of interest, personal characteristics of the proposed class representative, and the quality of class counsel." Here, all of those favor class

certification. Finally, "the plaintiffs have sufficiently demonstrated that a class action is the superior method of adjudication of plaintiffs' wage and hour action."

Cooper v. Sleepy's, LLC, 120 A D 3d 742 (2d Dept. 2014) – "One of the prerequisites to class certification requires the class representative to demonstrate that 'the representative will fairly and adequately protect the interests of the class' [citation omitted]. 'A class representative acts as a principal to the other class members and owes them a fiduciary duty to vigorously protect their interests [citation omitted]. 'That responsibility clearly encompasses the duty to act affirmatively to secure the class members' rights as well as to oppose the adverse interests asserted by others' [citation omitted]. 'The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g., familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel' [citation omitted]. Here, the plaintiffs failed to sustain their burden of demonstrating that they would fairly and adequately protect the interests of the class [citations omitted]. To the contrary, the record discloses that one of the proposed representatives maintains that he was entitled to a certain commission that was wrongfully paid by the defendant to a different member of the proposed class. Given the evidence in the record indicating that such disputes between and among salespersons were not unusual, we conclude that there exist potential conflicts of interest between the representatives and the class members such that the plaintiffs cannot fairly and adequately represent the interest of each member of the class."

Jiannaris v. Alfant, 124 A D 3d 582 (2d Dept. 2015) – In this action seeking essentially to undo a merger, a majority of this divided Court affirms the denial of approval of a settlement "because it did not afford nonresident class members the opportunity to opt out of the settlement in order to preserve their right to assert claims for damages." The majority relied upon the Court of Appeals decision in *Matter of Colt Industries Shareholder Litigation*, 77 N Y 2d 185 (1991), which held that in a class action solely for equitable relief, a Court may bind nonresident members of the class even without an opportunity to opt out, but that, in a class action including a damages component, the Court may not bind nonresident members of the class without an opt-out provision. The dissenting Justice argued that, here, the damages at issue "are merely incidental to the equitable relief sought," and that, therefore "the court was not required to afford any class members the opportunity to opt out." Moreover, the dissenter "disagree[s] with the practice of affording only out-of-state class members the opportunity to opt out, while denying that opportunity to in-state class members."

INDEMNIFICATION AND CONTRIBUTION

Cunningham v. North Shore University Hospital, 123 A D 3d 650 (2d Dept. 2014) – In this personal injury action, defendant landscaper "submitted evidence sufficient to establish, *prima facie*, that the North Shore defendants were not entitled to contribution,

since A.G. Landscaping did not owe a duty of reasonable care to the plaintiff, or a duty of reasonable care independent of its contractual obligations to the North Shore defendants."

Capretto v. City of Buffalo, 124 A D 3d 1304 (4th Dept. 2015) – After the City of Buffalo, one of the alleged joint tortfeasors, successfully moved for summary judgment dismissing the complaint, one of the remaining defendants sought to continue its cross-claim for contribution. The Appellate Division affirms the dismissal of that claim. "It is well settled 'that the existence of some form of tort liability is a prerequisite to application of CPLR 1401 [citations omitted]. Inasmuch as the amended complaint against the City was dismissed, the Bison defendants 'may not properly seek contribution from the City.'"

Bivona v. Danna & Associates, P.C., 123 A D 3d 956 (2d Dept. 2014) – "'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]. 'Thus, a party which has actually participated in the wrongdoing is not entitled to indemnification.'"

Dreyfus v. MPCC Corp., 124 A D 3d 830 (2d Dept. 2015) – "'The key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is "a separate duty owed the indemnitee by the indemnitor"' [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.'"

PLEADINGS

Anonymous v. Lerner, 124 A D 3d 487 (1st Dept. 2015) – "While plaintiff's allegations concerning the negligent and fraudulent transmission of genital herpes, a sexually transmitted disease, implicates a substantial privacy right [citation omitted], 'the trial court should exercise its discretion to limit the public nature of judicial proceedings "sparingly" and "then, only when unusual circumstances necessitate it"' [citation omitted]. The determination of whether to allow a plaintiff to proceed anonymously requires the court to 'use its discretion in balancing plaintiff's privacy interest against the presumption in favor of open trials and against any potential prejudice to defendant' [citation omitted]. The trial court did not improvidently exercise its discretion in finding that plaintiff's privacy concerns were outweighed by, *inter alia*, the fact that the action was brought against an individual defendant, relates to his private life and reputation, and puts plaintiff's credibility at issue [citations omitted], and undermined by her reporting her story to the media before serving defendant with process [citation omitted]. 'Claims

of public humiliation and embarrassment are not sufficient grounds for allowing a plaintiff to proceed anonymously.'"

Tsionis v. Eriora Corp., 123 A D 3d 694 (2d Dept. 2014) – "The appellant was not required to serve an answer where the complaint did not set forth any allegations that the appellant was required to defend against [citations omitted]. 'A defendant who has no defense, and therefore serves no pleading, might nevertheless serve a notice of appearance so as to be kept apprised of the progress of the proceeding' [citation omitted]. Such was the situation here. The complaint contained no allegations about the appellant, except to state that he had a second mortgage on the property. Thus, the appellant properly proceeded by serving a notice of appearance only and was entitled to be kept apprised of the proceeding."

Dilorenzo-Coscia v. Adirondack Insurance Exchange, N.Y.L.J., 1202671152024 (Sup.Ct. Queens Co. 2014)(Pineda-Kirwan, J.) – "'Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail' [citations omitted]. Moreover, 'where, as here, the complaint does not state the specific promises or omissions of material facts allegedly made by the insurer, it alleges nothing more than a breach of the contract and any covenants implied; it does not allege a cause of action for fraud in the inducement.'"

Cassissi v. Yee, 46 Misc 3d 552 (Sup.Ct. Westchester Co. 2014)(Marx, J.) – In this medical malpractice case, plaintiffs sue 25 defendants allegedly involved in the care of their deceased. The complaint "is 269 pages in length and consists of 1287 numbered paragraphs, of which 650 paragraphs are preliminary statements leading up to the specific allegations that comprise the 27 causes of action." Defendants move "to strike the alleged scandalous, prejudicial and unnecessary portions of the complaint." Defendants "complain that Plaintiffs' complaint is 'unduly detailed' and includes a 'detailed recitation of treatment and extracts from the various medical charts,' all of which should be 'deleted or reduced as duplicative, prejudicial, minutia, or improper and unnecessary extracts from the record." The Court denies the motion. For, "'mere repetitiveness is not a ground for a motion to strike' [citations omitted]. The inclusion of irrelevant matter in the complaint is also not a basis for a motion to strike." Instead, "the moving party must show that the matter to be struck is scandalous or prejudicial. Even then, the party must also show that the matter is not relevant, as 'an allegation of scandalousness by itself does not suffice.'" Here, "while this is certainly a case where the oft repeated phrase 'less is more' finds ready application, prolixity alone is simply not a basis for striking material from a pleading."

Scholastic Inc. v. Pace Plumbing Corp., 129 A D 3d 75 (1st Dept. 2015) – "The fundamental question in this appeal is whether defendant properly pleaded an affirmative

defense based on the statute of limitations, where the defense was concealed within a boilerplate, catchall paragraph containing 15 other affirmative defenses and an attempt to plead and reserve every other conceivable affirmative defense. We hold that defendant's statute of limitations defense was inadequately pleaded because of its failure to separately state and number the defense and that plaintiff was prejudiced by the defective pleading. However, because the prejudice is curable by permitting discovery on the statute of limitations issue, we remand to the motion court to allow defendant to correct its defective pleading and plaintiff to obtain the needed discovery." In so ruling, the Court was unanimous. However, the Court was closely divided on the question whether the "conclusory pleading of the defense (*i.e.*, a bare assertion of the 'statute of limitations') was insufficiently particular to comport with CPLR 3013." The majority, noting that the existing authority that the bare statement of the defense is adequate – *Immediate v. St. John's Queens Hospital*, 48 N Y 2d 671 (1979) – was "a cursory, unsigned memorandum," urged that "this issue is one that the Court of Appeals should revisit." For, "the *Immediate* Court did not explain its rationale or cite any authority in deciding that a conclusory statute of limitations defense was sufficiently pleaded, and it apparently ignored the model statute of limitations defense embodied in Form 17 of the Official Forms. The Official Forms promulgated by the state administrator pursuant to CPLR 107 'shall be sufficient under the CPLR and shall illustrate the simplicity and brevity of statement which the CPLR contemplates' [citation omitted]. Official Form 17's exemplary statute of limitations defense states, 'the cause of action set forth in the complaint did not accrue within six years next before the commencement of this action' [citation omitted]. This example, by specifying the period of limitation on which the defense relies, sets forth the defense with greater particularity than the conclusory assertion of the defense accepted in *Immediate*. Moreover, it indicates the Judicial Conference's obvious determination that the 'simplicity and brevity' contemplated by the CPLR would be best achieved by a statute of limitations defense that included the period of limitation." And, "contrary to the concurrence, we are not advocating for a 'new pleading requirement,' nor are we suggesting that defendants be required to plead 'factual particulars' aside from the period of limitations upon which a statute of limitations defense is based." And, "again, prejudice is the critical concern. If a defendant is required to plead the applicable period of limitations (as illustrated by Official Form 17), then the plaintiff will have notice of the defense and be prompted to tailor discovery accordingly. Without such notice of the period of limitations on which a defendant relies, a plaintiff may conduct discovery with one period of limitations in mind regardless of whether the defendant intends to assert the defense based on another period of limitations (and, possibly, a different accrual date)." It is, in sum, "more sensible to require defendants to plead the statute of limitations with as much particularity as illustrated by Official Form 17, at least in cases where, as here, the plaintiff states multiple causes of action and the accrual date is absent from the face of the complaint (or the body of the answer)." The concurrence found no conflict between *Immediate* and Official Form 17.

"As the majority itself acknowledges, 'Official Form 17 establishes a ceiling, not a floor,' for proper pleading." And, "in the case of the statute of limitations, *Immediate* establishes that the Official Form 17 provides more information than is necessary." Moreover, "I fail to see what problem the majority believes would be solved by requiring defendants to specify a period of limitation in pleading a statute of limitations defense. The specification of the applicable limitation period is a legal conclusion that conveys no factual information about the case, and therefore does not help the plaintiff in framing discovery requests. Further, contrary to the majority's assertion, neither does the pleading of a particular limitation period tell the plaintiff the date from which the limitation period began to run, or how to ascertain that date. More fundamentally, to require the defendant to plead the length of the applicable limitation period, like the identification of the statute providing that limitation period, is to require the defendant to advise the plaintiff on the law applicable to the plaintiff's own cause of action. Why plaintiffs should be entitled to look to their adversaries for such advice is a question the majority does not answer."

Kimso Apartments, LLC v. Gandhi, 24 N Y 3d 403 (2014) – "This Court has in the past recognized that, absent prejudice, courts are free to permit amendment [to a pleading] even after trial [citations omitted]. Prejudice is more than 'the mere exposure of the party to greater liability [citation omitted]. Rather, 'there must be some indication that the party has been hindered in the preparation of the party's case or has been prevented from taking some measure in support of its position' [citation omitted]. The burden of establishing prejudice is on the party opposing the amendment." Moreover, "while a delay in seeking to amend a pleading may be considered by the trial court, it does not bar that court from exercising its discretion in favor of permitting the amendment where there is no prejudice."

Oh v. Jin, 124 A D 3d 639 (2d Dept. 2015) – This "slip and fall" action was commenced in January 2011. In his answer, defendant admitted ownership of the property at issue. In July 2013, after note of issue was filed, defendant sought to amend his answer to deny ownership of the property. "While leave to amend a pleading shall be freely granted [citation omitted], a motion for leave to amend is committed to the sound discretion of the court." Where "the application for leave to amend is made long after the action has been certified for trial, 'judicial discretion is allowing such amendments should be discrete, circumspect, prudent, and cautious' [citations omitted]. 'Moreover, when leave is sought on the eve of trial, judicial discretion should be exercised sparingly' [citations omitted]. Under the circumstances of this case, including the fact that the defendant admitted in his answer that he owned the subject property and maintained this position until after the note of issue had been filed, as well as the lateness of his request for leave to amend, the prejudice and surprise to the plaintiff, and the lack of any reasonable excuse for the delay, the Supreme Court improvidently exercised its discretion in

granting that branch of the defendant's motion which was pursuant to CPLR 3025(b) for leave to amend his answer."

Favia v. Harley-Davidson Motor Company, Inc., 119 A D 3d 836 (2d Dept. 2014) – "'Applications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit' [citations omitted]. 'No evidentiary showing of merit is required under CPLR 3025(b)' [citation omitted]. 'The court need only determine whether the proposed amendment is "palpably insufficient" to state a cause of action or defense, or is patently devoid of merit' [citation omitted]. 'A court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt.'" For, "'if the opposing party wishes to test the merits of the proposed added cause of action that party may later move for summary judgment upon a proper showing.'"

Borges v. Placeres, 123 A D 3d 611 (1st Dept. 2014) – "Defendant's motions to amend his answer to assert a statute of limitations defense and for summary judgment dismissing the complaint, made on the eve of trial eight years after the answer was served, were properly denied for lack of any excuse of the delay."

Red Zone LLC v. Cadwalader, Wickersham & Taft LLP, 118 A D 3d 581 (1st Dept. 2014) – Last year's "Update" reported on the Supreme Court decision in this matter [N.Y.L.J., May 21, 2013, 1202604831378 (Sup.Ct. N.Y.Co.)]. In this legal malpractice action, defendant seeks to amend its answer to add a defense of assumption of the risk, based upon the affidavit of one of its partners that the client agreed to the deal that caused its damages against his advice. However, in a prior related litigation, that partner was deposed, and his testimony was in direct contradiction to his current affidavit. Supreme Court noted that "he testified he gave instructions for a letter agreement with certain terms; he testified it worked; and was clear. His affidavit now says the terms were not there; it did not work, was not clear, and that he advised against accepting it." Although concluding that plaintiff would not be prejudiced by defendant's delay in seeking the amendment, "the court's opinion is that granting the motion – taking into account defendant's new theory of defense and Mr. Block's affidavit, which starkly contradicts his prior deposition testimony – would gravely prejudice New York's rules-based court system." The Appellate Division has affirmed. Because the affidavit in support of the motion to amend "directly contradicts" the attorney's earlier deposition testimony, "the proposed amendment is patently devoid of merit."

MOTION PRACTICE

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MOTION PROCEDURE

Rosenblatt v. St. George Health and Racquetball Associates, LLC, 119 A D 3d 45 (2d Dept. 2014) – In *Tirado v. Miller*, 75 A D 3d 153 (2d Dept. 2010), defendant moved to quash a third-party subpoena. *Nisi prius* granted the motion, but on grounds different from those urged by defendant. The Appellate Division held that, "trial courts are not necessarily limited by the specific arguments raised by parties in their submissions," although "a court typically lacks the jurisdiction to grant relief that is not requested in the moving papers." However, "the presence of a general relief clause enables the court to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced." In *Tirado*, "the relief granted, of quashing the plaintiff's subpoena and, in effect, granting a protective order, is not only similar, but in fact identical, to the ultimate relief demanded in the notice of motion, albeit on a different basis. We find that the general relief clause in the notice of motion permitted the court to consider an alternative ground for granting the motion, consistent with the ultimate relief that was requested, and which was based upon material contained in the court's own file." The Court noted that, under statute, there exist instances in which the Court's power to grant unrequested relief is limited – such as requiring notice before converting a motion to dismiss to a motion for summary judgment, or prohibiting a *sua sponte* dismissal on the ground of *forum non conveniens*, or a *sua sponte* change of venue or consolidation of related actions. The Court also noted circumstances when a Court is permitted to act *sua sponte* – such as reconsidering a prior interlocutory order during the pendency of an action, issuing a 90-day notice pursuant to CPLR 3216, appointing a receiver of matrimonial property, issuing Family Court orders of protection, ordering an accounting in an estate proceeding or taking judicial notice of facts or the law of sibling states. Thus, the *Tirado* Court concluded that, "there are circumstances when courts may act *sua sponte* and others when courts may not do so. The telltale sign of the difference, for many but not all circumstances, is the enabling language of the relevant statutory provision pursuant to which the court acts." But, the Court rejected the argument that the Trial Court improperly acted *sua sponte*. "There is a critical distinction between *sua sponte* relief not requested by any party, and *sua sponte* reasoning in granting or denying nondispositive discovery relief that has been requested by a party." Here, in *Rosenblatt*, on defendant's motion for summary judgment, it relied upon plaintiff's unsigned and uncertified deposition transcript. Plaintiff argued that the transcript could not be relied upon because it was "*unverified*." Supreme Court, recognizing that verification was unnecessary, nonetheless, *sua sponte*, concluded that, because the transcript was *uncertified*, the motion must be denied. The Appellate Division reverses, distinguishing *Tirado*. "The motion at issue in *Tirado*, which related to discovery, did not have 'dispositive import' to that action [citation omitted]. By contrast, [defendant's] motion for summary judgment is dispositive in nature. Thus, *Tirado* is distinguishable from the instant case. Here, the Supreme Court denied the subject motion for summary judgment on a ground that the

parties did not litigate. The parties did not have an opportunity to address the issue relating to the certification of the plaintiff's deposition transcript, relied upon by the Supreme Court in denying that dispositive motion. The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process." For, "'we are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made.'"

Kearney v. Kearney, 42 Misc 3d 360 (Sup.Ct. Monroe Co. 2013)(Dollinger, J.) – Defendant's notice of motion sought additional disclosure, "to determine the issues to be resolved in accordance with the claims of the defendant," and to "strike the complaint of the plaintiff," together with such "other and further relief as is just and proper." The Court rejects plaintiff's request to "narrowly read the notice of motion, draw an adverse inference from the lack of citations to the motion sections of the CPLR and deny the requested relief on a procedural basis." The Court concludes that defendant has adequately sought judgment – either under CPLR 3211 or CPLR 3212 – dismissing the complaint.

Government Employees Insurance Company v. Asare, Index No. 22031/2013 (Sup.Ct. Bronx Co. 2014)(Barone, J.) – Petitioner's motion to stay arbitration is granted "without opposition." The filing rules "for e-filed motions in Civil Term, Bronx Supreme Court provide, in pertinent part," that "after papers on motions have been e-filed, working copies thereof, with Confirmation Notice firmly attached as the back page facing out, must be submitted" no later than 5:00 p.m. on the return date of the motion. Here, "said working copies of opposition to the instant motion were not provided."

QPI-XXV, LLC v. Lame, 45 Misc 3d 63 (App.Term 2d Dept. 2014) – "Although tenant's motion papers were properly signed, the papers did not contain any language certifying that the contentions contained therein were not frivolous within the meaning of the Rules of the Chief Administrator of the Courts [citation omitted]. There is, however, no rule requiring such language." Instead, the Rules provide that the signature on submitted papers itself "certifies" that they are not frivolous. Thus, "contrary to the Civil Court's holding, tenant, by signing his motion papers, certified that the contentions set forth therein were not frivolous, as defined by Rules of the Chief Administrator of the Courts [citation omitted]. We note that, even if the motion papers had in fact not been signed by tenant, the record is devoid of any indication that the court called that fact to tenant's attention to afford him an opportunity to sign the paper as required by Rules of the Chief Administrator of the Courts."

Aparaji v. Citibank, N.A., 44 Misc 3d 25 (App.Term 2d Dept. 2014) – "CPLR 2103(c), governing service of papers on a party not represented by counsel, requires such party to be served by a method specified in CPLR 2103(b)(1), (2), (4), (5) or (6). Among those

methods, insofar as is relevant to this case, are service by delivery of the papers to the party personally [citation omitted] or by leaving the papers at the party's residence within the state with a person of suitable age and discretion [citation omitted]. The affidavit of service stated that, on May 16, 2012, the 'notice of motion, attorney affirmation and annexed exhibits' were personally delivered to plaintiffs at their address by 'leaving it with a person authorized to receive service of legal papers.' The language used in the affidavit of service to describe personal service is, therefore, improper. Even if we were to construe the language alleging service on a person 'authorized to receive service' as meaning that service was upon 'a person of suitable age and discretion,' the affidavit does not identify or even describe the person allegedly served [citation omitted]. While, in general, the mere denial of receipt of motion papers, as claimed by plaintiffs herein, without more, is insufficient to rebut the presumption of proper service created by a proper affidavit of service [citation omitted], here, as the affidavit of service did not demonstrate that plaintiffs were validly served with the motion papers, that presumption of proper service never arose."

Flatlands Medical, P.C. v. AAA Insurance, 43 Misc 3d 49 (App.Term 2d Dept. 2014) – "Despite defendant's failure to submit a proper certificate of conformity together with the out-of-state affidavit of its corporate officer, as required by CPLR 2309(c), this omission was not a fatal error [citations omitted], and, therefore, the affidavit has been reviewed on this appeal."

Fuller v. Nesbitt, 116 A D 3d 999 (2d Dept. 2014) – "The absence of a certificate of conformity in violation of CPLR 2309 is not a fatal defect [citations omitted], and, in the event that relief is denied on that ground, the denial should, as here, generally be without prejudice to renewal upon proper papers."

Ali v. Verizon New York, Inc., 116 A D 3d 722 (2d Dept. 2014) – "The Supreme Court did not err in considering the affidavit of the nonparty, even though it was signed and notarized in Florida and was not accompanied by a certification in accordance with CPLR 2309(c). This was not a fatal defect, as the plaintiff was not prejudiced thereby."

US Bank National Association v. Zeidman, N.Y.L.J., 1202657553968 (Sup.Ct. Westchester Co. 2014)(Connolly, J.) – When an affidavit is executed outside New York, CPLR 2309(c) requires that it be "accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation." The Court here holds that the statute is satisfied when an affidavit executed outside the state "contains both a notary's jurat and a 'Uniform Certificate of Acknowledgment." No further "certificate of conformity" is required, since "the acknowledgment appearing at the end of the affidavit satisfies the requirements of New York law."

Midfirst Bank v. Agho, 121 A D 3d 343 (2d Dept. 2014) – "Our Court is observing a significant upswing in the number of appeals where the parties are contesting the admissibility of affidavits executed outside of the state, without CPLR 2309(c) certificates of conformity." Thus, "we use the instant appeal as an occasion to clarify the law relating to the conformity of out-of-state affidavits as required by CPLR 2309(c)." Here, the affidavit executed outside New York was notarized, and, was accompanied by a "Uniform, All Purpose Certificate of Acknowledgement," in which the notary certified that the affiant appeared before him and was "personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument," and that the affiant "acknowledged to me that by his/her/their signature(s) on the instrument," that the affiant "executed the instrument." The certificate further attested to the place where the execution occurred. The Court holds that "a combined reading of CPLR 2309(c) and Real Property Law §§299 and 311(5) leads to the inescapable conclusion that where, as here, a document is acknowledged by a foreign state notary, a separate 'certificate of authentication' is not required to attest to the notary's authority to administer oaths [citations omitted]. Real Property Law §311(5) exempts the officers enumerated in Real Property Law §299, such as foreign notaries, from the requirement for a certificate of authentication. A certificate of authentication becomes necessary when an out-of-state acknowledgment is provided by a foreign officer other than one enumerated in Real Property Law §299, or when the acknowledgment is taken in foreign countries other than Canada, or by foreign mayors or chief civil officers not under seal [citation omitted]. Nevertheless, CPLR 2309(c) requires that even when a notary is the foreign acknowledging officer, there must still be a 'certificate of conformity' to assure that the oath was administered in a manner consistent with either the laws of New York or of the foreign state. In other words, a certificate of conformity is required whenever an oath is acknowledged in writing outside of New York by a non-New York notary, and the document is proffered for use in New York litigation." Real Property Law §309-b provides a template for such a certificate, but "out-of-state affidavits need mere conform 'substantially'" to its language. The acknowledgement at issue here did so. "Parenthetically," the Court noted, "that even if the Mills affidavit was not accompanied by a certificate of conformity, the Appellate Division, Second Department, has typically held, since 1951, that the absence of a certificate of conformity is not, in and of itself, a fatal defect [citations omitted]. The defect is not fatal, as it may be corrected *nunc pro tunc* [citation omitted], or pursuant to CPLR 2001, which permits trial courts to disregard mistakes, omissions, defects or irregularities at any time during an action where a substantial right of a party is not prejudiced [citations omitted]. Thus, even if the certificate of conformity was inadequate or missing, no substantial right of the defendants is prejudiced."

Todd v. Green, 122 A D 3d 831 (2d Dept. 2014) – "Although the Supreme Court found that the plaintiff's [out-of-state] affidavit lacked a proper certificate of conformity, it should have considered the affidavit since the absence of a certificate of conformity is not

a fatal defect [citations omitted]. Further, even if the subject certificate of conformity was inadequate, the defendant failed to answer or appear in opposition to the motion, and it was inappropriate for the Supreme Court to, *sua sponte*, raise the issue on the defendant's behalf."

Effective January 1, 2015, the Legislature has amended CPLR 2106 to provide that any person outside the United States or its territories may execute an affirmation instead of an affidavit "under the penalties of perjury under the laws of New York."

Matter of S.A.B.G., 47 Misc 3d 812 (Fam.Ct. Nassau Co. 2015)(Singer, J.) – "It is well settled law that a foreign document filed with the court must be accompanied by an English translation of same and by an affidavit by the translator stating their qualifications and that the translation is accurate." Here, the translator did not execute an affidavit, but merely a "certificate," which simply said, "I, being proficient in both the English and Spanish language, do hereby certify that the above represents a true and complete English translation from the original document written in Spanish." The Court rejects the translation. "This Court cannot ignore this structural defect of the affidavit coupled with the ambiguity of the translator's qualifications."

Gluck v. New York City Transit Authority, 118 A D 3d 667 (2d Dept. 2014) – "While it is true that unauthorized surreplies containing new arguments generally should not be considered by the court [citations omitted], the procedural history in this case is analogous to circumstances in which arguments are raised for the first time in reply. Arguments raised for the first time in reply may be considered if the original movant is given the opportunity to respond and submit papers in surreply." Here, defendants were granted an adjournment to respond to plaintiff's reply, and plaintiff was permitted to respond to that surreply. Indeed, oral argument was held after all papers had been submitted. "Consequently, the plaintiff had adequate opportunity to address the new arguments raised in the defendants' surreply, and the Supreme Court properly considered it."

47 Thames Realty , LLC v. Robinson, 120 A D 3d 1183 (2d Dept. 2014) – "Here, the so-called 60-day rule set forth in 22 NYCRR 202.48 is not applicable because the Supreme Court's direction that the defendants submit a proposed order with respect to an award of an attorney's fee did not specify that the proposed order be settled or submitted on notice [citations omitted]. Accordingly, the plaintiff's contention that the defendants abandoned their claim for an award of an attorney's fee by failing to comply with the 60-day rule is without merit."

RENEWAL, REARGUMENT AND RESETTLEMENT

A prior year's "Update" reported on the Second Department's decision in *Biscone v. JetBlue Airways Corporation*, 103 A D 3d 158 (2d Dept. 2012). There, the Court held

that "compliance with CPLR 2214(c) requires that a party seeking leave to renew or reargue cannot rely upon reference to e-filed documents in lieu of annexing a complete set of the originally submitted motion papers." Plaintiff, in seeking renewal of a motion denying class certification, "made reference to electronically filed docket entry numbers referencing the previously e-filed documents on which she relied." The Court rejected the argument that such reference sufficed for the documents to be "furnished to the court" as provided in the rule. Earlier decisions, rejecting renewal or reargument motions for failure to provide the full set of initial motion papers, apply equally to electronically filed cases, for "the rationale for those decisions nevertheless applies to the case at bar notwithstanding the greater efficacy of the e-filing system. If a party simply refers to docket entry numbers, the motion court would still be forced to expend time locating those documents in the system, a task that could easily be complicated by a voluminous record or incorrect citations to docket entry numbers. Consequently, just as a court 'should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions' [citations omitted], a court should likewise not be compelled, absent a rule providing otherwise, to locate previously submitted documents in the electronic record in considering subsequent motions." *Biscone* has now been legislatively overruled. Effective July 22, 2014, CPLR 2214(c) has been amended to provide, *inter alia*, that "except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the document numbers on the e-filing system."

Garrison v. Quirk, 120 A D 3d 753 (2d Dept. 2014) – Decided a month after the effective date of the amendment to CPLR 2214(c) discussed directly above, the Second Department, citing *Biscone v. JetBlue Airways Corporation*, 103 A D 3d 158 (2d Dept. 2012), which that amendment was designed to overrule, holds that "even if a readable CD-R [containing the medical records relied upon by defendants' experts] was previously submitted to the court in connection with an earlier motion in this case, the Supreme Court should 'not be compelled, absent a rule providing otherwise, to locate previously submitted documents in the electronic record in considering subsequent motions.'"

Ali v. Verizon New York, Inc., 116 A D 3d 722 (2d Dept. 2014) – "A motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination' [citation omitted] and 'shall contain reasonable justification for the failure to present such facts on the prior motion' [citations omitted]. While a court has discretion to entertain renewal based on facts known to the movant at the time of the original motion, the movant must set forth a reasonable justification for the failure to submit the information in the first instance."

Excelsior 57th Corp. v. Excel Associates, 126 A D 3d 479 (1st Dept. 2015) – "The motion court improvidently granted defendant's motion to renew on the basis of an

estoppel certificate. Defendant has not demonstrated a reasonable excuse for not presenting the estoppel certificate earlier [citation omitted]. Defendant has made no showing that the estoppel certificate, which was kept in its files, could not have been found by the use of due diligence."

Matter of Pasanella v. Quinn, 126 A D 3d 504 (1st Dept. 2015) – "Although a party seeking renewal should offer a reasonable justification for failing to present any new facts on the prior motion [citation omitted], 'courts have discretion to relax this requirement and to grant such a motion in the interest of justice.'"

AJ Holdings Group, LLC v. IP Holdings, LLC, ___ A D 3d ___, 2015 WL 3618228 (1st Dept. 2015) – "The IAS court correctly held that plaintiff's motion to 'renew' its previous summary judgment motion was actually an untimely motion to reargue, as plaintiff based it not on any newly discovered information, but on the theory that the IAS court had 'overlooked' the integration clause in the agreement." Accordingly, the appeal from that order was dismissed, since denials of motions to reargue are not appealable.

Mid Island, L.P. v. Kripalani, 44 Misc 3d 38 (App.Term 2d Dept. 2014) – The judgment in this action erroneously states that it was based upon a stipulation. That error would prevent defendant-tenant from appealing. Defendant's remedy is not a motion to renew or reargue. Such a motion "addresses a prior motion and order. Instead, tenant's motion should have been considered as one to vacate or modify the May 11, 2012 final judgment pursuant to CPLR 5015(a) [citations omitted], as well as to correct the final judgment pursuant to CPLR 5019(a), so that it would properly reflect the fact that it had been entered after a trial rather than upon stipulation."

SANCTIONS

CONTEMPT

Matter of Schmitt v. Piampiano, 117 A D 3d 1478 (4th Dept. 2014) – A Court may hold a person in criminal contempt only when that person has willfully violated "an unequivocal mandate." Here, respondent Justice held petitioner attorney in contempt for questioning a prosecution witness in a criminal trial as to whether the witness was "convicted" of a robbery. The record showed that respondent had agreed to permit petitioner to question the witness about a youthful offender adjudication because "the witness had opened the door to such testimony." But respondent "did not unequivocally mandate that petitioner was precluded from asking the witness whether he was 'convicted' of robbery."

Williams v. Striney, N.Y.L.J., 1202660355715 (Sup.Ct. Essex Co. 2014)(Muller, J.) – Defendant here may not be held in contempt for failure to pay a money judgment, "because the judgment did not include any particular deadline for payment." However,

"the defendant should be held in contempt for her failure to return plaintiff's personal property, as the judgment specifically directed the property to be returned within 10 days of service."

Matter of Highbridge Broadway, LLC v. Assessor of the City of Schenectady, 124 A D 3d 1193 (3d Dept. 2015) – "Because disobeying a court's order issued without subject matter jurisdiction may not be punishable as a contempt [citations omitted], petitioner's motion for contempt was properly denied."

PART 130

Marx v. The Rosalind, N.Y.L.J., 1202640083087 (Sup.Ct. Suffolk Co. 2014)(Spinner, J.) – The Court was compelled to declare a mistrial as the result of a series of improper questions posed by counsel for defendant in front of the jury. The Court concludes that the appropriate sanction is to direct "that the defendant's counsel or her firm, reimburse plaintiff's counsel for the expenses incurred as a result of the frivolous conduct and mistrial." Those costs will include the attorney's fees incurred during the days of trial, the cost of trial transcripts, and the costs of testifying experts.

The Board of Managers of Foundry at Washington Park Condominium v. Foundry Development Co., Inc., 44 Misc 3d 550 (Sup.Ct. Orange Co. 2014)(Marx, J.) – Upon a finding of frivolous conduct, a Court may award attorney's fees as "costs," even when the injured party will not itself be required to pay those fees. "The purpose of the fee award was to compensate BSRB for the costs incurred in defending itself against a frivolous action. The nature of the fee arrangement between BSRB and its counsel does not provide a basis upon which Mr. Suarez can escape enforcement of the attorney's fee award." And "the fact that BSRB was represented, in part, by counsel obtained and paid for by its malpractice carrier should not inure to Mr. Suarez's benefit."

OTHER SANCTIONS

Matter of Richard N., 45 Misc 3d 632 (Sup.Ct. Queens Co. 2014)(Ritholtz, J.) – "What is the appropriate sanction for an impaneled juror who intentionally abandons a summary jury trial after being charged on the law, and before deliberations, and, further, misleads the court as to his whereabouts?" The Court here discusses, but abjures the use of, contempt sanctions. Instead, relying upon the Court's "inherent power," to serve "warning to similar-minded persons who are selected as jurors, that absconding during the trial, and then deceiving the Court, is not only irresponsible behavior, but carries repercussions," the Court fines the juror $250, and directs the Clerk to maintain his name "in the general pool, and he may be called again for jury service in the near future."

PROVISIONAL REMEDIES

ATTACHMENT

Sheppard, Mullin, Richter & Hamilton LLP v. Strenger, N.Y.L.J., 1202726276968 (Sup.Ct. N.Y.Co. 2015)(Rakower, J.) – Plaintiff "has demonstrated that a cause of action for breach of the Security Agreement exists, a probability of success on the merits, and that the amount sought exceeds all counterclaims of which Sheppard Mullin has any knowledge. Pursuant to CPLR 6201, the grounds for attachment of the Collateral against County Holding and LNS Corp. is that each entity is a foreign corporation organized under the laws of the State of California and not qualified to do business in the State of New York." An order of attachment was therefore granted.

PRELIMINARY INJUNCTION

Wang v. Wong, N.Y.L.J., 1202669229279 (Sup.Ct. Queens Co. 2014)(McDonald, J.) – Plaintiff seeks to preliminarily enjoin defendant from defaming plaintiff or his business. That motion is denied. "A balancing of the equities does not favor restraining the defendant's first amendment rights of free speech. The plaintiff has not shown that any injury he is likely to sustain will be more burdensome to him than the harm likely to be caused to the defendant. To restrain the defendant's statements at this time would constitute a prior restraint on free speech." And "the courts have held that absent extraordinary circumstances, injunctive relief should not be issued in defamation cases [citation omitted]. Where there is no evidence of a sustained campaign to interfere with the plaintiff's business by the use of false statements, a claim for injunctive relief does not lie."

NY Great Stone Inc. v. Two Fulton Square LLC, 47 Misc 3d 720 (Sup.Ct. Queens Co. 2015)(Ritholtz, J.) - In *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N Y 2d 630 (1968), the Court of Appeals provided a mechanism by which tenants, served with notice of default, terminating the lease after a notice period, might obtain an injunction (since universally known as a "*Yellowstone*" injunction), tolling the running of the notice period while the parties litigate the question whether the tenant is, in fact, in default. "Essential to obtaining a *Yellowstone* injunction is a demonstration by movant that it desires and has the ability to cure the alleged default [citation omitted]. In the instant case, the subject lease and rider impose an obligation on the tenant to procure and maintain general liability insurance from the commencement of the lease throughout the term of the tenancy that names the landlord as an additional insured." The tenant's failure to maintain a policy throughout the tenancy "constitutes a material default of the terms of the lease [citations omitted]. A default of this type is incurable as a prospective insurance policy does not protect a landlord against unknown claims that might arise during the period in which no coverage existed." Thus, "*Yellowstone* relief is unavailable to avoid forfeiture."

LIDC I, LLC v. Sunrise Mall, LLC, 46 Misc 3d 885 (Sup.Ct. Nassau Co. 2014)(Palmieri, J.) – "A *Yellowstone* injunction is intended to maintain the status quo so that a commercial tenant, threatened by a termination of its lease, can protect its leasehold investment by obtaining a stay tolling the cure period and avoid a forfeiture of its lease [citations omitted]. In order to qualify for the injunction, the tenant must demonstrate that (1) it holds a commercial lease, (2) it received a notice of default, a notice to cure, or a threat of termination of the lease, (3) it made its request for the injunction prior to both termination of the lease and the period to cure, and (4) it is prepared and has the ability to cure the alleged default by any means short of vacating the premises [citations omitted]. The required showings are less stringent than what is required for a preliminary injunction [citation omitted], and a demonstration of probable success on the merits is not a prerequisite for relief [citation omitted]. However, all the required showings must be made, including the ability to cure a rent default, if that is the basis of the landlord's action against the tenant, or the injunction will be denied." Here, plaintiff seeks to enjoin termination based upon failure to pay rent. But, "the plaintiffs have not completed construction, have no operating businesses generating income, and have not pointed to any other independent source of funds, or that access to sufficient funds to cure the rent default is imminent. The court accordingly finds that they have failed to satisfy that prong of the required showings for a *Yellowstone* injunction that they are prepared and have the ability to cure the rent default."

NOTICE OF PENDENCY

Gordon v. Barrett, N.Y.L.J., 1202673731595 (Sup.Ct. Kings Co. 2014)(Schmidt, J.) – "'At common law, the doctrine of *lis pendens* provided that any person who purchased real property that was the subject of litigation was presumed to have constructive notice of the dispute and was bound by the judgment in the action as if he or she were a party to it' [citation omitted]. Thus, a search of all court records was required under the common-law *lis pendens* doctrine to determine whether real property in which a purchaser sought an interest was the subject of pending litigation [citation omitted]. Because this cumbersome process of searching through court records was seen as an intolerable burden effectively restraining alienation of real property, 'the common-law *lis pendens* doctrine was replaced in most states by statutes requiring the filing of a notice of pendency before a would-be purchaser would be charged with notice of the prior interest [citation omitted]. This reduced the harshness of the former common-law rule because the notice of pendency is now filed with the records pertaining to the real property itself, and third persons are chargeable with knowledge only of what appears in the records filed in the central registry [citation omitted]. The primary purpose of the notice of pendency procedure set forth in CPLR article 65 is to furnish a substitute for actual notice of pending litigation [citation omitted]. On the other hand, once a notice of pendency expires, or is vacated or canceled, it is considered to be a 'nullity' – a 'void' that cannot be filled [citation omitted]. The authorities are nearly uniform in their conclusion that a

lapsed notice of pendency in a subsisting action does not impart inquiry notice to a prospective purchaser despite his or her actual knowledge of the lapsed notice of pendency." Thus, here, "even if Associates actually knew of the existence of the lapsed notice of pendency in the prior action, such knowledge would not, in and of itself, defeat its status as a *bona fide* purchaser for value."

123 Powell, LLC v. Camacho, N.Y.L.J., 1202665019281 (Sup.Ct. Queens Co. 2014) (McDonald, J.) – "'A person claiming to be a *bona fide* purchaser for value in a case involving a prior contract of sale must demonstrate, *prima facie*, that he or she purchased the property for valuable consideration, that he or she did not have notice of the prior contract and the he or she did not have knowledge of facts that would lead a reasonably prudent purchaser to make inquiry about the prior contract [citations omitted]. Therefore, whether a party has actual or inquiry notice of a competing interest is a relevant consideration in determining if that party is a *bona fide* purchaser entitled to the protection of the Recording Act."

Right Choice Holding, Inc. v. 199 Street LLC, 48 Misc 3d 227 (Sup.Ct. Kings Co. 2015) (Rivera, J.) – "It is well settled that a second notice of pendency cannot be filed when a prior notice of pendency for the same property has been canceled for failure to comply with the statutory requirements." This "no second chance rule was codified by adding CPLR 6516 to article 65 in 2005. CPLR 6516(c) provides that a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective. CPLR 6516(c) carves an exception for foreclosure actions."

Romanoff v. Romanoff, 125 A D 3d 415 (1st Dept. 2015) – "The notice of pendency filed in this action was correctly cancelled as a prohibited successive notice affecting the same property [citation omitted]. 'An expired or cancelled notice of pendency may not be refiled on the same cause of action or claim.'"

SEIZURE OF CHATTEL

Southeast Financial, LLC v. Broadway Towing, Inc., 117 A D 3d 715 (2d Dept. 2014) – "'An order of seizure is not a final disposition of a matter but is a *pendente lite* order made in the context of a pending action where the movant has established, *prima facie*, a superior right in the chattel' [citations omitted]. Pursuant to CPLR 7102, an application for an order of seizure must be supported by an affidavit that 'clearly identifies the chattel to be seized' and states, among other things, facts demonstrating 'that the plaintiff is entitled to possession' of the chattel, that 'the chattel is wrongfully held by the defendant,' and that 'no defense to the claim is known to the plaintiff' [citations omitted]. Here, in support of their motion, the plaintiffs submitted, among other things, evidence demonstrating that they have a perfected security interest in the subject vehicles that is enforceable under Florida and New York law, that they are entitled to possession of the

vehicles pursuant to the terms of two financing agreements entered into by the purchasers of the subject vehicles, and that there is no valid defense to their claim [citations omitted]. Since the plaintiffs' evidence demonstrated that 'it is probable they will succeed on the merits and the facts are as stated in the affidavit' [citation omitted], the Supreme Court properly granted the plaintiffs' motion, in effect, pursuant to CPLR 7102 for an order of seizure."

ACCELERATED JUDGMENT

CPLR 3211

Bank of New York v. Cepeda, 120 A D 3d 451 (2d Dept. 2014) – "Supreme Court abused its discretion in, *sua sponte*, directing dismissal of the complaint and the cancellation of the notice of pendency filed against the subject property for lack of standing. A court's power to dismiss a complaint, *sua sponte*, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal [citations omitted]. Here, the Supreme Court was not presented with extraordinary circumstances warranting *sua sponte* dismissal of the complaint and cancellation of the notice of pendency. Since the defendants did not answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing [citations omitted]. Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant a *sua sponte* dismissal of the complaint by the court."

Williams v. North Shore LIJ Health System, 119 A D 3d 935 (2d Dept. 2014) – "The present action to recover damages for medical malpractice and wrongful death was commenced against more than 112 defendants. At a June 10, 2011, precalendar conference, the plaintiff's counsel was unable to explain to the court why so many defendants were named in the action. The court indicated that the case would be unable to proceed, based upon logistics, while so many extraneous defendants remained in the action. At a subsequent pretrial conference, held on October 27, 2011, the court directed the plaintiff's counsel to file a bill of particulars stating the allegations of negligence as to each specific defendant by December 15, 2011. On December 15, 2011, the court restated its directive, ordering the plaintiff to provide all defendants with a statement of malpractice claimed against each party, including dates of the alleged malpractice, by January 12, 2012. The plaintiff was unable to fully comply with the court's order, and the court subsequently signed an order settled on notice directing the dismissal of the complaint against the respondents. Contrary to the plaintiff's contention, dismissal of the complaint insofar as asserted against the respondents, *sua sponte*, was proper under the circumstances of this case."

Uptown Healthcare Management, Inc. v. Allstate Insurance Company, 117 A D 3d 542 (1st Dept. 2014) – "Where an amended pleading is submitted in response to a pre-answer motion to dismiss, the provident course of action for the motion court is to include the amended complaint in the record on the pending motion, which should then be granted or denied based on the sufficiency of the amended pleading."

Collins v. Santoro, N.Y.L.J., 1202677257352 (Sup.Ct. N.Y.Co. 2014)(Schweitzer, J.) – "Plaintiffs seek to avoid the court's dismissal of this action by filing an amended complaint" while the motion to dismiss was pending. "This tactic is unsuccessful. 'An amended pleading does not "automatically abate a motion to dismiss that was addressed to the original pleading."'" For, as the First Department has determined, "'it has been held that the motion "abates," that it must automatically be denied as moot since it refers to a pleading which has been superseded. This approach, which only invites additional motion practice, should be restricted to those situations where the amendments make a significant change in the nature of the action.'"

Sriram v. GCC Enterprises, Inc., N.Y.L.J., 1202671940652 (Sup.Ct. Suffolk Co. 2014)(Emerson, J.) – In response to plaintiff's motion for summary judgment, "the defendant cross moves to dismiss the complaint pursuant to CPLR 3211(a)(1). A motion to dismiss a cause of action under CPLR 3211(a)(1) must be made before service of the responsive pleading, i.e., before answering [citations omitted]. A motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading [citation omitted]. Summary judgment is, therefore, a post-answer device [citation omitted]. Any of the grounds on which a CPLR 3211 motion could have been made before service of the answer can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved [citations omitted]. The defendant has answered the complaint and raised the issues that it now raises as an affirmative defense. Thus, although the cross motion is denominated as a motion to dismiss pursuant to CPLR 3211(a)(1), it is, in effect, a motion for summary judgment on that ground."

Bailey v. Peerstate Equity Fund, L.P., 126 A D 3d 738 (2d Dept. 2015) – CPLR 3211(e) provides in part that a party may move to dismiss a pleading on "one or more of the grounds set forth" in CPLR 3211(a), but that "no more than one such motion shall be permitted." This "single motion rule" precludes a second motion to dismiss causes of action restated in an amended complaint.

Hui v. New Clients, Inc., 126 A D 3d 759 (2d Dept. 2015) – The existence of an arbitration agreement between the parties is not a ground to dismiss a complaint pursuant to CPLR 3211(a)(1).

Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc., 120 A D 3d 431 (1st Dept. 2014) – "Plaintiff alleges that defendant, a senior executive search firm retained by plaintiff to recruit senior level executives to help it develop its hotel division, misrepresented that a potential placement, nonparty David Bowd, was not subject to a nonsolicitation agreement with his former employer. Plaintiff further alleges that it relied on this misrepresentation in hiring Bowd, and subsequently incurred legal expenses to defend a lawsuit brought by his former employer against plaintiff and the employee for breach of a restrictive covenant between the employee and his former employer." Defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(1). The "documentary evidence" defendant relied upon was an e-mail sent by Bowd to plaintiff, revealing the nonsolicitation agreement. The majority finds that e-mail to be insufficient "documentary evidence" to warrant dismissal. "The courts of this state have grappled with the issue of what writings do and do not constitute documentary evidence, since the term is not defined by statute. 'Judicial records, such as judgment and orders, would qualify as "documentary," as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence' [citation omitted]. To qualify as 'documentary,' the paper's content must be 'essentially undeniable and assuming the verity of the paper and the validity of its execution, will itself support the ground on which the motion is based (Neither the affidavit nor the deposition can ordinarily qualify under such a test.).'" The majority agrees that "in our electronic age, emails can qualify as documentary evidence if they meet the 'essentially undeniable' test." But, "the email at issue here simply fails this test." For, the e-mails here "do not, standing on their own, conclusively establish a defense to the claims set forth in the complaint. While they may indicate that Bowd put defendants on notice of potential employment restrictions, other letters indicate that Bowd had, in fact, accepted the offer of employment days before he sent the emails in question. Because defendant has not 'negated beyond substantial question' the allegation of reasonable reliance, and the submissions raise factual issues concerning the circumstances and communications underlying plaintiff's hiring of Bowd, it cannot be concluded that plaintiff has no causes of action for fraudulent and negligent misrepresentation." The dissenter argued that "Bowd's first email on June 10, 2009 plainly put plaintiff on notice of the restrictions imposed upon him by his employment agreement with MHG. The email therefore dispels any notion that plaintiff hired Bowd on June 29, 2009 in justifiable reliance on defendant's alleged representation that Bowd was not subject to such restrictions." The earlier June 4, 2009 "letter of employment" does not, the dissent argued, merit a different result. "By its own terms, the 'letter is not to be construed as an implied contract of employment.'"

Art and Fashion Group Corporation v. Cyclops Production, Inc., 120 A D 3d 436 (1st Dept. 2014) – "A cause of action may be dismissed under CPLR 3211(a)(1) 'only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law' [citation omitted]. In other words, the

documents relied upon must 'definitely dispose of the plaintiff's claim' [citation omitted]. Email correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211(a)(1) [citation omitted]. Factual affidavits, however, do not constitute documentary evidence within the meaning of the statute [citation omitted]. In support of the motion, defendants submitted three factual affidavits and a series of emails exchanged between the parties. The affidavits, 'which do no more than assert the inaccuracy of plaintiffs' allegations' [citation omitted] cannot be considered, and the emails do not conclusively establish a defense as a matter of law. There is no merit to defendants' assertion that the emails show, as a matter of law, that no joint venture agreement was reached and that the parties were merely engaging in preliminary negotiations. 'Even where the parties acknowledge that they intend to hammer out details of an agreement subsequently, a preliminary agreement may be binding' [citation omitted]. Although some parts of the emails suggest that all of the details of the joint venture were not fully agreed upon, the emails, when read in their entirety, do not conclusively refute plaintiffs' allegations that an oral joint venture agreement had in fact been reached."

MKC-S, Inc. v. Laura Realty Co., N.Y.L.J., 1202653274369 (Sup.Ct. Kings Co. 2014) (Demarest, J.) – The corporate tenant here is barred from commencing this action for a *Yellowstone* injunction because it regularly does business in New York without having become authorized to do so. The Court finds that "acting continuously as the sub-landlord for commercial property is 'doing business' within the meaning of BCL §1312(a)." But, rather than dismissing the action, the Court continues the stay of the running of the termination period "to afford the plaintiff an opportunity to cure by obtaining authority to do business in New York."

Jadron v. 10 Leonard Street, LLC, 124 A D 3d 842 (2d Dept. 2015) – "Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action [citations omitted]. A court may dismiss an action pursuant to CPLR 3211(a)(4) where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same [citations omitted]. It is not necessary that 'the precise legal theories presented in the first action also be presented in the second action' [citations omitted]. The critical element is whether both suits arise out of the same subject matter or series of alleged wrongs." Here, "the sole relief sought in the [earlier] personal injury action is a money judgment for damages. The instant action arises from the post-accident transfer of title of approximately one half of 10 Leonard's property to 10 Boulevard, and the plaintiff seeks various relief authorized by Debtor and Creditor Law article 10, including setting aside the alleged fraudulent conveyance. Contrary to the defendants' contention, the claims asserted in both actions are not 'sufficiently similar' to warrant dismissal simply because the plaintiff raised an argument pertaining to constructive fraud as a basis for the imposition of

liability upon 10 Boulevard for violation of Labor Law §240(1) in the personal injury action."

Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 115 A D 3d 128 (1st Dept. 2014) – 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 [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 dissenters urged that "a motion to dismiss for failure to state a cause of action is no longer, as it once was, limited to the face of the complaint (CPLR 3211, subd. [c]). The question now is whether the plaintiff has a cause of action, not simply whether he has stated one. Thus, the court may consider affidavits and other extrinsic proof to determine whether a fact essential to the plaintiff's cause of action is lacking." But, "today, however, this court has held that these affidavits 'are not to be examined for the purpose of determining whether there is evidentiary support for the pleading.' Hence, the defendant can no longer move to dismiss under this section no matter how conclusively he can show that the plaintiff's cause of action, though properly pleaded, has no basis in fact." 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 then, there has been much confusion

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*. Then, in *Lawrence v. Graubard Miller*, 11 N Y 3d 588 (2008), the Court of Appeals, citing *Rovello*, but neither *Guggenheimer* nor *Nonnon*, held that, "affidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 *unless* they 'establish conclusively that petitioner has no claim or cause of action'" [emphasis by the Court]. 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*]. Here, the complaint asserts that Bally did not 'employ or properly employ lifesaving measures regarding Miglino' after he collapsed. Bally's motion is supported by affidavits that contradict this claim, by purporting to show that the minimal steps adequate to fulfill a health club's limited duty to a patron apparently suffering a coronary incident – i.e., calling 911, administering CPR and/or relying on medical professionals who are voluntarily furnishing emergency care – were, in fact, undertaken. But, as noted before, 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." Here, in *Basis*, the majority opinion for this divided Court holds that "the concurrence's contention that this Court is limited to the pleadings, when reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), is not a completely accurate statement of the law. 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]. A CPLR 3211(a)(7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, 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 v. Bally Total Fitness of Greater N.Y., Inc.*, discussed directly above]. 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."

Liberty Affordable Housing, Inc. v. Maple Court Apartments, 125 A D 3d 85 (4th Dept. 2015) – In *Rovello*, "the Court of Appeals held that summary dismissal is appropriate under CPLR 3211(a)(7) when the defendant's evidentiary submissions 'establish conclusively that plaintiff has no cause of action.' We now consider whether that holding remains viable in light of the Court's recent decision in *Miglino*." Agreeing with the majority in the First Department decision in *Basis Yield*, discussed directly above, the Court concludes 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."

Clarke v. Laidlaw Transit, Inc., 125 A D 3d 920 (2d Dept. 2015) – Here, the Second Department assesses 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.'"

Shaffer v. Gilberg, 125 A D 3d 632 (2d Dept. 2015) – "Dismissal pursuant to CPLR 3211(a)(7) is warranted if the evidentiary proof disproves an essential allegation of the complaint, even if the allegations of the complaint, standing alone, could withstand a motion to dismiss for failure to state a cause of action."

Lee v. New York City Industrial Development Agency, 121 A D 3d 548 (1st Dept. 2014) – "In the circumstances presented, the court improperly considered affidavits and deposition testimony submitted by defendant in deciding its CPLR 3211(a)(7) motion to dismiss the complaint. CPLR 3211(a)(7) 'limits the court to an examination of the pleadings to determine whether they state a cause of action' [citing *Miglino* and *Rovello*]. 'Modern pleading rules are "designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one"' [citing *Rovello*]. Here, defendant's submission regarding 'special employment' did not negate the elements of plaintiffs' complaint, which asserts common law negligence. Indeed, in their opposition papers, plaintiffs argued that since they had not yet had discovery, a motion for summary judgment was premature, and they 'requested' that the motion court decline to treat defendant's motion as a motion for summary judgment."

Siskin v. Cassar, 122 A D 3d 714 (2d Dept. 2014) – When "a defendant has submitted evidence in support of a motion to dismiss pursuant to CPLR 3211(a)(7), and the motion has not been converted into one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she 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' [citing, *inter alia*, *Guggenheimer*]. Dismissal pursuant to CPLR 3211(a)(7) is warranted if the evidentiary proof disproves an essential allegation of the complaint, even if the allegations of the complaint, standing alone, could withstand a motion to dismiss for failure to state a cause of action."

Soodoo v. LC, LLC, 116 A D 3d 1033 (2d Dept. 2014) – "On a motion to dismiss a pleading pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the nonmoving party the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory [citations omitted]. 'Whether the pleading will later survive a motion for summary judgment, or whether the non-moving party will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss.'"

Aqua NY of Sea Cliff v. Buckeye Pipeline Company, L.P., 119 A D 3d 829 (2d Dept. 2014) – "In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the sole criterion is whether from the complaint's 'four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law' [citing, *inter alia*, *Guggenheimer*]. Although the facts pleaded are presumed to be true and are to be accorded every favorable inference [citation omitted], 'bare legal conclusions or factual claims flatly contradicted by the record are not entitled to any such consideration' [citations omitted], nor are legal conclusions or factual claims which are inherently incredible."

Warsowe Acquisition Corporation v. DeNoble, 116 A D 3d 949 (2d Dept. 2014) – "Pursuant to CPLR 3211(e), the defendant John DeNoble, Jr. was required to move to dismiss the complaint for lack of proper service within 60 days following the service of his answer, unless an extension of time was warranted on the ground of undue hardship. DeNoble's cross motion to dismiss the complaint insofar as asserted against him for lack of proper service was untimely, and was not supported by an adequate showing of undue hardship that prevented him from making the motion within the required 60-day period [citations omitted]. Contrary to DeNoble's contention, any delay by the plaintiff in prosecuting the action did not prevent him from making a timely motion to dismiss on the ground of improper service within the 60-day period."

TIMING OF MOTIONS FOR SUMMARY JUDGMENT

Carobene v. City of Glen Cove, N.Y.L.J., 1202646597599 (Sup.Ct. Nassau Co. 2014) (Winslow, J.) – 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." Berating the "sloppy practice threatening the integrity of our judicial system," the Court declined to permit a violation of the statutory deadlines. 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." Last 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 has sued two different hospitals – HSS

and HJD – that treated him at different times, claiming that both failed to advise and perform necessary surgery. HJD timely moved for summary judgment; HSS 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 [citations omitted]. The problem in the case at bar is that HSS's 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.'" Here, "to the extent HSS's motion was directed at the complaint, as opposed to any cross claims by HJD, and was not made returnable the same day as the original motion, 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." For, "the argument that HSS's motion should be considered on the merits because it 'sought relief on the same issues raised in HJD's timely motion,' ignores the distinction in the CPLR between motions and cross motions and perpetuates an increasingly played end run around the Court of Appeals' bright line rule in *Brill*. Even if we were to find that the Court of Appeals intended for an exception to be carved out of *Brill* for incorrectly labeled 'me too cross motions,' that is, motions relying on the arguments and evidence of the originally filed motions, to the extent HSS's motion against a nonmoving party can be properly considered such a motion, the motion court correctly found that it is not merely a duplication of HJD's timely motion." For, here, "because HSS and HJD have different treatment histories with plaintiff, HJD's timely motion did not clearly put plaintiff on notice of the need to gather evidence in opposition to the arguments ultimately proffered by the HSS defendants." 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 dissenters argued that the majority's interpretation of *Brill* constitutes "an unnecessarily rigid application of CPLR 3212(a),

contravening the sound policy considerations underlying the decision and the intent expressed by the Legislature in amending the statute." For, "the practice sought to be deterred in *Brill* is delay occasioned by the submission of a summary judgment motion on the eve of trial, thereby staying proceedings to the prejudice of litigants who have applied their resources in preparation for trial of the issues." Here, however, "the proceedings were already stayed by the concededly timely summary judgment motion brought by HJD. Thus, the primary objective of *Brill* to discourage dilatory conduct is not implicated." The dissent agreed with the majority that HSS's 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, "neither the motion court nor the majority identifies any prejudice that was incurred by any party due to HSS's motion that might warrant requiring HSS to forfeit summary determination. Particularly absent from the discourse is any consideration of the significant burden to be imposed on the court in presiding over a trial against HSS as opposed to proceeding summarily by way of motion." And "the majority thereby dispenses with the salutary aspects of summary disposition acknowledged in *Brill* for no apparent purpose." Indeed, "rote application of the summary judgment provision, which permits the court to 'set a date after which no such motion may be made,' leads to the result advocated by the majority – strict rejection of the motion as untimely without taking into consideration the circumstances of the case, relegating the moving party to litigating its position at trial. However, it is a well-established rule of statutory construction that a court should avoid any interpretation that leads to absurd and unintended consequences." Accordingly, the dissent would hold that "a late motion filing is properly entertained when it raises nearly identical issues to one timely made." And, here, "the modestly late motion submitted by HSS sought relief on the same issues raised in HJD's timely motion." Both "seek dismissal of the complaint on the identical ground – that it was not a departure from good and accepted medical practice to forego surgery in favor of a conservative treatment plan." Here, in *Carobene*, "the Court notes an apparent discord between the rule in *Kershaw* and the Court's power to 'search the record' and grant summary judgment to any party without the necessity of a cross-motion. *See* CPLR 3212(b). In this Court's view, however, these principles can be reconciled, or synthesized, into a new rule: summary judgment may be granted to any party without the necessity of a cross-motion, or even upon an 'improperly labeled' cross-motion, but only upon consideration of the evidence presented on the timely-filed motion. If a party other than the original moving party seeks to submit evidence on its own behalf, it must do so in a timely motion or a proper cross-motion, or it must show good cause for its delay."

Borges v. Placeres, 123 A D 3d 611 (1st Dept. 2014) – Citing its *Kershaw* decision discussed above, the First Department holds that "the motion for summary judgment did not seek relief against a party whose timely motion for summary judgment was returnable

the same day, and therefore did not fall within the exception permitting a court to entertain an untimely summary judgment motion."

Derrick v. North Star Orthopedics, PLLC, 121 A D 3d 741 (2d Dept. 2014) – In this medical malpractice action, 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.'"

Wernicki v. Knipper, 119 A D 3d 775 (2d Dept. 2014) – "The Supreme Court improvidently exercised its discretion in denying, as untimely, the plaintiff's cross motion for summary judgment. While the cross motion was made more than 120 days after the note of issue was filed and, therefore, was facially untimely [citation omitted], an untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds [citations omitted]. 'In such circumstances, the issues raised by the untimely cross motion are already properly before the motion court and, thus, the nearly identical nature of the grounds may provide the requisite good cause [citation omitted] to review the merits of the untimely cross motion. Notably, a court, in deciding the timely motion, may search the record and award summary judgment to a nonmoving party' [citations omitted]. Therefore, the Supreme Court should have entertained the plaintiff's cross motion for summary judgment."

Kritzer v. Ventura Insurance Brokerage, Inc., N.Y.L.J., 1202722118897 (Sup.Ct. N.Y.Co. 2015)(Billings, J.) – "When the court sets the time within which a party may move for summary judgment under CPLR 3212(a), the court may not excuse lateness without a showing of good cause [citations omitted]. Defendant failed to seek an extension of time to move for summary judgment either before or when seeking that relief [citations omitted], and only in reply to plaintiffs' opposition insists that the 60 days stipulated by the parties and approved by the court was a mistake [citations omitted]. While the mistaken belief of defendant's attorney that no deadline shorter than the 120 days provided by CPLR 3212(a) had been imposed may explain defendant's failure to seek an extension, an attorney's inadvertence does not amount to the good cause required to excuse the lateness [citations omitted]. Therefore the court denied defendant's motion insofar as it seeks summary judgment under CPLR 3212 [citations omitted]. CPLR 3212(a), however, permitting the court to 'set a date after which no such motion may be made,' applies only to motions for summary judgment. No authority permits the court to abrogate CPLR 3211(e)'s provision that a motion pursuant to CPLR 3211(a)(7) failure to state a claim, 'may be made at any time' [citation omitted]. While the parties themselves stipulated to a deadline for 'dispositive motions' [citation omitted],

plaintiffs maintain only that defendant's motion pursuant to CPLR 3212(b) is untimely under 3212(a) and not that its motion pursuant to CPLR 3211(a)(7) is untimely under 3211(e). Nor do plaintiffs offer any support for simply assuming that 'dispositive motions' includes a motion pursuant to CPLR 3211(a)(7). Absent evidentiary or legal support for such an interpretation, CPLR 3211(e)'s authorization that a motion based on CPLR 3211(a)(7) 'may be made at any time' and CPR 3212(a)'s limitation to motions for summary judgment, 'dispositive motions' in this context must be interpreted as encompassing only motions for summary judgment."

Freire-Crespo v. 345 Park Avenue L.P., 122 A D 3d 501 (1st Dept. 2014) – The preliminary conference order in this action provided that the last date for dispositive motions was 120 days after filing of the note of issue. "The reassignment of the matter thereafter to a part whose rules provide for a standard 60-day time limit did not serve to eliminate that provision of that preliminary conference order, in the absence of a further order or directive explicitly providing for a reduced time limit, or some other means of directing that the time limits of the new part's rules would supersede the preliminary conference order."

Sweeney v. County of Niagara, 122 A D 3d 1432 (4th Dept. 2014) – The note of issue here was filed on April 7, 2010. In response to defendant's motion to strike, the Court directed, in a May 10, 2010 order, that plaintiff comply with defendant's discovery demands, and that, "if such discovery is not obtained within sixty (60) days by the parties, the Note of Issue shall be stricken as of July 12, 2010." Plaintiff did not comply with the order. Defendant moved for summary judgment in December 2011. "A conditional, self-executing order, which requires discovery to be complied with by a specific date, becomes absolute on the specified date if the condition has not been met." Thus, "because plaintiff undisputedly failed to provide the requested discovery materials within that time period, the note of issue was stricken as of July 12, 2010. Where, as here, a note of issue is struck by court order, it cannot commence the running of the time limit [to move for summary judgment] set forth in CPLR 3212(a)."

Exceptional Medical Care, P.C. v. Fiduciary Insurance Company, 43 Misc 3d 75 (App.Term 2d Dept. 2014) – "It was improper for the Civil Court to consider plaintiffs' untimely cross motion for summary judgment in the absence of a showing by plaintiffs of good cause for not serving the motion within 120 days of the filing of the notice of trial, the Civil Court equivalent of a note of issue." And, "to the extent plaintiffs contend that defendant never objected to their cross motion as untimely, we conclude that the absence of an objection does not constitute good cause to consider an otherwise untimely motion. As noted, the 120-day time limit specified in CPLR 3212(a) is strict and serves to eliminate the 'sloppy practice' of late summary judgment motions and promote 'a habit of compliance with the statutory deadlines' for such motions."

SUMMARY JUDGMENT

Reyes v. Sanchez-Peña, 117 A D 3d 621 (1st Dept. 2014) – "The motion court erred in denying defendants' motions on the ground that they failed to annex complete copies of the pleadings, including those of the non-movants, in their motion papers [citation omitted]. Since each moving party provided copies of the pleadings pertaining to the claims against that party, the record was complete for purposes of deciding the motions."

Scholem v. Acadia Realty Limited Partnership, 45 Misc 3d 562 (Sup.Ct. Suffolk Co. 2014)(Emerson, J.) – "Although multiple summary judgment motions in the same case are discouraged, the defendant's motion does not violate the general proscription against successive summary judgment motions. Discovery is now complete, and the record is fully developed. The motion is based, at least in part, on deposition testimony that was elicited after this court's denial of the defendant's earlier cross motion for summary judgment [citation omitted]. The defendant raises issues that were not raised on the earlier motion and that are now ripe for summary judgment. The current motion, in addition to being substantively valid, will further the ends of justice while eliminating an unnecessary burden on the resources of the courts [citation omitted]. Entertaining a second summary judgment motion under these circumstances is a better use of judicial resources than conducting a full trial [citation omitted]. Moreover, the court notes that it was the plaintiff who first moved for summary judgment. The defendant cross-moved for summary judgment in response thereto. It appears that the plaintiff is attempting to obtain a tactical advantage by arguing that the present motion should be denied because it is a successive motion for summary judgment. Contrary to the plaintiff's contentions, the denial of the defendant's prior cross motion is not the law of the case. A denial of summary judgment on the merits is merely a determination that the moving party has failed to make the requisite showing at that time [citations omitted]. It does not bar the court from resolving an issue after further discovery [citation omitted], nor does it bind the trier of fact [citation omitted]. An order denying summary judgment only establishes that a question of fact exists for determination at a trial [citation omitted]. It does not establish the law of the case any more than the grant or denial of a temporary injunction."

Kelly v. Foster, 119 A D 3d 1250 (3d Dept. 2014) – "Although successive summary judgment motions are generally discouraged absent 'a showing of newly discovered evidence or other sufficient cause' [citations omitted], where, as here, evidence produced from additional discovery places the motion court 'in a far better position to determine' a legally dispositive issue, the court should not be precluded from exercising its discretion to consider the merits of a subsequent motion."

The New Kayak Pool Corporation v. Kivinoky Cook LLP, 125 A D 3d 1346 (4th Dept. 2015) – Defendant "was not barred by the doctrine of law of the case from filing a second motion for summary judgment. Discovery was not completed at the time of the first motion, and 'where, as here, the second motion is based upon new information obtained

during disclosure, the second motion is not repetitive of the first and the court may rule on the merits of the second motion' [citations omitted]. In any event, 'a subsequent summary judgment motion may be properly entertained when it is substantively valid and when the granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts.'"

Healthcare I.Q., LLC v. Chao, 118 A D 3d 98 (1st Dept. 2014) – "We find that the second summary judgment motion, brought after the pleadings were amended on a substantive issue not previously decided by the court, was procedurally proper. 'Once plaintiff served the amended complaint, the original complaint was superseded, and the amended complaint became the only complaint in the action. The action was then required to proceed as though the original pleading had never been served' [citation omitted]. Thus, defendant's appeal from the prior order denying summary judgment became moot [citation omitted], and 'sufficient cause existed' for his motion for summary judgment dismissing the amended complaint."

Fuller v. Nesbitt, 116 A D 3d 999 (2d Dept. 2014) – A second motion for summary judgment "may be properly entertained where, as here, it is substantively valid, and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts, despite the general rule that successive motions for summary judgment should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause."

Matthew Adam Properties, Inc. v. The United House of Prayer for All People of the Church on the Rock of the Apostolic Faith, 126 A D 3d 599 (1st Dept. 2015) – "Defendants' failure to plead the affirmative defense of waiver in their answer did not preclude them from asserting such defense for the first time on summary judgment, since 'there is no prohibition against moving for summary judgment based on an unpleaded defense where the opposing party is not taken by surprise and does not suffer prejudice as a result.'"

Al Sari v. Alishaev Bros., Inc., 121 A D 3d 506 (1st Dept. 2014) – "The motion court improvidently exercised its discretion in deeming paragraph 3 of plaintiff's statement of undisputed facts admitted. Defendant clearly disputed this paragraph in paragraph 13 of its statement. While it would have been better for defendant to submit a paragraph-by-paragraph response to plaintiff's statement, 'blind adherence to the procedure set forth in rule 19-a' of the Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.70) is not required."

JPMorgan Chase Bank, N.A. v. Clancy, 117 A D 3d 472 (1st Dept. 2014) – "Plaintiff's motion [for summary judgment] was based on two sets of exhibits, one attached to plaintiff's complaint, and the other to an affidavit of plaintiff's employee. The exhibits

would be in admissible form only if plaintiff satisfied the requirements for their admission as business records under CPLR 4518(a). Plaintiff failed to satisfy those requirements. Although a verified pleading may be used anytime an affidavit is called for [citation omitted], here the complaint was verified only by counsel, rather than a person with knowledge. Thus, it was insufficient to establish that the attached documents were admissible under the business records exception to the hearsay rule."

Derrick v. North Star Orthopedics, PLLC, 121 A D 3d 741 (2d Dept. 2014) – In opposition to defendants' motion for summary judgment, in this medical malpractice action, "plaintiff submitted an unsigned and redacted physician's affidavit. Such an affidavit should not be considered in opposition to a motion for summary judgment where the plaintiff does not offer an explanation for the failure to identify the expert by name and does not tender an unredacted affidavit for *in camera* review."

Rivera v. Albany Medical Center Hospital, 119 A D 3d 1135 (3d Dept. 2014) – "Defendants' submission of a medical expert's affidavit with the expert's name redacted is incompetent evidence to support their summary judgment motion. In order to establish a *prima facie* entitlement to judgment as a matter of law, defendants were required to 'tender sufficient, competent, admissible evidence demonstrating the absence of any genuine issue of fact' [citation omitted]. Among other submissions, defendants provided an affidavit from a medical expert whose identity was redacted and who opined on the appropriateness of plaintiff's medical care and the adequacy of the warnings given to plaintiff. Defendants also submitted an unredacted version of the affidavit for Supreme Court's *in camera* review. Because defendants were the movants for summary judgment, their submission of an anonymous expert affidavit was incompetent evidence not proper for consideration upon the motion."

Abreu v. Metropolitan Transportation Authority, 117 A D 3d 972 (2d Dept. 2014) – "'A party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment' [citations omitted]. Abreu and Perez submitted the [expert's] affirmed report and affirmation in opposition to the Westrans defendants' timely cross motion for summary judgment, and the Westrans defendants had the opportunity to refute [the expert's] conclusions in their reply. There is no evidence of prejudice to the Westrans defendants from the plaintiffs' late disclosure of their expert."

Puri v. Solomon, 123 A D 3d 685 (2d Dept. 2014) – Several Appellate Division cases have held that, in moving for summary judgment with respect to liability in a personal injury case, the burden is on plaintiffs to not only demonstrate defendant's negligence, but also their own lack of negligence. Here, however, the Court, reversing the denial of plaintiff's motion for summary judgment as to liability, holds that "plaintiff

demonstrated, *prima facie*, that the defendant driver failed to properly observe and yield to cross traffic coming from the plaintiff's direction of travel before proceeding into the intersection, and that this negligence was the sole proximate cause of the accident [citations omitted]. In opposition, the defendants failed to raise a triable issue of fact with respect to the defendant driver's negligence and the plaintiff's alleged comparative fault."

Anjum v. Bailey, 123 A D 3d 852 (2d Dept. 2014) – "A party seeking summary judgment bears the initial burden of establishing *prima facie* entitlement to such relief, tendering sufficient evidence to eliminate any material issues of fact from the case [citations omitted]. In a personal injury action, to prevail on a motion for summary judgment on the issue of liability, a plaintiff has the burden of establishing, *prima facie*, not only that a defendant was negligent, but also that he or she was free from comparative fault [citations omitted]. Here, the plaintiff established, *prima facie*, that Mejia was negligent by virtue of coming into contact with the plaintiff's vehicle, that Bailey was negligent by pulling her vehicle out of her parking space when it was unsafe to do so in violation of Vehicle and Traffic Law §1162, and that he was free from comparative fault, as he was merely seated within a legally parked vehicle at the time of the accident. However, Bailey's opposition papers, which included her affidavit and the MV-104A accident report form, raised triable issues of fact as to whether Bailey or Mejia were individually nonnegligent, which prevents the plaintiff from obtaining summary judgment against either defendant. This matter involves more than simply a trier of fact's apportionment of fault between both defendants [citations omitted], since conceivably, one defendant or the other could be found to be nonnegligent."

CPLR 3213

Segway of New York, Inc. v Udit Group, Inc., 120 A D 3d 789 (2d Dept. 2014) – "The notice of motion for summary judgment in lieu of complaint did not provide timely notice of the motion to the defendant Andrew Udit, who was served by substituted service pursuant to CPLR 308(2), inasmuch as the notice of motion set a return date that was prior to the expiration of the 30-day period within which that defendant was statutorily entitled to appear [citations omitted]. Furthermore, the copies of the notice of motion served upon the defendants with the summons pursuant to CPLR 3213 contained an affirmative misstatement of the address at which the motion could be defended * * * not simply a misspelling of the correct address for the relevant courthouse. As such, the motion for summary judgment in lieu of complaint was made returnable to a location in Mineola at which the Supreme Court was not located, and at which the motion could not have been opposed. These defects in the notice of motion, under the particular circumstances of this case and in the context of an action commenced pursuant to CPLR 3213, created a greater possibility of frustrating the core principles of notice to the

defendants [citations omitted]. Accordingly, these defects constitute 'jurisdictional defects that courts may not overlook' pursuant to CPLR 2001."

Kaplan v. U.S. Coal Corporation, 115 A D 3d 517 (1st Dept. 2014) – "The agreement sued upon gives plaintiff a put, affording him the right to require defendant to purchase his shares of U.S. Coal stock upon a certain event and upon proper notice, the occurrence of which are not disputed. The agreement sets the nominal price at $5.40 per share, adjusted for 'stock splits, stock dividends and the like.' The agreement also provides that defendant's obligation to make payment for such shares shall be secured by a security interest in certain U.S. Coal assets. Supreme Court properly denied plaintiff's motion for summary judgment in lieu of complaint because determination of the amount to be paid under the agreement requires reference to proof extrinsic to the instrument."

1000 Northern Boulevard of New York Company, LLC v. Singer, N.Y.L.J., 1202653875103 (Sup.Ct. Nassau Co. 2014)(Winslow, J.) – Plaintiff seeks summary judgment in lieu of complaint upon a note which provides, *inter alia*, that it will be payable "commencing upon seven days after execution of the new lease to Imperial Plastic Surgery, LLC, a company licensed to do business in New York, following the same terms and conditions as the previous lease to Anew Allure, LLC, and continuing every week thereafter." The Court concludes that the conditional nature of the obligation precludes relief pursuant to CPLR 3213. Moreover, "outside evidence is necessary to prove plaintiff's claim. In the absence of proof regarding the execution of the new lease and the terms and conditions of both leases, it cannot be determined if or when defendant's obligation to pay commenced."

Von Fricken v. Schaefer, 118 A D 3d 869 (2d Dept. 2014) – "The subject of this action for accelerated relief pursuant to CPLR 3213 is a handwritten instrument dated April 29, 2008, and executed by the defendant before a notary public (hereinafter the document). The document states that the defendant borrowed the sum of $25,000 from her now-deceased mother," and that "she 'will pay her mother back in full with her lawsuit money from Billy – of Cool Temp Mechanical – or any debt will be paid in full.'" This record "does not support the Supreme Court's determination that the document reflects the defendant's unconditional promise to repay the borrowed sum upon demand or at definite time."

Axis Capital, Inc. v. Khan, N.Y.L.J., 1202730330007 (Sup.Ct. Nassau Co. 2015)(Winslow, J.) – "An absolute and unconditional guaranty is generally held to qualify as an 'instrument for the payment of money only' within the meaning of CPLR 3213 [citations omitted]. Moreover, a guaranty may be deemed the proper subject of a motion for summary judgment in lieu of a complaint whether or not it recites a sum certain. The need to refer to an underlying instrument to establish the amount of liability does not affect the availability of CPLR 3213." But, here "the guaranty is invoked to

recover a deficiency after the sale of collateral," thus, "the question arises: does the plaintiff also have to demonstrate compliance with UCC Article 9 in order to establish its *prima facie* case? If so, does that render CPLR 3213 unavailable?" The Court concludes that "plaintiff has established a *prima facie* right to judgment as a matter of law on the issue of liability," but that "the existence of an issue of fact regarding the commercial reasonableness of the sale precludes accelerated judgment under CPLR 3213 on the issue of damages."

Broom v. Rubin & Yates, LLC, 126 A D 3d 1331 (4th Dept. 2015) – "By motion for summary judgment in lieu of complaint pursuant to CPLR 3213, plaintiff commenced this action to enforce a judgment entered in Texas upon the default of defendant." However, that Texas judgment "was not properly authenticated because it was not accompanied by the certification required by CPLR 4540(c)," and the denial of relief is affirmed.

DEFAULTS

OBTAINING A DEFAULT JUDGMENT

Posses & Chasan CPAs PLLC v. Raj & Raj Realty, Ltd., N.Y.L.J., 1202674203322 (Sup.Ct. Nassau Co. 2014)(Winslow, J.) – CPLR 3215(a) provides that "if the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application [for a default judgment] may be made to the clerk within one year after the default." The Court here vacates the Clerk-entered judgment. "'The term "sum certain" in this context contemplates a situation in which, once liability has been established, there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments. Obviously, the clerk then functions in a purely ministerial capacity' [citation omitted]. 'The statute is intended to apply to only the most liquidated and undisputable of claims.'" The complaint here alleged two causes of action – for services rendered, and for an account stated. The cause of action for services rendered "does not allege a written agreement, or specifically describe the nature of the action as one for breach of contract. No copy of a written agreement was annexed to the affidavit of facts submitted to the Clerk. The claim 'for account services rendered' should be viewed as stating a cause of action sounding in quantum meruit [citation omitted]. Such cause of action, equitable in nature, is not for a sum certain, and is thus not eligible for entry of a clerk's judgment." While a cause of action for an account stated may be entitled to entry of a clerk's judgment, "where one or more causes of action in a plaintiff's pleading is not for a sum certain, the Clerk is without authority to enter a default judgment." Finally, "the Court's finding that the Judgment must be vacated does not require the vacatur of the underlying determination that the defendant was in default [citation omitted]. Insofar as defendant has presented no reasonable excuse for the default or meritorious defense, the default remains and the proposed Answer is a nullity."

Ellis v. Fortune, N.Y.L.J., 1202667402623 (Sup.Ct. Suffolk Co. 2014)(Mayer, J.) – "The plaintiffs' affidavits of service do not contain the statutorily required statement as to the military status of the defendants. For example, defendant Fabrice Fortune was allegedly served pursuant to CPLR 308(2) by delivery to a person of suitable age and discretion, 'Jane Doe.' The military service portion of the plaintiffs' affidavit of service upon Fabrice Fortune merely states that the process server 'asked the person spoken to whether the *recipient* [Jane Doe] was in active military service. *Recipient* [Jane Doe] wore ordinary civilian clothes and no military uniform. Upon information and belief I aver that the *recipient* [Jane Doe] is not in the military service' [emphasis by the Court]. Similarly, although defendant Marie C. Fortune was allegedly served pursuant to CPLR 308(4), the so-called 'nail and mail' method of service, by affixing the summons and complaint to her door, the military service portion of the affidavit of service state, 'Upon information and belief I aver that the *recipient* [the door] is not in the military service' [emphasis by the Court]. Obviously, neither of these affidavits concerning the military status of the defendants is credible. Therefore, pursuant to 50 USCS Appx §521(b), a judgment of default may not be entered against either defendant." Moreover, "in support of this application, the plaintiff submits an attorney affirmation and a summons and complaint verified only by the plaintiffs' attorneys." Without "either a proper affidavit by the party or a complaint verified by the party, not merely by an attorney with no personal knowledge, the entry of judgment by default is erroneous."

Paulus v. Christopher Vacirca, Inc., 128 A D 3d 116 (2d Dept. 2015) – "The failure of a party to give notice of a motion for leave to enter a default judgment to a defendant who has previously appeared in the action entitles such defendant to vacatur of the default judgment." The failure of notice, required by CPLR 3215(g)(1), upon an appearing defendant "deprived the court of jurisdiction to entertain the motion." Providing notice "gives a defendant who has appeared in the action an opportunity to move to be relieved of his or her underlying default prior to the entry of judgment, as well as to raise objections to the sufficiency of the proof offered in support of the motion for leave to enter a default judgment and to the proposed judgment itself." In so ruling, the Second Department agreed with a prior First Department decision [*Walker v. Foreman*, 104 A D 3d 460 (1st Dept. 2013)], and rejected a contrary ruling by the Third Department [*Fleet Finance, Inc. v. Nielsen*, 234 A D 2d 728 (3d Dept. 1996)].

One West Bank, F.S.B. v. Corrar, N.Y.L.J., 1202658569389 (Sup.Ct. Kings Co. 2014) (Kurtz, J.) – "CPLR 3215(c) states, in pertinent part, that if a plaintiff 'fails to take proceedings for the entry of judgment within one year after the default, the Court shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.' This section 'prevents a plaintiff from taking advantage of a defendant's default where the plaintiff has also been guilty of inaction' [citation omitted]. The legislative intent underlying CPLR 3215(c) was to 'prevent the plaintiffs from unreasonably delaying the

determination of an action' and 'to avoid inquests on stale claims.'" Here, plaintiff contends that it satisfied the statute when it "made an application for entry of a default judgment within a year of defendant's default, despite the application having been withdrawn." The Court disagrees. "'The effect of a withdrawal of a motion is to leave the record as it stood prior to its filing as though it had not been made.'"

Pipinias v. J. Sackaris & Sons, Inc., 116 A D 3d 749 (2d Dept. 2014) – When service is made pursuant to CPLR 308(2) or (4), and the plaintiff fails to comply with the requirement to file proof of service within 20 days, the defendant's time to answer never begins to run. Indeed, if plaintiff *does* file proof of service, but beyond the 20-day period, and without Court permission to do so, the defendant's time to answer never begins to run. Accordingly, the defendant is never in default, and, CPLR 3215(c) is inapplicable. The action is not deemed abandoned for failure to take steps to enter a default within one year.

VACATING A DEFAULT

First American Title Insurance Company v. Gansburg, N.Y.L.J., 1202653912099 (Sup.Ct. Nassau Co. 2014)(Parga, J.) – "A corporate defendant's failure to receive copies of the summons and complaint, served upon the Secretary of State, due to its unexplained failure to keep a current address on file with the Secretary of State, does not constitute a reasonable excuse for its delay in appearing and answering the complaint."

Dela Cruz v. Keter Residence, LLC, 115 A D 3d 700 (2d Dept. 2014) – "Defendant's unexplained failure to keep the Secretary of State apprised of its current address over a significant period of time did not constitute a reasonable excuse" for defaulting. Moreover, defendant was not entitled to the benefit of CPLR 317, because "defendant failed to rebut the plaintiff's evidence that, for a period of more than five years, the defendant [, as a Limited Liability Company,]failed to file, with the Secretary of State, the required biennial form that would have apprised the Secretary of State of its current address [citation omitted]. Under these circumstances, the defendants' failure to personally receive copies of the summons and complaint was a result of a deliberate attempt to avoid notice of actions commenced against it."

Matter of Renaissance Economic Development Corporation v. Lin, 126 A D 3d 465 (1st Dept. 2015) – "The court properly denied vacatur under CPLR 317, where respondent admitted she had actual notice of the petition in time to defend [citations omitted]. The court also correctly declined to vacate under CPLR 5015(a)(3), which allows for vacatur where the judgment was obtained by fraud or misconduct. The fraud referenced in the statute must be 'extrinsic fraud,' that is, a fraud on the defaulting party that induces them not to defend the case [citations omitted]. Respondent's supposed confusion over the

relief sought in the petition is not a basis for such vacatur and she points to no other extrinsic fraud."

Xian v. Tat Lee Supplies Co., Inc., 126 A D 3d 424 (1st Dept. 2015) – "Although defendant's failure to maintain a current address with the Secretary of State is not a reasonable excuse for default warranting relief under CPLR 5015(a)(1), defendant demonstrated grounds for relief pursuant to CPLR 317, since it was not personally served, did not receive actual notice in time to defend, and has a meritorious defense [citations omitted]. Vacatur was also warranted pursuant to CPLR 5015(a)(3), since the default judgment was obtained through misrepresentation or misconduct. Defendant demonstrated that plaintiffs' motion for a default judgment was granted, in part, based on plaintiffs' counsel's incorrect representation that defendant's old address was the 'only known' address for service of the additional summons required by CPLR 3215(g)(4), when, in fact, plaintiffs' sublease provided another address for service of legal notices on defendant."

CPLR 3216

Rossi v. Scheinbach, N.Y.L.J., 1202721982927 (Sup.Ct. Nassau Co. 2015)(Marber, J.), *rev'd* 128 A D 3d 791 (2d Dept. 2015) – As Supreme Court described it, in *Cadichon v. Facelle*, 18 N Y 3d 230 (2011), "a 4-3 decision by the Court of Appeals reversed the Appellate Division [which had upheld dismissal of the complaint pursuant to CPLR 3216] and reinstated the plaintiff's complaint. The Court of Appeals relied on the stipulation executed by the trial court and the parties, which directed counsel for the Plaintiff to file the Note of Issue within 90 days and that pursuant to CPLR 3216, failure to comply within 90 days will serve as a basis for the court, on its own motion, to dismiss the action. The court noted that there was no order of the court dismissing the case, but only a ministerial dismissal without the benefit of further judicial review, despite what the stipulation provided. The Court of Appeals further stated that CPLR 205(a) was inapplicable to the case. Despite the Plaintiffs' assertion that the facts in *Cadichon* are similar to the facts in the instant case, that is incorrect. In fact, the holding in *Cadichon* is based on the specific language set forth in the stipulation, which is in sharp contrast to the language set forth in the Certification Order herein. In *Cadichon*, the key language was 'your default in complying with this demand within the 90-day period will serve as a basis for the court, on its own motion, to dismiss the action for unreasonably neglecting to proceed.' In this case, the Certification Order states: 'If plaintiff does not file a note of issue within 90 days, this action is deemed dismissed without further order of the Court (CPLR 3216).' Based on the stark contrast in the language between the stipulation in *Cadichon* and the Certification Order in this case, the holding in *Cadichon* is not applicable to the case at bar. Also, the Plaintiffs fail to acknowledge the line of post-*Cadichon* cases decided by the Appellate Division, Second Department, which all held that a certification order directing a plaintiff to file a note of issue within 90 days, and

warning that the complaint would be deemed dismissed without further order of the Supreme Court if the plaintiff failed to comply with that directive, had the same effect as a valid 90-day notice pursuant to CPLR 3216 [citations omitted]. The Plaintiffs' argument that 'the lower court justice and the Nassau County Clerk's Office' have a general policy of illegally dismissing cases, completely ignores the established pertinent appellate case law, which states that such dismissal is proper." The Appellate Division, without discussing Supreme Court's analysis of *Cadichon*, reversed because, "under the circumstances of this case, including the minimal 4-day delay in filing the note of issue, the fact that the defendants demanded additional discovery subsequent to the court's certification order containing the 90-day demand, the absence of any claim of prejudice, and the lack of evidence of a pattern of persistent neglect and delay in prosecuting the action or of any intent to abandon the action, the Supreme Court improvidently exercised its discretion in declining to excuse the plaintiffs' failure to meet the deadline for filing the note of issue."

Effective January 1, 2015, the Legislature has amended CPLR 3216 to provide that the earliest time that a defendant, or the Court, may serve a 90-day demand upon plaintiff is a year after joinder of issue, or six months "since the issuance of the preliminary court conference order where such an order has been issued, whichever is later." And, "where the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

Ramon v. Zangari, 116 A D 3d 753 (2d Dept. 2014) – "When a 90-day demand to resume prosecution of an action pursuant to CPLR 3216(b)(3) has been properly served, a plaintiff may avoid dismissal, as a matter of law, by either timely filing a note of issue or moving, before the default date, to vacate the notice or to extend the 90-day period [citations omitted]. Even where a plaintiff has failed to pursue either of these options, however, 'the statute prohibits the Supreme Court from dismissing a complaint based on failure to prosecute whenever the plaintiff has shown a justifiable excuse for the delay and the existence of a potentially meritorious cause of action' [citations omitted]. Moreover, CPLR 3216 is an 'extremely forgiving' statute [citation omitted], which 'never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed' [citations omitted]. Under the plain language of CPLR 3216, a court retains some 'residual discretion' to deny a motion to dismiss, even when a plaintiff fails to comply with the 90-day requirement and additionally fails to proffer an adequate excuse for the delay or a potentially meritorious cause of action [citation omitted]. Thus, while the statute prohibits the Supreme Court from dismissing a complaint based on failure to prosecute whenever the plaintiff has shown a justifiable excuse for the delay and the existence of a potentially meritorious cause of action [citations omitted], 'such a dual showing is not strictly necessary in order for the plaintiff to escape such a dismissal.'" Here, "the record demonstrates affirmative

steps taken by the plaintiff to continue the prosecution of this action that are inconsistent with an intent to abandon it." Plaintiff and defendants entered into a stipulation, after the 90-day period had expired, agreeing to ongoing discovery. The parties also agreed to filing a note of issue pursuant to an expected later Court conference. "Under these circumstances, including the lack of prejudice suffered by the moving defendants as a result of any delay, and their subsequent acquiescence to a continuing compliance schedule, we conclude that the Supreme Court improvidently exercised its discretion in granting the separate motions of the moving defendants pursuant to CPLR 3216 to dismiss the complaint."

Altman v. Donnenfeld, 119 A D 3d 828 (2d Dept. 2014) – CPLR 3216 is 'extremely forgiving' [citation omitted] in that it 'never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed' [citations omitted]. While the statute prohibits the Supreme Court from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for the delay in the prosecution of the action and a meritorious cause of action [citations omitted], such a dual showing is not strictly necessary to avoid dismissal of the action [citations omitted]. Here, upon receipt of the appellants' 90-day notice, the respondents did not file a note of issue within the 90-day period. However, the appellants refused certain requests to schedule a continued deposition of the injured respondent and, after the 90-day notice was served, both parties demonstrated an intent to proceed with discovery. Further, there is no evidence that the appellants were prejudiced by the minimal delay involved in this case or that there was a pattern of persistent neglect and delay in prosecuting the action, or any intent to abandon the action."

Schlau v. City of Buffalo, 125 A D 3d 1546 (4th Dept. 2015) – Supreme Court "did not abuse its discretion in granting plaintiff's motion to vacate the CPLR 3216(b)(3) notice. Discovery was not complete, and the Arena defendants continued to seek disclosure after serving the notice, which 'was sufficient reason in and of itself to' vacate the notice."

VOLUNTARY DISCONTINUANCE

Rothenberg v. Congregation Anshei Sfard, 125 A D 3d 631 (2d Dept. 2015) – Plaintiff commenced this action in Supreme Court, Kings County, and, after defendant moved to change venue, the parties stipulated to change venue to Rockland County. Thereafter, plaintiff commenced a new, identical, action in Supreme Court, Kings County, and seeks to voluntarily discontinue this action. While, ordinarily, motions to discontinue an action should be granted, "'particular prejudice to the defendant or other improper consequences flowing from discontinuance may however make denial of discontinuance permissible or obligatory." Here, "given the circumstances of this case, the Supreme Court providently exercised its discretion in denying the plaintiff's motion to voluntarily discontinue this action [citations omitted]. The record demonstrates that the plaintiff's motion was an

attempt to circumvent the consequences of the so-ordered stipulation which had already changed the venue of this action from Kings County to Rockland County."

Baez v. Parkway Mobile Homes, Inc., 125 A D 3d 905 (2d Dept. 2015) – Plaintiffs moved for leave to discontinue this action without prejudice "in response to Parkway's separate motion pursuant to CPLR 3216 to dismiss the complaint on the ground that the plaintiffs had failed to timely respond to its 90-day notice [pursuant to CPLR 3216]. The Supreme Court's determination to grant that branch of the plaintiffs' cross-motion which was for leave to discontinue the action without prejudice allowed the plaintiff to avoid the potentially adverse consequences of having failed to timely respond to Parkway's 90-day notice [citation omitted], and an adverse determination of Parkway's motion for summary judgment. Under these circumstances, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiffs' cross motion which was for leave to discontinue the action without prejudice."

DISCLOSURE

MOTION PRACTICE

Perez v. Stonehill, 121 A D 3d 960 (2d Dept. 2014) – "The Supreme Court improperly granted the defendants' motion pursuant to CPLR 3126(3) to dismiss the complaint as a sanction for the plaintiff's failure to comply with certain discovery. The defendants' failure to submit an affirmation of the parties' good faith effort to resolve the disclosure dispute pursuant to 22 NYCRR 202.7(a)(2) in connection with their motion required the denial of the motion."

Ponce v. Liu, 123 A D 3d 787 (2d Dept. 2014) – "The Supreme Court properly denied the defendant's motion pursuant to CPLR 3126 to strike the complaint, or, in the alternative, to vacate the note of issue and compel the plaintiffs to appear for a further deposition by a date certain. The defendant failed to provide an affirmation of a good-faith effort to resolve the discovery dispute, as required by 22 NYCRR 202.7."

Middleton v. Russell, 120 A D 3d 477 (2d Dept. 2014) – "Supreme Court improvidently exercised its discretion by denying the defendants' motion to compel certain disclosure, on the ground that the defendants neglected to comply with its part rules requiring advance notice of the motion so that the court could determine whether the matter should be conferenced. While such rules are permissible for the purpose of assisting the court in its supervision of disclosure, the application of the subject rule to the instant matter so as to deny the defendants' motion was improper in view of the strong indication that the defendants are entitled to additional disclosure [citations omitted], and the demonstrated inability of the parties to reach an agreement regarding the requested disclosure."

LIMITS OF DISCLOSURE

Ferolito v. Arizona Beverages USA, LLC, 119 A D 3d 642 (2d Dept. 2014) – "Notwithstanding New York's policy of liberal discovery [citation omitted], a party seeking disclosure of trade secrets must show that such information is 'indispensable to the ascertainment of truth and cannot be acquired in any other way' [citations omitted]. A witness who objects to disclosure on the ground that the requested information constitutes a trade secret bears only a minimal initial burden of demonstrating the existence of a trade secret."

PRE-ACTION DISCLOSURE

Juice v. Twitter, Inc., N.Y.L.J., 1202672226946 (Sup.Ct. Kings Co. 2014)(Rivera, J.) – After having been falsely accused of using a Twitter account to post pictures in direct contempt of a court order, petitioner seeks pre-action discovery from Twitter, in order to identify the person who created the account, impersonated and "framed" him, and seeks an order directing Twitter to preserve all relevant documents. "Before an action is commenced, 'disclosure to aid in bringing an action' may be obtained by court order [citation omitted], including 'discovery in order to obtain information relevant to determining who should be named as a defendant' [citation omitted]. Such pre-action disclosure is not available to a would-be plaintiff to determine if he or she has a cause of action [citation omitted]. Pre-action discovery 'is not permissible as a fishing expedition to ascertain whether a cause of action exists' [citations omitted], and is only available where a petitioner demonstrates that he or she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." Here, plaintiff has demonstrated the existence of a cause of action, and that "the discovery sought from Twitter is needed in order to obtain information relevant to determining who should be named as a defendant." But, "because the creator's conduct may arguably be covered by the First Amendment protections of free speech, an additional layer of review is appropriate." For, "when faced with the clash of such valued interests, the court must strike a balance 'between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendant.'" Here, "in conducting this balancing test the court finds that the anonymous Twitter account creator's behavior constitutes an actionable tort and is not speech covered by First Amendment protection." Thus the application for disclosure is granted, as well as the application to direct Twitter to preserve the posted image.

NON-PARTY DISCLOSURE

Ferolito v. Arizona Beverages USA, LLC, 119 A D 3d 642 (2d Dept. 2014) – Last year's "Update" reported on *Matter of Kapon v. Koch*, 105 A D 3d 650 (1st Dept. 2013), *aff'd*, 23 N Y 3d 32 (2014), in which the Court of Appeals resolved a split in the Appellate

Divisions which saw the First and Fourth Departments lined up against the Second and Third. Thus, in *Kooper v. Kooper*, 74 A D 3d 6 (2d Dept. 2010), the Appellate Division, Second Department, held "a party's inability to obtain the requested disclosure from his or her adversary or from independent sources to be a significant factor in determining the propriety of discovery from a nonparty. A motion to quash is, thus, properly granted where the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the nonparty [citations omitted], and properly denied when the party has shown that the evidence cannot be obtained from other sources [citations omitted]. Our cases have not exclusively relied on this consideration, however, and have weighed other circumstances which may be relevant in the context of the particular case in determining whether discovery from a nonparty is warranted." The Court held that it "declined, here, to set forth a comprehensive list of circumstances or reasons which would be deemed sufficient to warrant discovery from a nonparty in every case." But, "we emphasize, however, that our cases have consistently adhered to the principle that 'more than mere relevance and materiality is necessary to warrant disclosure from a nonparty." For, "as a matter of policy, nonparties ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest unless the particular circumstances of the case require their involvement." The Third Department cited *Kooper* with approval in *Matter of Troy Sand & Gravel Company, Inc. v. Town of Nassau*, 80 A D 3d 199 (3d Dept. 2010) in which the Court noted that, "petitioners urge this Court to abandon our prior precedent in this area and adopt a standard permitting discovery upon a showing that the nonparty possesses material and necessary – i.e., relevant – information useful to a party in preparing for trial. Although the Appellate Division, Fourth Department has evidently adopted the standard urged by petitioners [citations omitted], we decline to do so. Imposition of the 'material and necessary' standard to all individuals, regardless of their status, would render the distinction drawn in the statute between parties and nonparties meaningless." Thus, "while we agree with petitioners that the requirement of 'special circumstances' as defined prior to the 1984 amendment – involving, for example, an affirmative showing of nonparties' hostility and special knowledge [citation omitted] – is no longer applicable, we adhere to our precedent holding that 'something more than mere relevance or materiality must be shown to obtain disclosure from a nonparty witness.'" Thus, "'inasmuch as defendant has not established that it is unable to obtain the information in question from other sources' [citation omitted], the court properly granted Bader's motion to quash." The First Department, in *Ledonne v. Orsid Realty Corp.*, 83 A D 3d 598 (1st Dept. 2011), disagreed with the rule stated in *Matter of Troy Sand* and *Kooper*. "CPLR 3101(a) 'mandates full disclosure of all matter material and necessary in the prosecution or defense of an action,' and the person seeking to quash a subpoena bears 'the burden of establishing that the requested documents and records are utterly irrelevant' [citation omitted]. The court properly exercised its discretion in determining, upon review of all the facts, that the nonparties had not shown that the surveillance

materials sought are utterly irrelevant to plaintiffs' claims." In *Matter of Kapon*, the Court of Appeals, agreeing with the First and Fourth Departments, concluded "that the subpoenaing party must first sufficiently state the 'circumstances or reasons' underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it), and the witness, in moving to quash, must establish either that the discovery sought is 'utterly irrelevant' to the action or that the 'futility of the process to uncover anything legitimate is inevitable or obvious.' Should the witness meet this burden, the subpoenaing party must then establish that the discovery sought is 'material and necessary' to the prosecution or defense of an action, i.e., that it is relevant." Thus, "we conclude that the 'material and necessary' standard adopted by the First and Fourth Departments is the appropriate one and is in keeping with this State's policy of liberal discovery." For, "section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of the action, it must be provided by the nonparty." And, "it is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated." Here, in *Ferolito*, the Court holds that, "pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the 'circumstances or reasons' requiring disclosure." And "disclosure from a nonparty requires no more than a showing that the requested information is 'material and necessary,' i.e., relevant to the prosecution or defense of an action [citation omitted]. However, 'the subpoenaing party must first sufficiently state the "circumstances or reasons" underlying the subpoena (either on the face of the subpoena itself or in a notice accompanying it), and the witness, in moving to quash, must establish either that the discovery sought is "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious'" [citation omitted]. Should the nonparty meet this burden, 'the subpoenaing party must then establish that the discovery sought is "material and necessary" to the prosecution or defense of an action, i.e., that it is relevant.'"

Ziolkowski v. Han-Tek, Inc., 126 A D 3d 1431 (4th Dept. 2015) – "Following the deposition of plaintiff's accountant, the attorney for defendant Han-Tek, Inc. issued a subpoena *duces tecum* directing plaintiff's accountant to produce documents relating to the operation of plaintiff's residential real estate business. Supreme Court erred in granting plaintiff's motion to quash the subpoena, and we therefore reverse and order and deny the motion. Plaintiff failed to meet his burden of establishing that 'the information sought is utterly irrelevant to any proper inquiry.'"

Board of Managers of 225 East 86th Street Condominium v. Ren, N.Y.L.J., 1202659447350 (Sup.Ct. N.Y.Co. 2014)(Mills, J.) – "Where the person to be deposed is not a party, he or she must be served with a subpoena issued pursuant to CPLR 3106(b). Where production of 'books, papers and other things' is also sought in conjunction with

his or her deposition, a notice or subpoena pursuant to CPLR 3111 is the appropriate device, and the party serving the subpoena should describe the items sought and be certain to make the subpoena unambiguous, requiring both attendance by the recipient and production of the item. CPLR 3101(a)(4) requires that a nonparty served with a subpoena be given notice 'stating the circumstances or reasons such disclosure is sought or required' [citation omitted]. 'The purpose of such requirement is presumably to afford a nonparty who has no idea of the parties' dispute or a party affected by such request an opportunity to decide how to respond' [citation omitted]. The court should grant a motion to quash a subpoena *duces tecum* only when the materials sought are utterly irrelevant to any proper inquiry [citation omitted]. The burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed."

EXPERT DISCLOSURE

Rivera v. Montefiore Medical Center, 123 A D 3d 424 (1st Dept. 2014) – "Plaintiff's *in limine* application during trial to preclude Dr. Silberman's testimony was properly denied as untimely. Plaintiff's argument at trial for precluding Dr. Silberman's testimony was based on the lack of specificity of defendant's CPLR 3101(d) statement. The statement recited, with regard to the causation of the decedent's death, that defendant's expert would 'testify as to the possible causes of the decedent's injuries and contributing factors and on the issue of proximate causation'; also included in its formulaic recitation was the assertion that 'the grounds for the expert's opinion will be said expert's knowledge and experience and the trial testimony.'" At the time plaintiff received the statement, "the only objection that plaintiff voiced was that the expert's qualifications failed to include the dates of his residency, which deficiency defendant then cured. Plaintiff neither rejected the document nor made any objection to the lack of specificity regarding the cause of death. Having failed to timely object to the lack of specificity in defendant's expert disclosure statement regarding the cause of the decedent's death, plaintiff was not justified in assuming that the defense expert's testimony would comport with the conclusion reached by the autopsy report, and plaintiff cannot now be heard to complain that defendant's expert improperly espoused some other theory of causation for which there was support in the evidence."

Rivera v. Albany Medical Center, 119 A D 3d 1135 (3d Dept. 2014) – "The Legislature has allowed for some protection from disclosure of the identities of medical experts [in medical malpractice cases] during 'trial preparation' [citation omitted], and, consistent with this intention, courts have found it appropriate to allow nonmovants in the summary judgment context to also withhold experts' identities from their adversaries upon the reasoning that such parties did not choose to abandon the disclosure protections provided during trial preparation." Here, however, defendant, in *moving* for summary judgment, submitted a medical expert's affidavit with the expert's name redacted. The Court holds

that such an affidavit is "incompetent evidence to support their summary judgment motion. In order to establish a *prima facie* entitlement to judgment as a matter of law, defendants were required to 'tender sufficient, competent, admissible evidence demonstrating the absence of any genuine issue of fact.'" And, "the Legislature has shown no broad intention of protecting experts from accountability at the point where their opinions are employed for the purpose of judicially resolving a case or a cause of action. Further, we see no compelling reason to allow for such anonymity that would outweigh the benefit that accountability provides in promoting candor [citation omitted]. Requiring a movant to reveal an expert's identity in such circumstances would allow a nonmovant to meaningfully pursue information such as whether that expert has ever espoused a contradictory opinion, whether the individual is actually a recognized expert and whether that individual has been discredited in the relevant field prior to any possible resolution of the case on the motion [citation omitted]. Further, any expert who anticipates a future opportunity to espouse a contradictory opinion would be on notice that the public record could be used to hold him or her to account for any unwarranted discrepancy between such opinions. For these reasons, we will not consider the incompetent affidavit of defendants' medical expert."

PRIVILEGES

ATTORNEY-CLIENT PRIVILEGE

Nicastro v. New York Central Mutual Fire Insurance Company, 117 A D 3d 1545 (4th Dept. 2014) – "A party seeking to invoke the attorney-client privilege must show that 'the information sought to be protected from disclosure was a "confidential communication" made to the attorney for the purpose of obtaining legal advice or services, and the burden of proving each element of the privilege rests upon the party asserting it' [citations omitted]. 'For the privilege to apply when communications are made from client to attorney, they "must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose." For the privilege to apply when communications are made from attorney to client – whether or not in response to a particular request – they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.'"

National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. TransCanada Energy USA, Inc., 119 A D 3d 492 (1st Dept. 2014) – "The record shows that the insurance companies retained counsel to provide a coverage opinion, i.e., an opinion as to whether the insurance companies should pay or deny the claims. Further, the record shows that counsel were primarily engaged in claims handling – an ordinary business activity for an insurance company. Documents prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so 'merely because the investigation was conducted by an attorney.'"

Barry v. Clermont York Associates LLC, N.Y.L.J. 1202713882359 (Sup.Ct. N.Y.Co. 2014)(Kornreich, J.) – "The attorney-client privilege shields confidential communications between an attorney and his client, made during the course of a professional relationship for the purpose of facilitating the rendition of legal services [citations omitted]. The party asserting the privilege has the burden of proving each element of the privilege and that it has not been waived [citations omitted]. Typically, the presence of a third-party destroys the privilege cause confidentiality is lacking [citations omitted]. However, where counsel needs assistance from other experts, the privilege extends to such third parties, hired as an agent of the attorney or client to facilitate the rendition of legal services [citation omitted]. A party asserting a privilege based upon the [*United States v.*] *Kovel* [, 296 F.2d 918 (2d Cir. 1961] exception has the burden of proving each element of the privilege [citation omitted] and must produce contemporaneous proof of a '*Kovel* agreement' such as a separate retention agreement or separate billing [citation omitted]. Accounting concepts can be highly complex – analogous to that of a foreign language for many attorneys [citation omitted]. The presence of an accountant, whether hired by the lawyer or the client, is often necessary or at least highly useful for the effective consultation between attorney and client [citation omitted]. However, if the advice sought is the accountant's rather than the lawyer's, the privilege does not apply [citation omitted]. Consequently, if a client communicates first with his accountant and later consults his attorney on the same matter, there is no privilege."

William Tell Services, LLC v. Capital Financial Planning, LLC, 46 Misc 3d 577 (Sup.Ct. Rensselaer Co. 2014)(Ceresia, J.) – "In *Upjohn Co. v. United States* (449 U.S. 383 [1981]) the United States Supreme Court applied the attorney-client privilege to protect from disclosure communications between a law firm and low-level corporate employees." The rationale for that rule "is that low-level employees might be the only employees who possess relevant information with regard to the specific legal problem at issue; and without such information, the corporate attorney would be unable to carry out her or his job in providing legal advice or services to the corporate client [citation omitted]. For this reason, the communications were found to be insulated from disclosure under the attorney-client privilege." The rule in *Upjohn* has been expanded to include independent contractors who are the "functional equivalent" of employees. "'To determine whether a consultant should be considered the functional equivalent of an employee, courts look to whether the consultant had primary responsibility for a key corporate job, whether there was a continuous and close working relationship between the consultant and the company's principals on matters critical to the company's position in litigation, and whether the consultant is likely to possess information possessed by no one else at the company' [citations omitted]. The functional equivalent test has been applied to uphold application of the attorney-client privilege where an outside consultant plays such a major role in the corporate decision-making process, that the consultant's communication with the corporate attorney is essential for the corporate attorney to properly advise the corporate client."

Sebastian Holdings, Inc. v. Deutsche Bank AG, 123 A D 3d 437 (1st Dept. 2014) – In the course of this action by an investor against its broker, plaintiff sought production of documents from Deutsche Bank Suisse located in Switzerland. "To shield Deutsch Bank Suisse who assisted in the production of documents from criminal penalties under article 271 of the Swiss Penal Code, Deutsche Bank insisted on an order and request under the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters." The Court thereupon entered orders initiating the Hague process, on the consent of the parties. Those orders authorized a Swiss attorney to take documents provided to him "in accordance with the New York Civil Practice Law and Rules," and specified that Deutsche Bank "would prepare a privilege log 'in accordance with the standards of the New York Civil Practice Law and Rules for determination by the Court upon application as to such privilege designations and redactions.'" When Deutsche Bank produced some documents, but withheld others on a claim of privilege, because they reflected "communications between employees of Deutsche Bank Suisse and its in-house counsel," plaintiff sought to compel production, "contending that Swiss law – which Deutsche Bank concedes does not recognize attorney-client privilege for communications with in-house counsel – must be applied to the in-house documents." The Court rejected that argument. "The stipulated orders, directing that discovery is to proceed under the CPLR, are dispositive. Indeed, the Request specifically states that Deutsche Bank would prepare a privilege log 'in accordance with the standards of the New York Civil Practice Law and Rules for determination by the Court upon application as to such privilege designations and redactions.' We reject plaintiff's assertion that this language creates a reservation of rights on privilege challenges; on the contrary, the language merely allows plaintiff to challenge Deutsche Bank's privilege designation and redactions. Accordingly, the motion court properly concluded that privilege determinations are governed by New York law, as the parties stipulated."

Matter of The Bank of New York Mellon, 42 Misc 3d 171 (Sup.Ct. N.Y.Co. 2013) (Kapnick, J.) – "'A client can waive the attorney-client privilege by placing the subject matter of counsel's advice in issue and by making selective disclosure of such advice' [citation omitted]. Waiver may also occur 'where the invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information' [citation omitted]. Moreover, 'the waiver of the attorney-client privilege normally compels the production of other documents protected by the privilege which relate to the same subject' [citation omitted]. 'The "at issue" waiver has been applied when, for example, a client asserts as a defense that he has relied on the advice of counsel. However, the waiver has been applied more broadly to cover circumstances in which a client does not expressly claim that he has relied on counsel's advice, but where the truth of the parties' position can *only* be assessed by examination of a privileged communication'" [emphasis by the Court]. The Court also discussed the "fiduciary exception" to the attorney-client privilege. Movants urged that communications between the Trustee and his counsel are not privileged vis-à-

vis the beneficiaries of the trust. The Court, relying upon *Hoopes v. Carota*, 142 A D 2d 906 (3d Dept. 1988), *aff'd*, 74 N Y 2d 716 (1989), held that there is good cause for such disclosure when, in the absence of a showing that the Trustee consulted counsel solely in an individual capacity, and at his own expense: "(1) there was an apparent identity of interests regarding disclosure among the beneficiaries of the trusts; (2) plaintiffs may have been directly affected by any decision defendant made on his attorneys' advice; (3) the information sought was highly relevant to and may be the only evidence available on whether defendant's actions respecting the relevant transactions and proposals were in furtherance of the interests of the beneficiaries of the trust or primarily for his own interests in preserving and promoting the rewards and security of his own position as a corporate officer; (4) the communication apparently related to prospective actions by defendant, not advice on past actions; (5) plaintiffs' claims of defendant's self-dealing and conflict of interest are at least colorable, and the information they seek is not only relevant, but specific."

Stock v. Schnader Harrison Segal & Lewis LLP, 2014 WL 6879923 (Sup.Ct. N.Y.Co. 2014)(Schweitzer, J.) – Plaintiff sues his former lawyers for malpractice and breach of fiduciary duty. The substance of his claim is that defendants "failed to advise him that his departure [from employment with MasterCard] would accelerate the expiration date for his stock options." Defendants also represented him in the ensuing arbitration proceeding against MasterCard, in which MasterCard called one of the firm's lawyers as a witness. In this action, plaintiff seeks the communications among the firm's lawyers concerning that testimony. Those communications are not privileged with respect to plaintiff. They were made at a time when the firm was representing plaintiff, and, at that time, "they did not expect their communications to be confidential as to their current client." Moreover, plaintiff "has a right to disclosure from his fiduciaries of communications that directly correlate to his claims of self-dealing and conflict of interest." And, "finally, the documents fall under the 'at issue' waiver, and defendants cannot selectively disclose self-serving documents regarding the same subject matter."

Gaska v. Nassau Health Care Corporation, 46 Misc 3d 302 (Sup.Ct. Nassau Co. 2014)(Winslow, J.) – Plaintiff claims to have been assaulted by a fellow patient at defendant's medical facility. In the course of disclosure, plaintiff demanded production of certain incident reports, and defendant objected on the ground of privilege. Following an *in camera* inspection, the Court orally directed production of some of the demanded documents. "No party requested a written order, or sought to place an objection on the record." Some 3 1/2 months later, and after the deposition of plaintiff, defendant moved for a protective order, *nunc pro tunc*, "directing plaintiff to return" the documents, "and precluding plaintiff from using the documents and information contained therein," particularly with respect to the scheduled deposition of defendant. The Court denies the motion. "The orderly and fair administration of justice requires that rulings of the Court may be reopened only upon a predictable and timely basis, and not at the convenience or

strategic advantage of any party. Accordingly, the Court finds that defendant has waived its right to challenge the ruling of the Court which allowed the disclosure of the disputed documents."

ATTORNEY WORK PRODUCT

Geffner v. Mercy Medical Center, 125 A D 3d 802 (2d Dept. 2015) – Attorney work product under CPLR 3101(c), which is subject to an absolute privilege, is generally limited to materials prepared by an attorney, while acting as an attorney, which contain his or her legal analysis, conclusions, theory, or strategy [citations omitted]. 'The mere fact that a narrative witness statement is transcribed by an attorney is not sufficient to render the statement "work product"' [citation omitted]. Contrary to the plaintiff's contention, she did not meet her burden of establishing that the audio recording of an interview she conducted with the defendant Nicoletta Starks prior to the commencement of the instant action constituted attorney work product. Among other things, the plaintiff failed to show that the recording contained elements of opinion, analysis, theory, or strategy."

MATERIAL CREATED FOR LITIGATION

Liguore v. City of New York, 128 A D 3d 1027 (2d Dept. 2015) – "'The burden of proving that a statement is privileged as material prepared solely in anticipation of litigation or trial is on the party opposing discovery' [citations omitted]. Such burden is met 'by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation' [citations omitted]. Here, the appellants failed to meet their burden of establishing that the requested material was prepared solely in anticipation of litigation and, therefore, is protected from disclosure by the qualified immunity privilege of CPLR 3101(d)(2). An attorney's affirmation containing conclusory assertions that requested materials are conditionally immune from disclosure pursuant to CPLR 3101(d)(2) as material prepared in anticipation of litigation, without more, is insufficient to sustain a party's burden of demonstrating that the materials were prepared exclusively for litigation."

Lalka v. ACA Insurance Company, 128 A D 3d 1508 (4th Dept. 2015) – "'It is well settled that the payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of business' [citation omitted]. 'Reports prepared by attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable, even when those reports are mixed/multi-purpose reports, motivated in part by the potential for litigation with the insured.'"

Guzek v. B&L Wholesale Supply, Inc., 126 A D 3d 1506 (4th Dept. 2015) – A recorded statement of a non-party witness to defendants' liability insurer "prepared in anticipation of litigation, was conditionally privileged [citation omitted], and the record does not support plaintiffs' contention that the statement was used to refresh the recollection of the nonparty witness at his deposition, thereby waiving the privilege."

THE "COMMON INTEREST" PRIVILEGE

Ambac Assurance Corporation v. Countrywide Home Loans, Inc., 124 A D 3d 129 (1st Dept. 2014) – Rejecting a line of Second Department cases [*see*, *Hyatt v. State of California Franchise Tax Board*, 105 A D 3d 186 (2d Dept. 2013); *Hudson Valley Marine, Inc. v. Town of Cortlandt*, 30 A D 3d 377 (2d Dept. 2006)], the Court here holds that, "in today's business environment, pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege. Our conclusion holds particularly true in this case, where the parties have a common legal interest because they were engaged in merger talks during the relevant period and now have a completed and signed merger agreement." To "properly understand the common-interest doctrine, it is necessary to examine the purpose of the privilege from which it descends – namely, the attorney-client privilege. The attorney-client privilege is 'the oldest among common-law evidentiary privileges' [citation omitted]. The purpose of this privilege 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" Further, "the 'attorney-client privilege is not tied to the contemplation of litigation,' because 'advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct [citation omitted]. For that reason, and because of 'the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter.'" Accordingly, the Court holds that, "so long as the primary or predominant purpose for the communication with counsel is for the parties to obtain legal advice or to further a legal interest common to the parties, and not to obtain advice of a predominantly business nature, the communication will remain privileged." The cases holding to the contrary "provide that when two parties with a common legal interest seek advice from counsel together, the communication is not privileged unless litigation is within the parties' contemplation; on the other hand, when a single party seeks advice from counsel, the communication is privileged regardless of whether litigation is within anyone's contemplation. We cannot reconcile this contradiction, as it undermines the policy underlying that attorney-client privilege."

OTHER PRIVILEGES

People v. Rivera, 25 N Y 3d 256 (2015) – "Defendant, while seeking treatment from a psychiatrist, admitted to sexually abusing an 11-year-old relative. The psychiatrist notified the Administration for Children's Services (ACS) or defendant's admission. Subsequently, at defendant's criminal trial, over defendant's objection, the trial court permitted the psychiatrist to testify that defendant had made the admission. The issue on this appeal is whether the trial court's ruling ran afoul of the physician-patient privilege." The Court held "that the trial court's ruling violated the physician-patient privilege," rejecting the prosecution argument that, because of the doctor's obligation to report instances of sexual abuse of a child, defendant "had no reason to believe that [his admission] would remain confidential." For, "regardless of whether a physician is required or permitted by law to report instances of abuse or threatened future harm to authorities, which may involve the disclosure of confidential information, it does not follow that such disclosure necessarily constitutes an abrogation of the evidentiary privilege a criminal defendant enjoys under CPLR 4504(a). Whereas confidentiality is an ethical requirement of physicians that 'is essential to psychiatric treatment and is based in part of the special nature of psychiatric therapy as well as on the traditional ethical relationship between physician and patient' [citation omitted], the physician-patient privilege is a rule of evidence that protects communications and medical records [citation omitted]. The privilege serves several objectives: it encourages unrestrained communication between a patient and his or her medical provider so that the patient may obtain diagnosis and treatment without fear of embarrassment over potential disclosure; it encourages physicians to be forthright in recording their patients' confidential information; and it protects 'patients' reasonable privacy expectations against disclosure of sensitive personal information.'" Thus, "even if a patient is cognizant of his psychiatrist's reporting obligations under child protective statutes, that does not mean that he should have any expectation that statements made during treatment will be used against him in a criminal matter."

Kneisel v. QPH, Inc., 124 A D 3d 729 (2d Dept. 2015) – "'As a general rule, disclosure of the name and address of a nonparty patient who may have been a witness to an alleged act of negligence or malpractice does not violate the patient's privilege of confidentiality of treatment' [citations omitted]. However, where it is not possible to comply with a demand for the name and address of a patient without disclosing privileged information concerning diagnosis and treatment, discovery is prohibited pursuant to CPLR 4504(a)." Here, "the decedent was housed in a unit of the Holliswood Hospital that was designated for patients ages 12 to 15 years old who suffered from certain psychiatric disorders. Since the roommate's location in that unit of the Holliswood Hospital would, by simple deduction, reveal her medical status, disclosure was prohibited."

Castiglione v. James F.Q., 115 A D 3d 696 (2d Dept. 2014) – Pursuant to CPL 720.35(2), all records concerning a youthful offender adjudication are sealed. Moreover, "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. However, a person must still answer questions regarding the facts underlying the adjudication. Here, defendant was arrested for throwing an egg at plaintiff's daughter, causing injury to her eye, and, upon his plea of guilty, was adjudicated a youthful offender. At his deposition in this civil action involving the same incident, defendant denied that he threw the egg, and then refused to answer questions regarding the youthful offender proceedings. The Court concludes that defendant did not waive the privilege, "since he did not commence an action which places the conduct at issue," he "did not assert counterclaims or cross claims in this action placing the conduct at issue," and he "did not testify as to the confidential contents of the records."

City of Newburgh, New York v. William J. Hauser, P.E., 126 A D 3d 926 (2d Dept. 2015) – "The defendant sought to compel the plaintiff to produce certain documents submitted in a private mediation proceeding between the plaintiff and a nonparty. The subject documents are material and relevant to the defense of this action [citations omitted]. Contrary to the plaintiff's contention, CPLR 4547 does not bar disclosure of the subject documents, as that statute is concerned with the admissibility of evidence, and does not limit the discoverability of evidence."

PRIVILEGE LOGS

Stephen v. State of New York, 117 A D 3d 820 (2d Dept. 2014) – "Pursuant to CPLR 3122(b), 'whenever a person is required to produce documents for inspection, and where such person withholds one or more documents that appear to be within the category of the documents required to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the documents states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document.' Here, the defendant did not comply with the requirements of CPLR 3122(b), as it failed to identify the type of document being withheld, the general subject matter of each document, and the date of the document [citations omitted]. Under the circumstances of this case, the appropriate remedy for the defendant's failure to produce an adequate privilege log is to allow the defendant to produce an adequate privilege log and, thereafter, for the Court of Claims to review *in camera* the allegedly privileged documents, along with the privilege log."

The Chief Administrative Judge has issued a new Rule 11-b of the Uniform Rules of Practice for the Commercial Division, effective September 2, 2014, dealing with the creation of privilege logs for cases pending in the Supreme Court, Commercial Division.

For the first time, the Rules will require attorneys to "meet and confer" at the outset of a case, "and from time to time thereafter," to discuss "the scope of the privilege review" of documents, and the amount of information and categorization of privilege logs, "including the entry of an appropriate non-waiver order." The Rule notes that "to the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes." The Rule expresses "the preference in the Commercial Division" for the parties "to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs." The parties are urged to agree – at the directed meet and confers – "where possible" to employ a categorical approach to privilege designations. The producing party shall provide, for each such category, a certification "setting forth with specificity those facts supporting the privileged or protected status of the information included within the category. The certification shall also describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted." If, however, the demanding party refuses to permit a categorical approach, compelling the producing party to produce a document-by-document listing in the privilege log, the producing party will have to comply with CPLR 3122 – unless "the Court deems it appropriate to issue a protective order pursuant to CPLR 3103 based upon the facts and circumstances before it." If the producing party is required to produce the privilege log on a document-by-document basis, "the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the document-by-document log." Moreover, if the demanding party insists on a document-by-document log, "absent an order to the contrary," the following will be the protocol with respect to e-mails: "each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following: (i) an indication that the e-mails represent an uninterrupted dialogue; (ii) the beginning and ending dates and times (as noted on the e-mails) of a dialogue; (iii) the number of e-mails within the dialogue; and (iv) the names of all authors and recipients – together with sufficient identifying information about each person (e.g., name of employee, job title, role in the case) to allow for a considered assessment of privilege issues." The rule further encourages the hiring by the parties of a Special Master in complex cases raising significant disclosure issues, and requires that "the attorney having supervisory responsibility over the privilege review shall be actively involved in establishing and monitoring the procedures used to collect and review documents to determine that reasonable, good faith efforts are undertaken to ensure that responsive, non-privileged documents are timely produced." Finally, "agreements and protocols agreed upon by parties should be memorialized in a court order."

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DEPOSITIONS

A prior year's "Update" reported on *Sciara v. Surgical Associates of Western New York, P.C.*, 104 A D 3d 1256 (4th Dept. 2013), in which the Fourth Department revisited its earlier decision in *Thompson v. Mather*, 70 A D 3d 1436 (4th Dept. 2010). In *Thompson*, the Appellate Division held that "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition. CPLR 3113(c) provides that the examination and cross-examination of deposition witnesses 'shall proceed as permitted in the trial of actions in open court.'" Since attorneys for nonparty witnesses have no right to object or otherwise participate at trial, they may not do so at deposition. In *Sciara*, a medical malpractice case, Supreme Court [32 Misc 3d 904 (Sup.Ct. Erie Co. 2011)], attempted to square the holding in *Thompson* with the Uniform Rules. Counsel for the as-yet non-party witness – a pathologist who examined and reported on specimens removed during plaintiff's surgery – interrupted the deposition to clarify a question for the witness, and, after "an unpleasant exchange" with counsel, eventually terminated the deposition. Plaintiff moved for a renewed deposition, and sanctions. Supreme Court held that, in light of *Thompson*, counsel's reasons did not constitute a proper basis for interrupting the deposition, but "they highlight the tension between the ethical obligations a nonparty witnesses' counsel has to represent his or her client and the trial procedures applicable to depositions. On the one hand, the lawyer for the nonparty has no right to object or otherwise participate. On the other hand, the lawyer has a duty under the Rules of Professional Conduct to represent his or her client competently (Rule 1.1) and diligently (Rule 1.3). Undoubtedly, it is this tension which causes lawyers to bristle at the perceived requirement that they sit by as a 'potted plant.'" Supreme Court also stated that "*Thompson* should be read in light of its facts. There, the Fourth Department addressed attempts by a nonparty witness's counsel to object to form and relevance. The relief requested by plaintiff on the motion involved in *Thompson* excepted out objections for 'privileged matters' and questions deemed 'abusive or harassing' [citation omitted]. Thus, the facts in *Thompson* do not support a conclusion that counsel for a nonparty witness is prohibited from protecting his or her client from an invasion of a privilege or plainly improper questioning causing significant prejudice if answered. Uniform Rules §§221.2 and 221.3 are not limited to parties but apply to 'deponents.' Thus, in the event that a question posed to a nonparty fits within the three exceptions listed in §221.2, the nonparty's attorney is entitled to follow the procedures set forth in §§221.2 and 221.3. In accordance with these rules, the examining party is entitled to complete the remainder of the deposition. In the event a dispute arises regarding the application of the Uniform Rules, CPLR 3103(a) authorizes any 'party' or 'person from whom discovery is sought' to apply for a protective order. Either a 'party' or 'person from whom discovery is sought' is therefore entitled to suspend the deposition to serve such a motion. The deposition is stayed while the motion is pending (CPLR 3103[b])." A narrowly-divided Appellate Division "modified" – essentially reversed – that order. The majority held that "as we stated in *Thompson*, 'counsel for a nonparty witness does not have a right to

object during or otherwise to participate in a pretrial deposition. CPLR 3113(c) provides that the examination and cross-examination of deposition witnesses shall proceed *as permitted* in the trial of actions in open court' [citation omitted; emphasis by the Court], and it is axiomatic that counsel for a nonparty witness is not permitted to object or otherwise participate in a trial [citation omitted]. We recognize that 22 NYCRR 221.2 and 221.3 may be viewed as being in conflict with CPLR 3113(c), inasmuch as sections 221.2 and 221.3 provide that an 'attorney' may not interrupt a deposition except in specified circumstances. Nevertheless, it is well established that, in the event of a conflict between a statute and a regulation, the statute controls [citation omitted]. We also recognize the practical difficulties that may arise in connection with a nonparty deposition, which also have been the subject of legal commentaries [citations omitted]. However, we decline to depart from our conclusion in *Thompson* [citation omitted] that the express language of CPLR 3113(c) prohibits the participation of the attorney for a nonparty witness during the deposition of his or her client. We further note, however, that the nonparty has the right to seek a protective order [citation omitted], if necessary." The dissenters "do not believe that CPLR 3113(c) must be interpreted in a manner that establishes a conflict with the Uniform Rules." This is particularly so in light of the history of the interpretation of the statute, including "numerous cases over the years addressing issues arising at depositions of nonparties [that] have noted, without comment or criticism, the active participation of counsel for the nonparty." Moreover, "there is also the practical question faced by a nonparty at the deposition, when the statute of limitations has not yet run against that nonparty. Indeed, the decision in *Thompson* encourages a plaintiff, faced with commencing an action against several defendants, whether in the medical malpractice realm or some other area of law [citation omitted], to name the seemingly least culpable party as a defendant and depose ostensibly more culpable parties, with the idea that information, perhaps incriminating and always under oath, may be gleaned from the 'nonparties' who do not have the right to have counsel present." Effective September 23, 2014, the Legislature has legislatively overruled *Thompson* and *Sciara*. CPLR 3113 now provides that "examination and cross-examination of deponents shall proceed as permitted in the trial of actions, in open court, *except that a non-party deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party*" [emphasis added].

Grech v. HRC Corporation, N.Y.L.J., 1202729669551 (Sup.Ct. Queens Co. 2015)(Elliot, J.) – Plaintiff's counsel, after interviewing non-party witnesses, offered to represent those witnesses at their depositions, and, when that offer was accepted, precluded defendants counsel from interviewing those witnesses. The Court grants defendants' motion to disqualify plaintiff's counsel from representing the non-party witnesses. "Plaintiff's counsel essentially conceded during oral argument that she would have the benefit, at deposition of these witnesses, of acting as both counsel for plaintiff and counsel for the witnesses." Thus, it appears "from the circumstances presented herein that plaintiff's

representation of these witnesses is no more than a pretext to permit plaintiff to gain a 'tactical advantage' by foreclosing the 'laudable policy consideration of *Niesig v. Team I*, 76 N Y 2d 363 (1990) in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses,' *i.e.*, it was done solely to impede defendants' rights to conduct informal discovery." In addition, "by virtue of her dual representation, counsel would obtain yet another tactical advantage which would permit her to make objections at the depositions for the non-party witnesses that she would not otherwise be entitled to make were she not also counsel for plaintiff."

White v. White, 42 Misc 3d 260 (Sup.Ct. Monroe Co. 2013)(Dollinger, J.) – "The general rule requiring a deponent to answer all questions does not extend to questions of law or legal strategy or the witness's opinion about legal strategy." Here, in a matrimonial action, counsel asked defendant husband: "you're not withdrawing your request for changing custody unless she withdraws her request for child support?" This question "clearly asks the client to disclose his legal position and because his decision or opinion would be clearly outside the scope of a fact-based inquiry, the question is 'plainly improper.'"

Butler v. The City of New York, N.Y.L.J., 1202660000280 (Sup.Ct. N.Y.Co. 2014) (Freed, J.) – "Pursuant to CPLR 3108, a party may take an oral deposition outside the state under an open commission where it is demonstrated to be necessary or convenient. The reason for this procedural device is that service of a subpoena outside of New York State is ineffective to compel a non-party witness to appear at a deposition or produce documents. In order to justify the issuance of a commission to take the deposition of an out-of-state non-party witness, the party seeking the commission must demonstrate the information sought is material and necessary to the prosecution or defense of the claims. The moving party must establish that the witness possesses relevant evidence, or that an examination of the witness would be reasonably calculated to lead to the discovery of information bearing on the claims or defense at issue. Generally, however, the party seeking an open commission must demonstrate not only that the information sought is necessary to the investigation of the claim but also that a voluntary appearance or compliance by the witness is unlikely or that discovery cannot be obtained by stipulation or the cooperation of the witness either in New York or the other state. Absent any showing that the 'proposed out-of-state deponent would not cooperate with a notice of deposition or would not voluntarily come within this State or that the judicial imprimatur accompanying a commission will be necessary or helpful when the designee seeks the assistance of the foreign court in compelling the witness to attend the examination, the moving party fails to demonstrate that a commission is necessary or convenient.'"

Singh v. Brown, 43 Misc 3d 715 (Sup.Ct. Bronx Co. 2014)(Aarons, J.) – "Pursuant to CPLR 3116(a), a deposition transcript must be provided to the deponent for his or her review and signature. If a deponent refuses or fails to sign his or her deposition under

oath within 60 days, it may be used as if fully signed. The party seeking to use an unsigned deposition transcript thus bears the burden of demonstrating that a copy of the transcript has been submitted to the deponent for review and that the deponent failed to sign and return it within 60 days." However, "unsigned transcripts are admissible in support of a motion for summary judgment in certain limited circumstances. First, a deposition transcript which was not signed, but which is certified by the reporter, may be considered where it is not challenged as inaccurate [citations omitted]. Second, a certified, unsigned deposition transcript submitted by the party deponent is deemed to be adopted as accurate by the deponent, and is admissible [citations omitted]. Third, an admission against interest contained in an unsigned deposition transcript may be placed in evidence."

Fountain v. Ferrara, 118 A D 3d 416 (1st Dept. 2014) – "Defendants failed to preserve their argument that plaintiff may not rely upon his deposition testimony [in opposition to defendants' motion for summary judgment] since such deposition was taken in an action in which they were not parties and were not represented [citations omitted]. In any event, the argument is unavailing, since defendants' absence at the time of the deposition merely renders the deposition transcript hearsay as to them [citation omitted], and 'hearsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition.'"

Horn v. 197 5th Avenue Corp., 123 A D 3d 768 (2d Dept. 2014) – "Notwithstanding the detailed, consistent, and emphatic nature of the plaintiff's deposition testimony regarding the location of her accident, she subsequently executed an errata sheet containing numerous substantive 'corrections' which conflicted with various portions of her testimony and which sought to establish that she actually fell at 197 Fifth Avenue, not 140 Fifth Avenue. The only reason proffered for these changes was that, prior to her deposition, she was shown photographs of 140 Fifth Avenue that mistakenly had been taken by an investigator hired by her attorney, and that she thereafter premised her testimony on her accident having occurred at the located depicted in those photographs." Supreme Court's denial of defendants' motion to strike the errata sheet is reversed. "The plaintiff failed to provide an adequate reason for the numerous, critical, substantive changes she sought to make in an effort to materially alter her deposition testimony [citations omitted]. Accordingly, the court should have granted those branches of the defendants' motions which were to strike the errata sheet."

Jacome v. Garcia, N.Y.L.J., 1202654297552 (Sup.Ct. Nassau Co. 2014)(Feinman, J.) – Defendant's motion to strike plaintiff's errata changes to his deposition transcript is denied. "A 'witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefore.'" Arguably, "plaintiff's explanations may be insufficient, and even arguably be substantive, however, the corrections do not unduly prejudice the defendant who has the opportunity

to impeach such changes through the use of the original deposition transcript. Any purported conflict between the original deposition testimony and the correction raises issues of credibility."

DEPOSITION IN AID OF A FOREIGN ACTION

Matter of Boyarsky, N.Y.L.J., 1202655216383 (Sup.Ct. Westchester Co. 2014) (Lefkowitz, J.) – In order to take advantage of CPLR 3119, "an out-of-state party seeking the issuance of a subpoena in New York must have already obtained a subpoena directing the discovery from the court of record in the other state or territory of the United States. Notably, CPLR 3119(a)(1) defines an 'out-of-state subpoena,' which is required under both methods set forth in CPLR 3119 for the issuance of a New York subpoena, as 'a subpoena issued under authority of a court of record of a state other than this state.' Moreover, CPLR 3119(b)(3) provides that when a party requests the issuance of a subpoena by the county clerk, the subpoena must incorporate the terms of the out-of-state subpoena. Additionally, the legislative history indicates that the statute contemplated that the scope of the examination under the subpoena would be determined by the court of the other state in which the out-of-state action is pending, not a New York court [citation omitted]. Thus, the language of the statute, as well as the legislative history, clearly indicates that a prerequisite for the use of the expedited procedure set forth in CPLR 3119 is a subpoena issued by a court of record in a state other than New York."

PRODUCTION OF DOCUMENTS

Lombardo v. Dormitory Authority of the State of New York, 47 Misc 3d 702 (Sup.Ct. Kings Co. 2015)(Rivera, J.) – CPLR 2307 provides that any subpoena *duces tecum* to be served upon "a department or bureau of a municipal corporation or of the state," must be issued by the Court, and "unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice" to the "officer having custody" of the sought documents. Here, defendant sought to subpoena documents from Jacobi Medical Center, operated by the New York City Department of Hospitals. Defendant submitted the subpoenae to be "so ordered" by the Court without the required notice or motion. Accordingly, the request was denied without prejudice to a proper motion.

DISCLOSURE OF SOCIAL MEDIA

Del Gallo v. City of New York, N.Y.L.J., 1202663098604 (Sup.Ct. N.Y.Co. 2014)(Freed, J.) – "While courts continue to grapple with, and formulate guidelines for, discovery of electronically stored information, including social media records, courts recognize that, generally, 'discovery of social networking postings requires the application of basic discovery principles in a novel context' [citations omitted]. As in other contexts, a 'party demanding access to social networking accounts must show that the method of discovery will lead to "the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information that bears on the claims."'" Discovery, "while broad, does not

give a party 'the right to "uncontrolled and unfettered disclosure' [citation omitted], and 'the "fact that the information Defendant seeks is in an electronic file as opposed to a file cabinet does not give it the right to rummage through the entire file"' [citation omitted]. 'Digital "fishing expeditions" are no less objectionable than their analog antecedents' [citations omitted]. Courts have used 'a two-prong analysis for determining whether social media accounts are discoverable. First, the court determines whether the content in the accounts is material and necessary, and then it balances whether the production of this content would result in a violation of the account holder's privacy rights' [citations omitted]. To warrant such discovery, 'defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's social media account – that is, information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims"' [citations omitted]. 'Absent some facts that the person disclosed some information about the subject matter of the pending law suit, granting carte blanche discovery of every litigant's social media records is tantamount to a costly, time consuming "fishing expedition."'" Here, defendants seek access to plaintiff's entire LinkedIn account. At her deposition, plaintiff "testified that she had a LinkedIn account prior to the June 2010 accident, and she left it up after the accident to keep in touch with former colleagues [citation omitted]. She stated that she has responded to former colleagues 'who are asking how I'm doing. Not about work-related stuff' [citation omitted]. She also stated that recruiters have contacted her about positions and she has responded that she is 'not looking for employment at this time.'" The Court holds that defendants "may obtain information pertaining to plaintiff's communications with recruiters and others, related to job offers and inquiries, searches, and responses, if any, available on her LinkedIn account." However, defendants have not shown "that they are entitled to discovery of plaintiff's communications with former colleagues inquiring about her condition, or to all other material on plaintiff's LinkedIn account." For, "defendants offer no more than 'the mere hope of finding relevant evidence,' which is insufficient to warrant such disclosure."

Spearin v. Linmar, L.P., 129 A D 3d 528 (1st Dept. 2015) – "Defendant established a factual predicate for discovery of relevant information from private portions of plaintiff's Facebook account by submitting plaintiff's public profile picture from his Facebook account, uploaded in July 2014, depicting plaintiff sitting in front of a piano, which tends to contradict plaintiff's testimony that, as a result of getting hit on the head by a piece of falling wood in July 2012, he can no longer play the piano [citations omitted]. However, the direction to plaintiff to provide access to all of his post-accident Facebook postings is overbroad. We remand for an *in camera* review of plaintiff's post-accident Facebook postings for identification of information relevant to his alleged injuries."

Melissa G. v. North Babylon Union Free School District, 48 Misc 3d 389 (Sup.Ct. Suffolk Co. 2015)(Rebolini, J.) – In this personal injury action based upon sexual contact by a teacher with plaintiff-student, the complaint alleges, among the items of damage,

that plaintiff suffers from "emotional distress, mental distress, legal process trauma, alienation of affections, loss of enjoyment of life, post-traumatic stress disorder." Defendant seeks "complete, unedited account data for all Facebook accounts" maintained by plaintiff, based upon plaintiff's public Facebook pages, which contain photographs of her "engaged in a variety of recreational activities and activities with her boyfriend; at work in a veterinary hospital; rock climbing; and out drinking with friends." Plaintiff testified in her deposition that she has "'serious trust issues with everyone' and that she suffers from anxiety attacks. It was also her testimony that she was 'struggling' in her relationship with her boyfriend and that she had 'no trust' concerning others." The Court concludes that "as defendants have shown that plaintiff's public Facebook pages contain photographs of Melissa engaged in a variety of recreational activities that are probative to her damage claims, it is reasonable to believe that other portions of her Facebook pages may contain further evidence relevant to the defense." But "notwithstanding defendants' request for disclosure in this action of 'the complete, unedited account data' for plaintiff's Facebook accounts, this Court is mindful that 'the fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress." Thus, the Court holds that "not all of plaintiff's personal communications to others are subject to scrutiny in connection with her claims." First, "in discovery matters, counsel for the producing party is the judge of relevance in the first instance [citation omitted]. While it has been suggested that an *in camera* review is appropriate to determine whether certain material on plaintiff's Facebook account is discoverable, an *in camera* inspection in disclosure matters is the exception rather than the rule, and there is no basis to believe that plaintiff's counsel cannot honestly and accurately perform the review function in this case [citation omitted]. Accordingly, plaintiff is directed to print out and to retain all photographs and videos, whether posted by others or by plaintiff herself, as well as status postings and comments posted on plaintiff's Facebook accounts, including all deleted materials." But, "private messages sent by or received by plaintiff need not be reviewed, absent any evidence that such routine communications with family and friends contain information that is material and necessary to the defense." And, "within sixty (60) days from the date of this order, plaintiffs' counsel shall review the Facebook postings and shall disclose all postings that are relevant to plaintiff's damage claims."

Last year's "Update" reported that the New York County Lawyers Association Committee on Professional Ethics has concluded (Op. 745, July 2, 2013) that "an attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages." And, "provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on 'private' social media pages, and what may be 'taken down' or removed." Of course, while a lawyer is ethically permitted to advise a client to remove potentially harmful material from a social media site, "a client must

answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject." Thereafter, the Philadelphia Bar Association, citing the New York County Opinion, has concluded that ethics rules do not prohibit an attorney from instructing a client to "delete information that may be damaging from the client's [social media] page." But the lawyer must "take appropriate steps to preserve the information in the event it should prove to be relevant and discoverable" [Op. 2014-5, July 14, 2014]. The North Carolina State Bar Ethics Committee has opined that lawyers in that State may counsel a litigation client to take down postings on social media if the removal will not amount to spoliation of evidence or violate the law in some other way. Lawyers are required to counsel clients about how social media information may affect the case, and may advise clients to change security and privacy settings. But, "in general," relevant social media postings "must be preserved." The Florida Bar's Ethics Committee has released a proposed opinion in which it states that "a lawyer may advise the client pre-litigation to remove information from a social media page, regardless of its relevance to a reasonably foreseeable proceeding," if "the removal does not violate any substantive law regarding preservation and/or spoliation of evidence." The attorney must then ensure that "an appropriate record" of the removal is maintained. The opinion further provides that "what information on a social media page is relevant to reasonably foreseeable litigation is a factual question that must be determined on a case-by-case basis," and "what constitutes an 'unlawful' obstruction, alteration, destruction, or concealment of evidence is a legal question, outside the scope of an ethics opinion."

D'Alessandro v. Nassau Health Care Corporation, N.Y.L.J., 1202663929568 (Sup.Ct. Nassau Co. 2014)(Marber, J.) – Plaintiff seeks defendant's cellular phone records for the period of time surrounding the accident at issue. In support, plaintiff submits the affidavit of her accident reconstruction expert, who opines that defendant "would have been able to see the pedestrians in the roadway for over five (5) seconds prior to the impact with decedent." Therefore, the expert concludes that defendant "was inattentive or distracted. He contends that this distraction may have been caused by cellular telephone usage." The Court denies the motion. "There is no direct evidence that the Defendant, Baldwin, was using a cell phone at the time of the accident. The Plaintiff's conclusory assertions, based upon the experts' opinions that the Defendant, Baldwin, may have been using a cellphone, which may have caused her to be inattentive or distracted, is completely speculative and is not supported by any direct evidence." The request "amounts to nothing more than a fishing expedition."

SPOLIATION

Pennachio v. Costco Wholesale Corporation, 119 A D 3d 662 (2d Dept. 2014) – "The plaintiff allegedly was injured when he reached for a shrink-wrapped glass jar of olives

on a shelf in a store owned by the defendant which, unbeknownst to him, was broken. The defendant originally retained the subject jar and marked it as 'evidence' not to be discarded. However, according to the defendant, the jar was later discarded inadvertently. After commencing this personal injury action against the defendant, the plaintiff demanded production of the subject jar and, due to its unavailability, moved to strike the defendant's answer on the ground of spoliation of evidence. In support of his motion, the plaintiff submitted an affidavit from an expert, averring that examination of the subject jar, which had contained mold at the time of the accident, would have enabled her to render an opinion regarding the length of time the jar had been broken." Plaintiff "contended that this evidence was vital to his ability to prove that the defendant had constructive notice of the allegedly dangerous condition of the jar." Defendant, however, "submitted an affidavit from an expert disputing the ability of the plaintiff's expert to reach an accurate conclusion as to when the jar broke." The Court holds that Supreme Court erred in directing an adverse inference charge. "An issue of fact exists as to whether spoliation of relevant evidence occurred. The sanction of an adverse inference for spoliation of evidence is not warranted when the evidence destroyed is not relevant to the ultimate issues to be determined in the case." Thus, "this issue of fact should be placed before the jury, along with the inferences to be drawn therefrom [citations omitted]. The jury should be instructed that, if it credits the opinion of the defendant's expert that no conclusion could have been reached with reasonable certainty regarding how long the jar had been broken by analyzing the mold contained in the jar, then no adverse inference should be drawn against the defendant. On the other hand, the jury should be advised that, if it credits the opinion of the plaintiff's expert that she could have determined how long the jar had been broken by analyzing the mold inside, then it would be permitted to draw an adverse inference against the defendant."

Duluc v. AC & L Food Corp., 119 A D 3d 450 (1st Dept. 2014) – "One week after plaintiff's August 8, 2009 slip-and-fall accident on defendant's premises, plaintiff's counsel sent a notice to defendant 'to preserve any and all video records/surveillance tapes/still photos of any nature that depict the subject slip and fall accident' on the date and time in question." Defendant reviewed the tapes from all of its cameras, and preserved an 84-second portion of tape from one camera, that depicted the accident. In accordance with its then usual practice, defendant automatically erased all other footage 21 days later. "Six weeks after the first request, counsel expanded his demand to six hours of footage leading up to the accident, for all 32 cameras in the store." The majority at the Appellate Division holds that "we take no issue with the dissent's contention that a property owner's receipt of a notice to preserve records triggers certain obligations. The extent of the obligation is where we part company with our colleague. While it is true that a plaintiff is entitled to inspect tapes to determine whether the area of an accident is depicted and 'should not be compelled to accept defendant's self-serving statement concerning the contents of the destroyed tapes' [citation omitted], this principle does not translate into an obligation on a defendant to preserve hours of tapes indefinitely each

time an incident occurs on its premises in anticipation of a plaintiff's request for them. That obligation would impose an unreasonable burden on property owners and lessees." The dissenting Justice argued that "defendant suggests that based on the phrasing of plaintiff's notice, it was reasonable for it to limit its retrieval and retention to only that portion of the footage that actually showed plaintiff falling. However, defendant's obligation upon receipt of plaintiff's notice was not so narrow." For, "'plaintiffs were entitled to inspect the tapes to determine for themselves whether the area of the accident was depicted. They should not be compelled to accept defendant's self-serving statement concerning the contents of the destroyed tapes.'"

AJ Holdings Group, LLC v. IP Holdings, LLC, ___ A D 3d ___, 2015 WL 3618228 (1st Dept. 2015) – "Plaintiff's failure to ensure that its principals, who were all involved in the instant transactions, preserved their emails on various accounts used by them, and its failure to implement any uniform or centralized plan to preserve data or even the various devices used by the 'key players' in the transaction, demonstrated gross negligence with regard to the deletion of the emails [citation omitted]. This gross negligence gave rise to a rebuttable presumption that the spoliated documents were relevant [citation omitted]. However, plaintiff sufficiently rebutted that presumption by demonstrating that the defenses available to defendants all necessarily turned on communications to or with them, not plaintiff's internal communications."

Simoneit v. Mark Cerrone, Inc., 122 A D 3d 1246 (4th Dept. 2014) – The Court concludes "that preclusion of the affirmative defenses based on brake failure is warranted as a sanction for spoliation [citation omitted]. After the accident, Cerrone replaced the payloader's allegedly defective brake calipers and discarded the old calipers. It is well established that courts have 'broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence,' and 'may, under appropriate circumstances, impose a sanction "even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator became a party, provided the party was on notice that the evidence might be needed for future litigation"' [citation omitted]. Here, Freeman drove a 32,000 pound construction vehicle into a school bus filled with children, several of whom were removed from the scene in ambulances. Under those circumstances, we conclude that defendants should have anticipated that litigation was likely [citation omitted] and, therefore, they were on notice that the brake calipers might be needed for future litigation."

Lentini v. Weschler, 120 A D 3d 1200 (2d Dept. 2014) – Last year's "Update" reported on the Supreme court decision in this matter [N.Y.L.J., July 3, 2013, 1202609383030 (Sup.Ct. Nassau Co.)]. Supreme Court held that, "when a party negligently loses, or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading [citation omitted]. The sanction of spoliation has been extended

to also include the non-intentional or negligent destruction of evidence [citations omitted]. In determining the appropriate sanction, the essential issue is the resulting prejudice to the adversary [citation omitted]. The assertion that evidence was never requested prior to its destruction, while compelling, is nevertheless, not always excusable. The fact that evidence is destroyed prior to the commencement of an action, and hence prior to being requested by an adverse party, is not a cognizable excuse to a spoliation claim when the spoiler of evidence had notice that the evidence may be needed for future litigation [citation omitted]. In cases where the spoiled evidence is not crucial to a litigant's case, such that its absence does not prevent the outright prosecution or defense of a case, preclusion of evidence, rather than outright dismissal of pleadings, is the preferred remedy." Here, on notice of the potential claim resulting from plaintiff's fall on defendant's allegedly defective walkway, defendant completely disassembled and rebuilt the walkway. "The destruction of the walkway, coupled with the pouring of concrete over the dirt pathway once the walkway was removed, completely deprived the plaintiff of establishing her claim by destroying crucial evidence." Defendant's answer was stricken. The Appellate Division has affirmed. Defendant paved over the walkway "after receiving notice that plaintiff intended to inspect it and after his own expert was afforded an opportunity to inspect the walkway prior to it being covered in cement." And, "plaintiff demonstrated that the condition of the ground which was underneath the bricks was central to the prosecution of her case and that its permanent change in character preventing inspection and analysis was prejudicial, since she would be unable to rely on other evidence to prove her claims." Thus, "Supreme court providently exercised its discretion in striking the defendant's answer and awarding the plaintiff summary judgment on the issue of liability."

McKenzie v. Southside Hospital, N.Y.L.J., 1202644937216 (Sup.Ct. Queens Co. 2014) (McDonald, J.) – After an accident in defendant hospital, a security guard told plaintiff that surveillance cameras recorded the event. When plaintiff asked to see the tape, the request was refused by hospital personnel. When the later preliminary conference order directed production, and in response to a Notice of Preservation, the hospital reported that the tape was unavailable because "the DVR system for the Hospital faulted and did not retain any footage from the date of the loss," and, "upon information and belief," that the area of the accident "was blocked by a laundry cart," so, "even if the footage was available, said footage would not have and did not depict the accident or the parties to the accident." The Court concludes that, even though disposal of the tape was not intentional, and the hospital was not on actual notice at the time of a request for preservation, it knew "that the plaintiff was claiming to have been injured from the accident," and that it would "likely be the subject of a lawsuit." Plaintiff is not required to accept the hospital's view of the usefulness of the tape. Accordingly, "a negative inference charge" is appropriate at trial.

Rodriguez v. City of New York, N.Y.L.J., 1202657798985 (Sup.Ct. N.Y.Co. 2014)(Chan, J.) – Plaintiff sues the New York City Department of Education for injuries he suffered as the result of an assault while leaving school for a class trip. The school Dean "testified at her deposition, taken on September 15, 2011, that a surveillance video from a school camera existed and that she viewed it prior to her deposition. Plaintiff served a Notice for Discovery and Inspection dated the same day that demanded a copy of the video. There are several court orders directing the defendants to respond to the Notice, the last of which was dated on October 24, 2012. It states that the failure to respond within forty-five days would result in preclusion of the defendants from offering any evidence as to liability at the time of trial. The defendants served a response dated November 27, 2012, that indicated the video was not preserved and that, in any event, Dean Hasandras only claimed that it showed the students exiting the building, but did not depict the assault on plaintiff." While the "response" sufficed to avoid preclusion, "the cavalier attitude of defendants and their failure to preserve a video that depicted at least some of the activity involved in this litigation is troubling. It is particularly concerning that the video was not preserved where a police investigation immediately ensued, a Notice of Claim was filed on June 17, 2010, for this civil action, and the faculty of the school thought to view the video soon after the events occurred and, in the case of Dean Hasandras, prior to her deposition." Since the video did not prevent plaintiff from presenting a case, the Court directed that "an adverse inference charge to be determined by the trial judge is appropriate here."

ELECTRONIC DISCLOSURE

Pegasus Aviation I, Inc. v. Varig Logistica S.A., 118 A D 3d 428 (1st Dept. 2014) – In recent years, the Appellate Division, First Department, has decided a number of significant cases dealing with Electronic Disclosure. First, in *Tener v. Cremer*, 89 A D 3d 75 (1st Dept. 2011), the Court concluded that, in determining whether to compel production of "inaccessible" Electronically Stored Information ("ESI"), and whether "cost-shifting" is appropriate, the Court should apply the "sophisticated rules" of the Nassau County Supreme Court Commercial Division. "Most important," the Nassau Guidelines "do not rule out the discoverability of deleted data, but rather suggest a cost-benefit analysis involving how difficult and costly it would be to retrieve it: 'As the term is used herein, ESI is not to be deemed "inaccessible" based solely on its source or type of storage media. Inaccessibility is based on the burden and expense of recovering and producing the ESI and the relative need for the data.'" The Court concluded that "the record is insufficient to permit this court to undertake a cost-benefit analysis. Accordingly, we remand to Supreme Court for a hearing to determine at least: (1) whether the identifying information was written over, as [the subpoenaed non-party] NYU maintains, or whether it is somewhere else, such as in unallocated space as a text file; (2) whether the retrieval software plaintiff suggested can actually obtain the data; (3) whether the data will identify actual persons who used the internet on April 12, 2009 via

the IP address plaintiff identified; (4) which of those persons accessed Vitals.com and (5) a budget for the cost of the data retrieval, including line item(s) correlating the cost to NYU for the disruption." For, "until the court has this minimum information, it cannot assess 'the burden and expense of recovering and producing the ESI and the relative need for the data' (Nassau Guidelines) and concomitantly whether the data is so 'inaccessible' that NYU does not have the ability to comply with the subpoena. That NYU is a non-party should also figure into the equation." Then, in *U.S. Bank, N.A. v. GreenPoint Mortgage Funding, Inc.*, 94 A D 3d 58 (1st Dept. 2012), the Court held that "we are persuaded that *Zubulake* [*v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003)] should be the rule in this Department, requiring the producing party to bear the cost of production [of both ESI *and* physical documents] to be modified by the IAS court in the exercise of its discretion on a proper motion by the producing party." For, "requiring the producing party to bear its own cost of discovery, including the searching, retrieving and producing of ESI, supports 'the strong public policy favoring resolving disputes on their merits' [citing *Zubulake*]. The alternative of having the requestor pay 'may ultimately deter the filing of potentially meritorious claims' particularly in circumstances where the requesting party is an individual." Finally, in *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A D 3d 33 (1st Dept. 2012), the Court concluded that "the *Zubulake* standard is harmonious with New York precedent in the traditional discovery context, and provides litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered." Thus, "once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data [citation omitted]. Regardless of its nature, a hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee. The hold should, with as much specificity as possible, describe the ESI at issue, direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease, and describe the consequences for failure to so preserve electronically stored evidence. In certain circumstances, like those here, where a party is a large company, it is insufficient, in implementing such a litigation hold, to vest total discretion in the employee to search and select what the employee deems relevant without the guidance and supervision of counsel." The Court rejected defendant's (and amicus's) argument that "reasonably anticipates" is too vague, and that no sanctions for destruction of electronically stored information should be imposed "in the absence of pending litigation." For, "to adopt a rule requiring actual litigation or notice of a specific claim ignores the reality of how business relationships disintegrate. Sides to a business dispute may appear, on the surface, to be attempting to work things out, while preparing frantically for litigation behind the scenes. EchoStar and amicus's approach would encourage parties who actually anticipate litigation, but do not yet have notice of a 'specific claim' to destroy their documents with impunity." The Court defined "reasonable anticipation of

litigation" as "such time when a party is on notice of a credible probability that it will become involved in litigation." Here, in *Pegasus*, Supreme Court granted plaintiff's motion for an adverse inference instruction at trial against defendants as a sanction for spoliation of electronic evidence. A splintered Appellate Division reverses. The Court unanimously agrees upon the standard – when the spoliation is intentional, or the result of gross negligence, the adverse party need not demonstrate prejudice flowing from the spoliation. But when the spoliation is merely negligent, the adverse party must show that it has been harmed for sanctions to be awarded. The 3-Justice majority concludes that defendant here was merely negligent, and that plaintiff failed to demonstrate prejudice. "The motion court's finding of gross negligence apparently was based on a statement by a federal district court of the Southern District of New York that, when litigation is anticipated, 'the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information' [citation omitted (emphasis by the Court)]. To the extent the district court meant by this that failure to institute a litigation hold, in all cases and under all circumstances, constitutes gross negligence *per se*, the statement has been disapproved by the Second Circuit [citation omitted]. The *per se* rule apparently articulated in [the Southern District decision], and followed by the motion court, has never to our knowledge been adopted by a New York state appellate court." One Justice agreed that only ordinary negligence had been shown, "however, because a court may, in its discretion, impose a spoliation sanction for the negligent destruction of evidence, I disagree with the majority's conclusion that no sanction is warranted, and would remand for a determination as to the extent to which plaintiffs have been prejudiced by the loss of the evidence, and the sanction, if any, that should be imposed." Another Justice dissented entirely, finding that defendant's "failure to take any meaningful steps to preserve evidence constitutes gross negligence and therefore that the order imposing the sanction of an adverse inference should be affirmed."

NOTICE TO ADMIT

Alberto v. Jackson, 118 A D 3d 733 (2d Dept. 2014) – If the admission demanded by a Notice to Admit, pursuant to CPLR 3123 "is not denied or otherwise explained 'within twenty days after service thereof or within such further time as the court may allow,' then the requested admission will be deemed admitted [citation omitted]. 'The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial' [citations omitted]. 'It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial' [citation omitted]. 'Also, the purpose of a notice to admit is not to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial' [citation omitted]. 'A notice to admit which goes to the heart of the matters at issue is improper.'" Here, third-party defendant sought to compel defendant-third-party plaintiff "to admit that the insurance policies issued to him by [third-party defendant] included a lead exclusion endorsement.

Since the admissions sought 'were at the heart of the controversy' in the third-party action [citations omitted], they were improper."

Williams v. City of New York, 125 A D 3d 767 (2d Dept. 2015) – "'The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial' [citations omitted]. Contrary to the plaintiff's contention, his notice to admit improperly sought the defendants' admissions concerning a matter that went to the heart of the controversy in this case [citations omitted]. Since the admissions sought were improper, the defendants' failure to timely respond to the subject notice should not be deemed an admission of the matters stated therein."

MEDICAL RECORDS AND EXAMINATIONS

Rogers-Duell v. Chen, 42 Misc 3d 291 (Sup.Ct. Albany Co. 2013)(Teresi, J.) – In this medical malpractice action, defendants, seeking to show that the infant plaintiff's injuries are genetic, rather than the result of a failure to diagnose and treat, seek the medical and educational records of plaintiff mother, and of non-party father, as well as genetic testing of the infant plaintiff. The Court denies the applications. The mother sues only in a representative capacity and "has not placed her own medical history in issue." Nor have defendants established the "relevance and materiality" of the mother's educational records. As to the father, since he is a non-party, defendants were required to serve a subpoena upon him "in the same manner as a summons," which they failed to do. While several courts "have compelled genetic testing in civil discovery disputes for identity related issues, " here, "identity is not at issue. Rather, defendants seek to use genetic testing to controvert plaintiff's causation proof." Finally, with respect to the request for genetic testing of the infant plaintiff, the Court concluded that, from the familial relationships that genetic testing could disclose to the potential discovery of genetic diseases, conditions, and predispositions, the information about plaintiff that an unspecified genetic test would provide defendants is extraordinary and constitutes a 'special burden' [citation omitted]. Although plaintiff put his physical and mental condition at issue, the information to be gleaned from unspecified genetic testing goes far beyond the relevant issues in this action. While one court has expressed its view that the DNA test sought in that action was not 'an extreme discovery tool which is very intrusive [citation omitted], such court was dealing only with DNA testing for identification/impeachment purposes. Here, however, defendants seek far more personal information; a genetic basis underlying plaintiff's disabilities. Moreover defendants have not specified the type of genetic test they wish to employ nor placed any limitation on the information they would collect. As such, the broad unspecified genetic testing defendants seek constitutes an especially heavy 'special burden.' In contrast, defendants offered no factual basis to substantiate their need for genetic testing."

Washington v. Alpha-K Family Medical Practice, P.C., 128 A D 3d 687 (2d Dept. 2015) – "The Supreme Court providently exercised its discretion in denying that branch of the appellants' motion which was to compel the production of a nonparty sibling's medical records. Even when the party seeking disclosure has demonstrated that such disclosure is material and necessary in the prosecution or defense of an action [citation omitted], discovery may still be precluded where, as here, the requested information is privileged and thus exempted from disclosure pursuant to CPLR 3101(b) [citations omitted]. 'Once the privilege is validly asserted, it must be recognized and the sought-after information may not be disclosed unoess it is demonstrated that the privilege has been waived.'"

Perez v. Fleischer, 122 A D 3d 1157 (3d Dept. 2014) – In this lead paint exposure case, "defendants demanded disclosure of academic and medical records of plaintiff's siblings and mother, including the mother's substance abuse and rehabilitation records, and that the mother be produced for an IQ test and participate in plaintiff's independent medical examination." Here, "contrary to plaintiff's assertion that all evidence concerning the medical and educational history of his family members is irrelevant, this Court has repeatedly permitted defendants in lead paint cases to rely on scientifically supported evidence indicating that a plaintiff's injuries could have been caused, at least in part, by factors other than lead poisoning, including environmental, social and family factors [citations omitted]. Defendants here provided an expert affidavit, supported by scientific articles, opining that medical, educational and IQ information concerning plaintiff's immediate family members is relevant, material and necessary to determining the causes and contributing factors related to plaintiff's numerous conditions, thereby rendering this information discoverable." However, the medical records of plaintiff's mother and siblings are protected by the physician-patient privilege, which has not been waived – except for the mother's medical records during the period of her pregnancy with plaintiff. As to the mother's and siblings' academic records, "considering that these records are private but not privileged, Supreme Court reasonably balanced defendants' need for them and their possible relevance against the burden to these nonparties from disclosure, requiring that the siblings' records be produced to the court for an *in camera* review [citations omitted]. The mother's academic records should similarly be submitted to the court for review and redaction of any privileged material." Finally, the request to have the mother take an IQ test is denied. Although "defendants have submitted some proof that the mother's IQ may be relevant to plaintiff's diminished mental capacity," defendants' "need for her IQ test results, however, are not [*sic*] outweighed by the burden on her to undergo such a test, as well as the potential for extending this litigation by focusing on information extraneous to plaintiff's condition, such as all of the factors contributing to the mother's IQ." Thus, "defendants should not be able to compel plaintiff's mother, a nonparty, to undergo an IQ test."

Xu v. New York City Health and Hospitals Corporation, N.Y.L.J., 1202724198509 (Sup.Ct. N.Y.Co. 2015)(Schoenfeld, J.) – "Under section 33.13(c) of the Mental Hygiene

Law (MHL), the Court may order disclosure of mental health clinical records 'upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality' [citation omitted]. Moreover, even if the Court determines that the medical information contained in the mental health records should not be released, the records may contain relevant 'information of a nonmedical nature relating to any prior assaults or similar violent behavior' that may be disclosed [citations omitted]. Under these circumstances, the proper procedure is for the Court to conduct an *in camera* inspection of the records to decide what, if anything, should be disclosed."

Schlau v. City of Buffalo, 125 A D 3d 1546 (4th Dept. 2015) – "Plaintiff waived the physician-patient privilege by affirmatively placing his medical and psychological condition in controversy, and he has disclosed all of his postaccident medical records [citation omitted]. With respect to plaintiff's preaccident medical records, the waiver of the physician-patient privilege extends to the same body parts or conditions that are at issue in the action [citation omitted], but not to 'information involving unrelated illnesses and treatments.'"

Del Gallo v. City of New York, N.Y.L.J., 1202663098604 (Sup.Ct. N.Y.Co. 2014)(Freed, J.) – Plaintiff seeks damages for head and brain injuries, "such as multiple skull and facial fractures, intra-cranial hemorrhage, damage to optic nerves, brain swelling and traumatic brain injury; as well as orthopedic injuries to her right and left arm, left shoulder, left leg, and lung contusions, respiratory failure, fractured teeth, hearing loss, dizziness, neuropathy, scarring, and more," resulting from being hit by a falling limb from a tree in Central Park. "Plaintiff's claimed injuries also include anxiety, memory deficits, depression, confusion, and survivor's guilt, all of which are claimed to have contributed to a lesser quality of life and a loss of enjoyment of life." In their demand for medical records, defendants seek, *inter alia*, plaintiff's obstetrical and gynecological records. The waiver of the physician-patient privilege by virtue of commencing an action for personal injuries, "'does not permit wholesale discovery of information regarding the protected party's physical and mental condition' [citations omitted]. 'A party does not waive the privilege with respect to unrelated illnesses or treatments.'" None of plaintiff's claimed injuries "encompass any gynecological conditions or sequelae." The Court rejects defendants' arguments that "a plaintiff places her entire medical condition in controversy when there are 'broad allegations of physical injury and mental anguish,'" and that these records "are needed to know 'to what degree plaintiff's psychological injuries are associated with the alleged tort and to what extent they are explained by other causes.'" The psychological and other records already obtained suffice.

McLeod v. Metropolitan Transportation Authority, N.Y.L.J., 1202729546835 (Sup.Ct. N.Y.Co. 2015)(Stallman, J.) – The Court here explores in depth the various – and somewhat conflicting – appellate decisions dealing with the scope of the waiver of the physician-patient privilege when a personal injury plaintiff asserts "loss of enjoyment of

life" as an element of damage. The principal issue is what medical records are "related" to such a claim. "A claim for loss of enjoyment of life is not a separate item of recoverable damages, but rather part of the damages recoverable for pain and suffering; it includes not only the suffering from the physical pain caused by injuries, but also encompasses 'the frustration and anguish caused by the inability to participate in activities that once brought pleasure' [citation omitted]. Thus, a claim for loss of enjoyment of life can place at issue not only a physical condition, such as physical pain or a physical inability to perform daily activities, but also frustration and anguish." The claim may also place "life expectancy" in issue. "In sum, by pleading loss of enjoyment of life or future lost wages of lost earning capacity based on permanent, disabling physical injuries, the plaintiff would be deemed to have waived the physician-patient privilege for his or her entire medical history." The Second Department has so held. But, "the Appellate Divisions of the other judicial departments have not been consistent on the issue of the scope of the waiver of physician-patient privilege when loss of enjoyment of life is claimed." The Fourth Department has ruled both ways on the issue. "Neither has the Appellate Division, First Department taken a consistent approach." But, on balance, "so long as a claim for loss of enjoyment of life or future lost earnings is considered as affirmatively placing at issue the plaintiff's life expectancy, work life expectancy, and general health, and so long as appellate courts continue to define 'relatedness' as 'material and necessary' or 'relevant,' this Court is constrained to conclude that plaintiff in this case has therefore waived the physician-patient privilege as to his entire medical history." The Court further noted that "courts have denied discovery of medical records that were once privileged if the plaintiff withdraws those injuries or claims that initially triggered waiver of the privilege when they were placed in issue."

Clarke v. New York City Health and Hospitals Corporation, N.Y.L.J., 1202717821474 (Sup.Ct. N.Y.Co. 2015)(Schoenfeld, J.) – In this medical malpractice case, alleging improper treatment during plaintiff's birth, resulting in neurological and physical injuries, defendant seeks production of all of plaintiff mother's obstetrical and gynecological records, and the medical and school records of the infant plaintiff's siblings. The Court finds that, for the most part, plaintiff mother's deposition "was factual and did not divulge confidential communications between Ms. Clarke and her doctors concerning her pregnancies with or the health of" her sons. Thus, she did not waive the physician-patient privilege with respect to them. In the one instance in which she waived the privilege, by revealing some communications with her doctors during delivery of her daughter, defendant failed to demonstrate the relevance of those medical records. And, while "privilege does not extend to disclosure of school and academic records," defendant had not adequately demonstrated the relevance of the records of the infant plaintiff's siblings, particularly in the face of plaintiff mother's specific testimony that "none of her children, except [the infant plaintiff] have been diagnosed with developmental disorders such as autism or pervasive developmental disorder."

Alford v. City of New York, 116 A D 3d 483 (1st Dept. 2014) – "Having granted plaintiff's motion to withdraw the claimed injuries relating to his mental condition, the motion court providently determined that plaintiff cannot be compelled to disclose confidential records relating to prior treatment for substance or alcohol abuse or his mental condition [citations omitted]. Defendant's [*sic*] remaining claim for 'loss of enjoyment of life,' relating solely to his claimed physical injuries, does not warrant disclosure of substance abuse and mental health treatment information, since its potential relevance has not been shown."

Hamilton v. Miller, 23 N Y 3d 592 (2014) – A prior year's "Update" reported on *Giles v. Yi*, 105 A D 3d 1313 (4th Dept. 2013), which is also decided by the Court of Appeals in this consolidated appeal. In these lead paint personal injury cases, defendants contend that none of the medical reports provided to them by plaintiff pursuant to CPLR 3121 and 22 NYCRR 202.17 make any connection between plaintiff's medical condition and exposure to lead. Defendant therefore seeks an order directing that, before it conducts a physical examination of plaintiff, it be provided "medical reports of treating or examining medical service providers detailing a diagnosis of all injuries alleged to have been sustained by plaintiff as a result of exposure to lead-based paint," or, in the alternative, to "preclude the plaintiff from introducing proof concerning said injuries." Supreme Court granted the motions, and a divided Appellate Division affirmed. The majority in *Giles* held that "under the unique circumstances of this case," Supreme Court did not abuse its "broad discretion." And, "although the dissent is correct that CPLR 3121 and 22 NYCRR 202.17 do not *require* the disclosure directed in this case, they likewise do not *preclude* a trial judge from proceeding in the manner at issue herein" [emphasis by the Court]. Moreover, "contrary to the view of the dissent, our affirmance of the trial court's order does not impose 'unduly burdensome obligations not contemplated by 22 NYCRR 202.17' upon all personal injury plaintiffs. Rather, we simply conclude that where, as here, the records produced by a plaintiff pursuant to Uniform Rule 202.17 contain no proof of medical causation, i.e., evidence causally linking the plaintiff's alleged injuries to his or her exposure to lead, it is not an abuse of discretion for a trial court to determine that 'defendants should not be put to the time, expense and effort of arranging for and conducting a medical examination of plaintiff without the benefit of a report or reports linking the symptoms or conditions of plaintiff to defendants' alleged negligence.'" The majority also disagreed with the dissent's assertion that "our ruling requires a plaintiff to retain an 'expert' at an 'early stage of litigation.'" Here, the demand comes at the end of discovery, and can be met other than by expert opinion – such as by "medical provider, workers' compensation, or insurance forms that provide the information required." The dissenting Justice concluded that "the majority's holding imposes unduly burdensome obligations not contemplated by 22 NYCRR 202.17 upon individuals seeking recovery for personal injuries. Contrary to the view of the majority, 22 NYCRR 202.17 does not require a personal injury plaintiff to retain an expert to address the issue of causation and provide the expert's report to the defendant prior to the defense medical examination of

plaintiff." The Court of Appeals disagrees with the majority at the Appellate Division, concluding that "it was an abuse of discretion to order plaintiffs to produce, prior to the defense medical examinations, medical reports detailing a diagnosis of each injury alleged to have been sustained by plaintiffs and causally relating those injuries to plaintiffs' exposure to lead-based paint." For, "requiring a personal injury plaintiff to hire a medical professional to draft a report purely to satisfy 22 NYCRR 202.17(b)(1) could make it prohibitively expensive for some plaintiffs to bring legitimate personal injury suits. Some plaintiffs may not be able to afford a medical examination or may not even have access to a doctor. Plaintiffs therefore need only produce reports from medical providers who have 'previously treated or examined' them." But, plaintiffs "cannot avoid disclosure simply because their treating or examining medical providers have not drafted any reports within the meaning of rule 202.17(b)(1)." If "plaintiffs' medical reports do not contain the information required by the rule, then plaintiffs must have the medical providers draft reports setting forth that information [citation omitted]. If that is not possible, plaintiffs must seek relief from disclosure and explain why they cannot comply with the rule." But, "there is no requirement that medical providers causally relate the injury to the defendant's negligence or, in this case, the lead paint exposure." For, "causation is more appropriately dealt with at the expert discovery phase and pursuant to CPLR 3101(d). If defendants wish to expedite expert discovery, they can move in Supreme Court for amendment of the scheduling orders. Should plaintiffs fail to produce any evidence of causation, then defendants can move for and obtain summary judgment."

Dozier v. Lee, N.Y.L.J., 1202649005154 (Sup.Ct. Nassau Co. 2014)(Winslow, J.) – "Defendants seek an additional orthopedic examination post Note of Issue on grounds that Robert Israel, MD, who conducted an orthopedic examination of plaintiff on September 27, 2011, and issued reports dated that date and November 17, 2011, was subsequently the subject of disciplinary proceedings and, as such, is no longer an acceptable witness. The Court notes Dr. Israel violated one or more Education Law sections thereby precluding him from engaging in any practice as an independent medical examiner." The Court concludes that "further examinations are not justified in this matter where Dr. Israel was subjected to discipline subsequent to his examination of plaintiff and for examinations he conducted prior to the time he examined plaintiff."

Portnoy v. Levin, 46 Misc 3d 641 (Sup.Ct. Nassau Co. 2014)(Brown, J.) – On facts identical to the *Dozier* case discussed directly above – involving the same examining physician – the Court reaches the same conclusion. "Dr. Israel is available to testify at this trial within the confines of the consent order [in which Dr. Israel agreed to be placed on probation and to not engage in any practice as an Independent Medical Examiner]. Thus, under the facts of this case, defendants failed to demonstrate 'unusual or unanticipated circumstances' that would cause this court to compel plaintiff to appear for a second physical examination."

Rebollo v. Nicholas Cab Corp., 125 A D 3d 452 (1st Dept. 2015) – "Although there is no restriction in CPLR 3121 limiting the number of examinations to which a plaintiff may be subjected, a defendant seeking a further examination must demonstrate the necessity for it [citation omitted]. Moreover, after a note of issue has been filed, as here, 'a defendant must demonstrate that unusual and unanticipated circumstances developed subsequent to the filing of the note of issue to justify an additional examination' [citation omitted]. Here, the fact that defendants' examining physician was placed on a three-year suspension subsequent to his examination of plaintiff and the filing of the note of issue does not justify an additional examination by another physician [citation omitted]. Defendants have failed to demonstrate the existence of 'unusual and unanticipated circumstances,' since the bill of particulars was served before the IME, and there were no allegations of new or additional injuries."

Clark v. Allen & Overy, LLP, 125 A D 3d 497 (1st Dept. 2015) – In this action for sexual harassment, retaliatory discharge and intentional infliction of emotion distress, plaintiff claims that defendant caused her to suffer "extreme mental and physical anguish" and "severe anxiety," resulting in "eczema all over her body, hair pulling, anxiety, depression and suicidal feelings." Under these circumstances, "plaintiff had placed her mental condition 'in controversy' by alleging unusually severe emotional distress, so that a mental examination by a psychiatrist is warranted to enable defendant to rebut her emotional distress claims."

ENFORCING DISCLOSURE ORDERS

CDR Créances S.A.S. v. Cohen, 23 N Y 3d 307 (2014). Last year's "Update" reported on the Appellate Division decision in this matter [104 A D 3d 17 (1st Dept. 2012)]. There, a divided First Department affirmed the striking of defendants' answer because of their "fraud on the court" resulting from "their well-documented acts of deceit and fraud committed to suborn the judicial process." The majority rejected defendants' attempt to make the primary issue whether the burden of proof is that the misconduct be "conclusively demonstrated" [*see*, *317 W. 87 Assoc. v. Dannenberg*, 159 A D 2d 245 (1st Dept. 1990)]. That language, the majority holds, "does not purport to pronounce an evidentiary standard." Here, defendants forged documents and suborned perjury. "The ample record is more than sufficient to demonstrate appellants' utter disregard for the judicial process, and while no finding of fraud on the court is necessary to warrant striking the pleadings, appellants' conduct is appropriately characterized as such." The dissenting Justice argued that Supreme Court improperly utilized a "clear and convincing" standard rather than the required "conclusively demonstrated" standard of proof, and that, given defendants' denials, and creation of credibility issues, the proof did not meet that standard. The Court of Appeals has, essentially, affirmed, concluding that "where a court finds, by clear and convincing evidence, conduct that constitutes fraud on the court, the court may impose sanctions including, as in this case, striking pleadings

and entering default judgment against the offending parties to ensure the continuing integrity of our judicial system." The Court, agreeing with the majority in the Appellate Division, rejects the "conclusively demonstrated" standard urged by defendants, in favor of the "clear and convincing" standard adopted in Federal Courts. For that standard "is sufficient to protect the integrity of our judicial system, and discourage the type of egregious and purposeful conduct designed to undermine the truth-seeking function of the courts, and impede a party's efforts to pursue a claim or defense. We adopt this standard and conclude that in order to demonstrate fraud on the court, the non-offending party must establish by clear and convincing evidence that the offending 'party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action [citations omitted]. A court must be persuaded that the fraudulent conduct, which may include proof of fabrication of evidence, perjury, and falsification of documents concerns 'issues that are central to the truth-finding process.'" Thus, "a finding of fraud on the court may warrant termination of the proceedings in the non-offending party's favor," but, "we caution that dismissal is an extreme remedy that 'must be exercised with restraint and discretion' [citations omitted]. Dismissal is most appropriate in cases like this one, where the conduct is particularly egregious, characterized by lies and fabrications in furtherance of a scheme designed to conceal critical matters from the court and the non-offending party; where the conduct is perpetrated repeatedly and wilfully, and established by clear and convincing evidence, such as the documentary and testimonial evidence found here. Dismissal is inappropriate where the fraud is not 'central to the substantive issues in the case' [citation omitted], or where the court is presented with 'an isolated instance of perjury, standing alone, which fails to constitute a fraud upon the court' [citation omitted]. In such instances, the court may impose other remedies including awarding attorney fees [citation omitted], awarding other reasonable costs incurred [citation omitted], or precluding testimony [citation omitted]. In the rare case where a court finds that a party has committed fraud on the court warranting dismissal, the court should note why lesser sanctions would not suffice to correct the offending behavior."

Asim v. City of New York, 117 A D 3d 655 (1st Dept. 2014) – A prior year's "Update" reported on Supreme Court's decision in this matter [N.Y.L.J., February 5, 2013, 1202586643987 (Sup.Ct. Bronx Co.)]. Supreme Court held that, "all parties and their counsel have an obligation to make good faith efforts to fulfill their discovery and disclosure obligations and to resolve all discovery and disclosure disputes, before seeking judicial intervention. Dilatory tactics, evasive conduct and/or a pattern of non-compliance with discovery and disclosure obligations may give rise to an inference of willful and contumacious conduct, and may result in severe adverse consequences and sanctions. Sanctions for non-compliance with discovery which have been upheld by the First Department include dismissal of a complaint or answer [citations omitted]. Based on the record before the court, plaintiff's motion to strike the Authority's answer for their willful failure to provide discovery is granted. The Authority was required to provide the

discovery at issue for over three years. Repeated demands and discovery orders were not complied with. However, what is more egregious in this situation is that since the inception of this case the Authority maintained through its in house counsel that it had no involvement in this matter, that they did not own, operate, or control the subject vehicle, and that there were no police incident or accident reports. Now after denying involvement, not complying with discovery, and moving for summary judgment on the grounds of lack of ownership, control and involvement, the Authority produces an affidavit from the operator of the MTA vehicle and police/incident reports from at or around the time of this incident, without any reasonable explanation from their newly retained outside counsel, or its in house attorney. On this record it is clear that at the very least the Authority failed to make a reasonable search for the discovery demanded years ago. Moreover, the failure to comply with discovery for over three years taken together with the lack of ownership and involvement defense allows this court to infer willfulness and evasive conduct on the part of the Authority which warrants the striking of their answer." The Appellate Division has agreed, modifying only to impose sanctions on the Authority. "The Authority's conduct constituted willful and contumacious behavior and was a significant waste of limited and strained judicial resources sufficient to warrant the 'drastic' sanction of striking its answer."

Winters v. Uniland Development Corporation, 124 A D 3d 1356 (4th Dept. 2015) – Supreme Court denied plaintiffs' motion for a default judgment on the issue of liability, and the holding of an inquest. The Appellate Division reverses. "Supreme Court had previously issued a conditional order providing that defendants' answer and affirmative defenses would be stricken if defendants failed to provide full and complete responses to plaintiffs' discovery demands by a certain date. Defendants failed to comply with that order and, because it was self-executing, it became absolute and binding upon defendants' failure to comply with it [citations omitted]. Consequently, 'it was error, as a matter of law, not to grant plaintiffs' motion.'" The Court noted "that our result herein does not preclude defendants from seeking vacatur of the conditional order."

Seck v. Serrano, 124 A D 3d 494 (1st Dept. 2015) – Here, the order directing plaintiff to produce documents "was not a conditional, 'self-executing' order, which required discovery to be complied with by a specific date, that becomes 'absolute' on the specified date if the condition has not been met [citation omitted]. Rather, defendants were authorized to renew their application for dismissal if plaintiff failed to comply with the discovery demands by the 20-day deadline. Defendants did not so move, and months later, when they finally did, they were already in receipt of all discovery demanded pursuant to the order." The Appellate Division reversed the order dismissing the complaint.

STIPULATIONS AND SETTLEMENT

Martin v. Harrington, N.Y.L.J., 1202724615547 (Sup.Ct. Westchester Co. 2015)(Wood, J.) – "An attorney must be specifically authorized to settle and compromise a claim, as an attorney has no implied power by virtue of his general retainer to compromise and settle his client's claim [citation omitted]. A party who relies on the authority of an attorney to settle an action in his client's absence deals with such an attorney at his own peril [citation omitted]. If the settlement is thereafter challenged, the relying party has the burden of establishing that the attorney's actions were, in fact, authorized. To determine apparent authority, courts consider 'words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction' [citation omitted]. 'The existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal not the agent' [citation omitted]. Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that reliance is reasonable [citation omitted]. To determine whether the attorney had such apparent authority, the relying party (here, the defendants) must demonstrate that some kind of communication or conduct on the client's (plaintiff) part, led defendant to believe that the attorney had authority to enter into the settlement on its client's behalf."

Harrison v. NYU Downtown Hospital, 117 A D 3d 479 (1st Dept. 2014) – "This matter was settled in 'open court' where, following negotiations in the trial-ready part with the assistance of the presiding judge, the part notified the County Clerk, who marked the matter 'settled . . . $85,000' [citations omitted]. Plaintiff does not dispute the terms of the settlement and the settlement was memorialized by the court."

Mochkin v. Mochkin, 120 A D 3d 776 (2d Dept. 2014) – "'A settlement agreement entered into by parties to a lawsuit does not terminate the action unless there has been an express stipulation of discontinuance or actual entry of judgment in accordance with the terms of the settlement. Absent such termination, the court retains its supervisory power over the action and may lend aid to a party who had moved for enforcement of the settlement' [citations omitted]. Further, CPLR 2004 provides, in pertinent part, that 'the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown' [citation omitted]. In addition to the statutory authority, a court has authority under the common law, in its discretion, to grant relief from a judgment or order in the interest of justice, taking into account the equities of the case and the grounds for the requested relief [citations omitted]. Here, the appellant and the defendant executed a stipulation of settlement which was so-ordered by the Supreme Court. It did not contain any provision terminating or discontinuing the action, and no judgment was entered in accordance with its terms. It provided, however, that the Supreme Court would retain jurisdiction in all related matters. Under the circumstances of this case, and pursuant to CPLR 2004 and the court's common-law supervisory authority, the Supreme Court providently exercised its discretion in granting

that branch of the defendant's motion which was to further extend the time for payment of the balance of the settlement funds provided for in the so-ordered stipulation of settlement."

Connery v. Sultan, 126 A D 3d 525 (1st Dept. 2015) – "As the action had not been discontinued, the court properly granted enforcement of the stipulation of settlement [citation omitted]. Because the court's power to do so was inherent, it was not necessary that the stipulation provide for the court to retain the power to enforce the settlement."

Maria McBride Productions, Inc. v. Badger, N.Y.L.J., 1202719533513 (Civ.Ct. N.Y.Co. 2015)(d'Auguste, J.) – "The e-mail negotiations between counsel, which contained their printed names at the end, constitute signed writings in accordance with CPLR 2104 in order to constitute a settlement agreement."

PRE-TRIAL PROCEEDINGS

Goodman v. Lempa, 124 A D 3d 581 (2d Dept. 2015) – It is undisputed that when this action was 'marked off' the calendar at a status conference in July 2013, the note of issue had not yet been filed. CPLR 3404 does not apply to this pre-note of issue case [citations omitted]. Furthermore, there was no 90-day notice pursuant to CPLR 3216, nor was there any motion pursuant to CPLR 3126 to dismiss the action based upon the plaintiff's failure to comply with discovery [citations omitted]. Accordingly, the plaintiff's motion to restore the action to the calendar should have been granted."

TRIAL AND JUDGMENT

JURY ISSUES

National Grid Corporate Services, LLC v. LeSchack & Grodensky, LLC, 41 Misc 3d 977 (Sup.Ct. Nassau Co. 2013)(Bucaria, J.) – "The joinder by plaintiff of legal and equitable claims arising from the same transaction results in a waiver of the right to trial by jury with respect to the legal claims." In this action by a client against a law firm for breach of a legal services agreement, the complaint also sought a declaratory judgment. "In order to determine if a jury trial is available in a declaratory judgment action, the court must examine what traditional common-law action would most likely have been used to present the claim had declaratory judgment not been created by the legislature." Here, the alternative to seeking a declaration that the termination of legal services was for cause would be "an injunction, ordering the law firm to turn over all replevin and collection files, free of any retaining lien." Indeed, that very relief was sought in a motion for a

preliminary injunction. Thus, here, the action for a declaratory judgment "is an equitable remedy."

Matter of Colonial Surety Company v. Lakeview Advisors, LLC, 125 A D 3d 1292 (4th Dept. 2015) – Plaintiff/judgment creditor commenced this action against a party other than the judgment debtor to enforce the judgment. Plaintiff's jury demand is rejected. "The right to a jury trial 'depends upon the nature of the relief sought' [citation omitted]. Under the CPLR, a jury trial is available in an action 'in which a party demands and sets forth facts which would permit a judgment for a sum of money *only* [citation omitted; emphasis by the Court]. Where a plaintiff joins legal and equitable causes of action in a complaint, it waives its right to a jury trial [citations omitted]. However, 'if "a sum of money alone can provide full relief to the plaintiff under the facts alleged, then there is a right to a jury trial."'" Here, "the enforcement of a judgment under CPLR 5225 and 5227 against a party other than the judgment debtor is an outgrowth of the 'ancient creditor's bill in equity,' which was used after all remedies at law had been exhausted. We thus conclude that Colonial's use of CPLR 5225 and 5227 in this case is in furtherance of both legal and equitable relief and, therefore, that Colonial is not entitled to a jury trial on those combined legal and equitable claims."

TRIAL PROCEDURE

The Legislature, effective August 11, 2014, has clarified that CPLR 3122-a applies "to business records produced by nonparties *whether or not pursuant to a subpoena so long as the custodian or other qualified witness attests to the facts set forth in paragraphs one, two and four of subdivision (a) of this rule*" [emphasis added].

Galue v. Independence 270 Madison LLC, N.Y.L.J., 1202722391388 (Sup.Ct. Bronx Co. 2015)(Aarons, J.) – Plaintiff seeks a trial preference pursuant to CPLR 3403(a)(3), in the interests of justice, on the grounds that plaintiff's counsel has recently been diagnosed with lymphoma and pancreatic cancer. The application is denied. "The Court has located no case in which a preference was granted due to hardship to the attorney, or that considerations personal to the attorney should be considered on an application for a trial preference. Logically, the focus should be on the circumstances of the client. Thus, in the usual case in which a preference is granted in the interests of justice, the focus is on the hardship to the plaintiff [citations omitted]. Counsel avers that he has been litigating this case from its inception since 2011, that the files are extensive, and that he has consulted with or retained 'numerous' experts. Nevertheless, counsel has not shown that if a trial preference is denied, and plaintiff is required to obtain new counsel, that plaintiff will suffer any hardship. It has not been shown that present counsel has any unique skill or knowledge pertinent to this case which would require that only present counsel should litigate the case, or that an attorney of general skill, competence and ability could not just as capably handle this matter. While certainly new counsel (in the event it is necessary to retain new counsel), will be required to take some time to become familiar with the case

files, it has not been shown that any resultant delay or expenditure of resources would be extraordinary or unusual, to the extent that the plaintiff's case would be prejudiced. In short, unusual or extraordinary hardship has not been demonstrated which would warrant the granting of a trial preference."

Fudge v. North Shore-Long Island Jewish Health Services Plainview and Manhasset Hospitals, 117 A D 3d 783 (2d Dept. 2014) – "The Supreme Court erred in, *sua sponte*, directing the dismissal of the complaint insofar as asserted against the defendants Peter Fervil and Charles Farber *during* the plaintiff's counsel's opening statement" [emphasis by the Court].

Piacente v. Bernstein, 127 A D 3d 1365 (3d Dept. 2015) – "Just prior to the close of the proof, plaintiff requested that Supreme Court, pursuant to CPLR 4105 and 4106, empanel the first six jurors that had been selected and designate the remaining two jurors as alternate jurors. Concluding that a local rule enacted in the Third Judicial District regarding jury selection procedures required that the six deliberating jurors be chosen randomly by the court clerk, the court denied plaintiff's request." After a verdict for defendant, the Court granted plaintiff's motion to set aside the verdict, in part because "the violation of his statutory right to designate the first six jurors selected during *voir dire* denied him a fair trial." The Appellate Division affirms.

VERDICTS

D'Annunzio v. Ore, 119 A D 3d 512 (2d Dept. 2014) – "'When a jury's verdict is internally inconsistent, the trial court must direct either reconsideration by the jury or a new trial' [citations omitted]. Here, contrary to the appellants' contention, the jury's verdict was internally inconsistent because the jury attributed 30% of the fault in the happening of the subject motor vehicle accident to the defendant Russell A. Ore, despite having found that Ore's negligence was not a substantial factor in causing the plaintiff's injuries [citations omitted]. Accordingly, the Supreme Court properly granted the motion of the defendants Daniel Lorence Goldman and Benjamin Goldman pursuant to CPLR 4404(a) to set aside the verdict on the issue of liability and for a new trial."

Henry v. Town of Hempstead, 119 A D 3d 649 (2d Dept. 2014) – "'A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against 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]. 'Where there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view' [citations omitted]. Here, a fair interpretation of the evidence supports the conclusion that the infant plaintiff's own negligence was the sole proximate cause of his accident."

Matter of Small Smiles Litigation (Varano v. FORBA Holdings, LLC), 125 A D 3d 1395 (4th Dept. 2015) – "We agree with defendants that the court abused its discretion in the manner in which it investigated and determined the issue whether there had been improper outside influence on the jury that 'was such as would be likely to influence the verdict' [citations omitted]. Shortly after the trial had concluded and the jury was discharged, the court received notice of an allegation from one juror that a person attending the trial had been 'stalking' the impaneled jurors on lunch breaks and during other recess periods. The juror described the individual's behavior as 'creepy.' It was later learned that the individual was a representative of an insurance company monitoring the progress of the trial because it insured many of the defendants. As a result of the 'stalking' allegation, the court conducted its own investigation and ultimately set aside the verdict, which had been entirely in defendants' favor, and ordered a new trial. We agree with defendants that the court abused its discretion in conducting an *in camera* interview of the complaining juror without notifying counsel, without seeking counsels' consent to that procedure [citation omitted], and without providing counsel with an opportunity to be heard or to participate, even in some restricted manner, in the interview of the juror [citation omitted]. Further, the court limited its investigation to one juror, and we conclude that the court abused its discretion in failing to conduct a more expanded investigation, including, at a minimum, conducting an interview of all of the jurors [citation omitted]. Lastly, the court abused its discretion in prohibiting counsel from contacting any jurors until after plaintiff's motion to set aside the verdict was decided. This unnecessary prohibition essentially precluded defendants from obtaining and submitting any meaningful opposition to plaintiff's motion, the practical result being that the granting of plaintiff's motion was a foregone conclusion."

JUDGMENTS

Capital One Bank (USA) N.A. v. Rodriguez, N.Y.L.J., 1202658517633 (Civ.Ct. Bronx Co. 2014)(Alpert, J.) – Having voluntarily paid the judgment, and a satisfaction having been filed, defendant may not seek to vacate the judgment. For, "there is no judgment to vacate in light of the satisfaction of judgment. A judgment which is paid and satisfied of record ceases to have any existence since a defendant, by paying the amount due, extinguishes the judgment and the obligation thereunder."

130 Clarkson Realty, LLC v. Callender, 44 Misc 3d 53 (App.Term 2d Dept. 2014) – When a judgment debtor makes "numerous payments on the debt," and, as here, waits 14 years to move to vacate the final judgment, the judgment debtor has "'evidenced a willingness to accede to the terms of the judgment,'" and may not now be heard to challenge it.

Arnav Industries, Inc. v. M.H.B. Holdings, Inc., N.Y.L.J., 1202668042011 (Sup.Ct. N.Y.Co. 2014)(Billings, J.) – Plaintiff seeks to vacate a satisfaction of judgment, claiming its signature is a forgery. "CPLR 5015(a)(3) provides that the court may relieve

a party from a judgment upon a motion on the ground of fraud, misrepresentation, or other misconduct of an adverse party. Although CPLR 5015(a)(3) does not expressly apply to a satisfaction of judgment, it does not prohibit the vacatur of a post-judgment satisfaction, discharge or enforcement proceeding upon a motion for that relief [citations omitted]. The court also is empowered to vacate prior proceedings in the interest of substantial justice [citations omitted]. A new action for fraud would be required to vacate a satisfaction of judgment only where the grounds for the vacatur occurred outside the original litigation and are wholly unrelated to the basis for the prior judgment in the original action." Here, "since the allegedly fraudulent satisfaction of judgment was procured in the course of the original litigation where the judgment was entered, a vacatur by motion pursuant to CPLR 5015(a)(3), instead of a separate action, is permissible." However, here, "although an expert's opinion is not essential, more than a bare allegation of forgery is required to contest a signature's authenticity [citations omitted]. Where, as here, the signature is accompanied by a notary public's acknowledgment, it establishes a presumption of the notarized signature's due execution and genuineness." Plaintiff's proof falls short of overcoming that presumption.

INTEREST

Coffey v. CRP/Extell Parcel I, LLP, 122 A D 3d 504 (1st Dept. 2014) – The judgment in this action directed defendant to return plaintiff's down payment of $1,035,000, plus "'interest on the sum of $1,035,000.00 from September 2, 2008 at the statutory rate of 9% as calculated by the clerk in the amount of $426,958.77,' and costs and disbursements in the amount of $611.25, for a total sum of $427,570.02." Defendant paid the principal amount, and posted a bond for the interest and costs, pending an appeal. Plaintiff thereafter sought a direction to increase the bond, to reflect interest on the $427,570.02. Defendant opposed, urging that such interest would be inappropriate "interest on interest." Supreme Court granted plaintiff's motion, and the Appellate Division affirms. "The court properly determined that plaintiff is entitled to post-judgment interest on the outstanding portion of the judgment until full satisfaction."

POWERS OF REFEREES

Albert v. Albert, 126 A D 3d 921 (2d Dept. 2015) – "'A referee [to hear and determine] derives authority from an order of reference by the court [citation omitted], which can be made only upon the consent of the parties, except in limited circumstances,' which are not applicable here [citations omitted]. Here, the parties did not consent to the determination of any issues by a referee, and the order of reference directed the referee to hear and report [citation omitted]. Absent the parties' consent, the referee had the power only to hear and report his findings [citations omitted]. Thus, the referee exceeded his authority in signing an order to show cause pursuant to which the defendant, in effect, sought leave to submit a motion to modify a prior order of custody and to stay the enforcement of an order entered in a related custody proceeding commenced in the

Family Court, pending her appeal of that order. The referee further exceeded his authority in temporarily restraining the enforcement of the Family Court's order and all proceedings in the Family Court pending the determination of that branch of the defendant's motion which was for a stay."

Armato v. Bullon, N.Y.L.J., 1202645748246 (Sup.Ct. N.Y.Co. 2014)(Helewitz, R.) – Like Judges, Special Referees also have individual part rules. And this referee's rules include a ban on post-hearing briefs on references to hear and report, because "with such references, the parties must move the referring judge to either confirm or reject the report, allowing them the opportunity, at that time, to present their legal arguments." Counsel's argument "that the matter was too complex for the Special Referee to understand," did not persuade the Referee to make an exception here.

SPECIAL PROCEEDINGS

Capital One National Association v. Bank of America, N.Y.L.J., 1202643604646 (Dist.Ct. Nassau Co. 2014)(Fairgrieve, J.) – "Service other than personal becomes problematic in special proceedings due to the difficulty in accurately affixing an appearance date." Here, "petitioner filed the Affidavit of Service for Dominic Obertis on January 7, 2014 with a petition appearance date scheduled for January 8, 2014. Under the facts herein, service upon Mr. Obertis is complete on January 18, 2014, therefore, the appearance date affixed by petition in the general notice of petition fails to comply with the CPLR provisions for substituted service. To avoid the appearance issues encountered in cases involving substituted service, a petitioner may invoke an order to show cause remedy in a special proceeding [citation omitted]. In a situation in which personal service is difficult or unavailable, an order to show cause provides the petitioner with the opportunity for the judge to direct both method of service and time of return, including reducing the notice time frame."

Matter of Bramble v. New York City Department of Education, 125 A D 3d 856 (2d Dept. 2015) – "In a special proceeding, where disclosure is available only by leave of the court [citation omitted], the Supreme Court has broad discretion in granting or denying disclosure [citation omitted], although it must balance the needs of the party seeking discovery against such opposing interests as expediency and confidentiality [citations omitted]. Contrary to the petitioners' contention, they failed to demonstrate that the requested discovery was necessary and that providing the requested discovery would not unduly delay this proceeding."

ARTICLE 78 PROCEEDINGS

GENERAL CONSIDERATIONS

Matter of Kickertz v. New York University, 25 N Y 3d 942 (2015) – A prior "Update" reported on the Appellate Division decision in this matter [99 A D 3d 502 (1st Dept. 2012)]. There, a closely-divided First Department held that, on the facts of this case, this Article 78 petition challenging petitioner's expulsion from NYU's College of Dentistry may be granted after denial of respondent's motion to dismiss, without giving respondent an opportunity to answer. "'Where, as here, the dispositive facts and the positions of the parties are fully set forth in the record, thereby making it clear that no dispute as to the facts exists and that no prejudice will result from the failure to require an answer, the court may reach the merits of the petition and grant the petitioner judgment thereon notwithstanding the lack of any answer and without giving the respondent a further opportunity to answer the petition.'" The dissenters argued that "CPLR 7804(f) requires us to permit respondent to serve and file an answer." For, "the Court of Appeals has recognized an exception to the CPLR 7804(f) mandate, where 'the facts are so fully presented that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer' [citation omitted]. In my view, this case does not fall within that exception." The Court of Appeals has "modified," and essentially reversed, agreeing with the dissent in the Appellate Division. Since the motion papers "'clearly did not establish that there were no triable issue of fact,'" NYU "should be permitted to answer in this case."

Matter of Thornton v. Saugerties Central School District, 121 A D 3d 1253 (3d Dept. 2014) – "While courts may look beyond the petition [in an Article 78 proceeding] to decide a pre-answer motion to dismiss on statute of limitations grounds, courts generally may not address the merits without first allowing all respondents to answer or giving the parties notice of the intention to treat the motion as one for summary judgment [citations omitted]. Indeed, CPLR 7804(f) states that if a pre-answer motion to dismiss 'is denied, the court shall permit the respondent to answer, upon such terms as may be just.' Thus, Supreme Court should have addressed the District's motion and, if it was denied, permitted the District to answer before ruling on the merits."

Matter of Flosar Realty LLC v. New York City Housing Authority, 127 A D 3d 147 (1st Dept. 2015) – "We are asked to decide whether a CPLR article 78 mandamus proceeding can be brought to compel respondent New York City Housing Authority (NYCHA) to (i) process renewal leases requesting increases in Section 8 rent subsidies; and (ii) process requests seeking reinstatement of Section 8 subsidies that were previously suspended due to housing quality violations that were subsequently remedied. We find that although mandamus does not lie to compel NYCHA to reach any particular result with respect to these requests, the petition states a claim for mandamus relief to the extent it seeks to compel NYCHA to make a determination, because NYCHA does not have the discretion to not process petitioners' requests." Moreover, the proceeding is not time-barred. "An

article 78 proceeding seeking mandamus to compel must be commenced within four months 'after the agency's refusal, upon the demand of the petitioner, to perform its duty.'" Here, "petitioners' submission of the renewal leases and repair certification forms to NYCHA constitutes the demand for the agency to perform its duties. Petitioners allege that NYCHA did not issue any denials of the rent increase requests and similarly remained silent after the submission of the repair certification forms. Because there was no clear and explicit refusal of petitioners' demands, the statute of limitations has not yet begun to run."

Matter of Greenberg v. Assessor of Town of Scarsdale, 121 A D 3d 986 (2d Dept. 2014) – "Administrative determinations may only be challenged via CPLR article 78 review after the determination is final [citation omitted]. 'For a challenge to administrative action to be ripe, the administrative action sought to be reviewed must be final, and the anticipated harm caused by the action must be direct and immediate' [citations omitted]. Moreover, a matter is not ripe where the claimed harm may be prevented or significantly ameliorated by further administrative action [citations omitted]. Here, the issuance of written recommendations by the Executive Director of the Westchester County Tax Commission was not a final approval or denial of the appellant's tax refund applications." Moreover, "'in a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand. The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment."

Joseph Paul Winery, Inc. v. State of New York, 47 Misc 3d 439 (Sup.Ct. N.Y.Co. 2014) (Ling-Cohan, J.) – Petitioner challenges the revocation of its farm winery license on a number of grounds, "some of which relate to the sufficiency of the evidence before the ALJ, and others which allegedly involve due process, errors of law and violations of lawful procedures." Thus, "respondents' insistence that this case must be transferred to the Appellate Division at this juncture [pursuant to CPLR 7804(g)] ignores the well settled law which requires that, prior to any transfer to the Appellate Division with respect to issues involving substantial evidence, the trial court 'shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue.'" Here, "respondents, in their laser-like focus on their one legal argument asserted in their answer insisting that this case must be transferred to the Appellate Division, have utterly failed to refute any of petitioner's core legal arguments." The Court found merit in petitioner's legal arguments, and granted the petition without reference to the "substantial evidence" issue.

Matter of M&V 99 Franklin Realty Corp. v. Weiss, 124 A D 3d 783 (2d Dept. 2015) – Petitioner applied to the Board of Appeals of the Town of Hempstead "for special exceptions permitting the display and sale of used cars and parking in the setbacks, and for a variance from off-street parking requirements. After a public hearing, the Board denied the application." The ensuing Article 78 proceeding was transferred by Supreme Court to the Appellate Division pursuant to CPLR 7804(g). "Supreme Court erred in transferring the proceeding to this Court pursuant to CPLR 7804(g), since the determinations to be reviewed were not made after a trial-type hearing held pursuant to direction of law at which evidence was taken [citations omitted]. Accordingly, the determinations are not subject to substantial evidence review. Rather, the question before us is whether the determinations were affected by an error of law, or were arbitrary and capricious or an abuse of discretion, or were irrational [citations omitted]. Nevertheless, since the full administrative record is before us, in the interest of judicial economy, we will decide, on the merits, that branch of the petition which was to review the Board's determination to deny the petitioner's applications for special exception permits."

Matter of Neroni v. Granis, 121 A D 3d 1312 (3d Dept. 2014) – Petitioner argues that the Appellate Division lacks subject matter jurisdiction when an Article 78 proceeding is incorrectly transferred to it pursuant to CPLR 7804(g). The Court rejects the argument. "'The order of transfer' itself, however, gave 'this Court jurisdiction over the combined CPLR article 78 proceeding, requiring us to assess the propriety of the transfer' [citations omitted]. That is, an improper transfer does not deprive this Court of subject matter jurisdiction."

STATUTE OF LIMITATIONS

Matter of Olivares v. Rhea, 119 A D 3d 866 (2d Dept. 2014) – "A proceeding pursuant to CPLR article 78 'must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner' [citation omitted]. Agency action is 'final and binding upon the petitioner' when the petitioner receives notice that the agency has 'reached a definitive position on the issue that inflicts actual, concrete injury and the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the petitioner.'" Here, respondent demonstrated "that the determination at issue was duly mailed to the petitioner on April 7, 2009. Such proof of proper mailing gave rise to a rebuttable presumption that the determination was received by the petitioner by April 12, 2009 [citations omitted], and that her time to commence a CPLR article 78 proceeding to review it expired four months later." Here, "the petitioner failed to rebut the presumption of receipt. 'Denial of receipt standing alone, is insufficient to rebut the presumption.'"

Matter of School Administrators Association of New York State v. New York State Department of Civil Service, 124 A D 3d 1174 (3d Dept. 2015) – "The parties agree that this combined CPLR article 78 proceeding and action for declaratory judgment is

governed by the four-month statute of limitations set forth in CPLR 217(1). In this regard, both the statute and case law make clear that the statute of limitations period for a CPLR article 78 proceeding begins to run when 'the determination to be reviewed becomes final and finding upon the petitioner' [citations omitted]. Such determination, in turn, 'becomes "final and binding" when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies. First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party' [citations omitted]. In the context of quasi-legislative determinations such as the one at issue here, actual notice of the challenged determination is not required in order to start the statute of limitations clock; rather, the statute of limitations begins to run once the administrative agency's 'definitive position on the issue becomes readily ascertainable' to the complaining party."

Matter of Riverso v. New York State Department of Environmental Conservation, 125 A D 3d 974 (2d Dept. 2015) – "In general, a request for discretionary reconsideration does not serve to extend the statute of limitations or render an otherwise final [administrative] determination nonfinal [citations omitted]. This is because 'a motion to reconsider generally seeks the same relief, and advances factual and legal issues that were previously litigated at the administrative level' [citation omitted]. However, where 'the agency conducts a fresh and complete examination of the matter based on newly presented evidence,' an aggrieved party may seek review in a CPLR article 78 proceeding commenced within four months of the new determination."

Whitmer v. New York State Department of Taxation and Finance, 120 A D 3d 1590 (4th Dept. 2014) – Defendant determined that plaintiff was personally liable for unpaid sales taxes pursuant to Tax Law §1138, as an "officer or a responsible person" of a corporation which failed to make such payments. Accordingly, it seized money from the sale of property she owned. Plaintiff commenced this "declaratory judgment action alleging that she was not an officer, director, employee, shareholder or responsible person of the named corporation and was not liable for the assessment. Plaintiff sought a judgment declaring that Tax Law §1138 was not applicable to her, that the assessment issued by defendant was null and void, and that the liens were null and void because she was not a person responsible for the sales taxes. Plaintiff also sought a return of money seized by defendant." The Court concludes that "this controversy could have been resolved in a CPLR article 78 proceeding to challenge the November 5, 2007 jeopardy assessment and notice of determination and, under the four-month statute of limitations, plaintiff's complaint is time-barred." The Court rejected plaintiff's argument that "the catch-all six-year statute of limitations applies because the nature of the action is a return of money paid under protest to defendant, which is a cause of action for monies had and received." Although "plaintiff's fourth cause of action sought a refund of approximately $73,000 for

the money seized by defendant pursuant to the assessment and levies, that claim for monetary relief was incidental to the primary relief sought, i.e., a declaration that plaintiff was not a responsible person for the taxes sought."

Riverview Development LLC v. City of Oswego, 125 A D 3d 1417 (4th Dept. 2015) – In a dispute over defendant City's purchase and sale agreement with respect to a parking garage, plaintiff seeks to declare the resolution authorizing the agreement null and void as a "waste of public property" and a "fraud upon the taxpayers." Plaintiff brought the action pursuant to General Municipal Law §51, which has "no specific limitations period." Thus, the Court "must 'examine the substance of the action to identify the relationship out of which the claims arise and the relief sought' [citations omitted]. 'If the rights of the parties may be resolved in a different form of proceeding for which a specific limitations period applies, then we must use that period' [citation omitted]. Ultimately, 'the nature of the remedy rather than the theory of liability is the salient consideration in ascertaining the applicable statute of limitations' [citations omitted]. Here, plaintiffs are challenging the resolution authorizing defendant Mayor to execute a purchase and sale agreement for the garage. The resolution was an administrative act, rather than a legislative act, inasmuch as it applies only to the City and [the prospective purchaser] SRE [citation omitted]. It is well established that the proper vehicle for challenging an administrative act is a CPLR article 78 proceeding, and thus the four-month statute of limitations under CPLR 217 applies."

Matter of Barad v. Pace University, N.Y.L.J., 1202668172577 (Sup.Ct. N.Y.Co. 2014) (Stallman, J.) – "CPLR 217(1) provides that an Article 78 proceeding 'must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.' 'An administrative determination becomes "final and binding" when the petitioner seeking review has been aggrieved by it' [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.'" Otherwise, the statutory period runs not from the date of the challenged determination, but from the date petitioner receives notification of it.

Matter of Watts v. New York City Transit Authority, N.Y.L.J., 1202677619959 (Sup.Ct. N.Y.Co. 2014)(Stallman, J.) – Petitioner challenges respondent's determination, upon petitioner's reinstatement to employment with respondent, to deny him back pay for the period of his termination. He commenced this proceeding more than four months after his reinstatement. "That petitioner allegedly made numerous requests to the NYCTA for back pay, the most recent purportedly on May 30, 2014, is not relevant. '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' [citation omitted]. Petitioner did not

receive back pay on September 30, 2013 when he was reinstated and knew at that time that he was aggrieved by this determination. Petitioner's only legal recourse would have been a timely Article 78 proceeding, as there were no other administrative remedies to exhaust once he was reinstated on September 30, 2013. An attempt to negotiate with an agency, after a final administrative determination, does not toll or extend the period of limitation."

Matter of Sutherland v. New York State Department of Environmental Conservation, 122 A D 3d 759 (2d Dept. 2014) – "Contrary to the petitioner's contention that the four-month statute of limitations did not begin to run until he was personally served with a copy of the Commissioner's administrative order, the statute of limitations began to run when the petitioner's attorney, who represented him at the administrative hearing, received the order."

Northern Electric Power Company, L.P. v. Hudson River-Black River Regulating District, 122 A D 3d 1185 (3d Dept. 2014) – Plaintiff commenced this action seeking "a refund of the assessments they paid to defendant between 2002 and 2008 on the basis that such assessments were unauthorized and, therefore, that defendant had been unjustly enriched." Supreme Court "erred in applying a six-year statute of limitations because, even though plaintiffs have now labeled their cause of action as one for unjust enrichment, they could have raised their claim for refunds in a CPLR article 78 proceeding challenging each annual assessment, for which the applicable statute of limitations is four months." For, "the relief sought was premised upon defendant's lack of authority to levy the annual assessments – as opposed to a challenge to the constitutionality of the statute pursuant to which the assessments were made."

Bristol Homeowners Environmental Preservations Associates, LLC v. Town of South Bristol, 122 A D 3d 1259 (4th Dept. 2014) – Respondent Town's Code provides that "site plan approval 'will automatically terminate two years after the same is granted unless significant work has commenced on the project." Plaintiff, challenging the Planning Board's interpretation of "significant work," commenced an action "seeking a declaration that, *inter alia*, the 2009 site plan approval had automatically terminated because 'significant work' had not been timely commenced on the project." The Appellate Division affirms the dismissal of the action. "Although a six-year limitations period governs declaratory judgment actions [citation omitted], it is well settled that if such claim could have been brought in another form, then the shorter limitations period applies [citation omitted]. Here, Town Law §274-a(11) provides for a 30-day limitations period for challenging 'a decision of the planning board or any officer, department, board or bureau of the town' under CPLR article 78. Thus, plaintiff's challenge to the Town Code Enforcement Officer's determination of the meaning of 'significant work' under Code §170-94(J) could have been brought in a CPLR article 78 proceeding."

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ARBITRATION

CPLR VS. FEDERAL ARBITRATION ACT

Cusimano v. Schnurr, 120 A D 3d 142 (1st Dept. 2014) – "The FAA governs agreements which 'evidence a transaction involving commerce' [citation omitted]. In determining if the FAA applies to a contract, the central question is whether the 'agreement is a contract evidencing a transaction involving commerce within the meaning of the FAA' [citation omitted]. Courts have interpreted the term 'involving commerce' broadly." It is "the equivalent of 'affecting commerce,' a term associated with the broad application of Congress's power under the Commerce Clause." Thus, "individual transactions do not need to have a substantial effect on interstate commerce in order for the FAA to apply [citation omitted]. Rather, as long as there is economic activity that constitutes a general practice 'bearing on interstate commerce in a substantial way,' the FAA is applicable." Here, "because commercial real estate can affect interstate commerce, the ownership of an investment in the commercial buildings here, one of which is occupied by an international chain hotel and another which houses a national chain drug store located out-of-state, renders the FAA applicable to these agreements."

Matter of ROM Reinsurance Management Company, Inc. v. Continental Insurance Company, 115 A D 3d 480 (1st Dept. 2014) – "The issue before us is whether the timeliness of a demand for arbitration is a matter to be determined by the court or the arbitrator." Under the Federal Arbitration Act, the issue is determined by the arbitrator. Under New York law, the issue is one for the Court. Because the agreement between the parties involves interstate commerce, the FAA will govern unless the parties have specifically agreed otherwise. The agreement between the parties provides that "the arbitration law of New York State" shall govern any arbitration. That, holds the Court, suffices. "'It is hard to imagine what the parties intended when they agreed that the "arbitration law of New York State shall govern such arbitration" if they did not intend to have the CPLR apply.'"

Matter of Flintlock Construction Services, LLC v. Weiss, 122 A D 3d 51 (1st Dept. 2014) – The so-called *Garrity* rule [*Garrity v. Lyle Stuart, Inc.*, 40 N Y 2d 354 (1976)] holds that, under New York law, arbitrators have no power to award punitive damages. The agreement between the parties here included an arbitration clause, and also provided that the agreement was to be "construed and enforced" in accordance with New York law. The majority of this closely-divided Court holds that, "under the FAA, it is for the arbitrators, and not a court, to determine the availability of punitive damages, notwithstanding the general choice-of-law provision in the contracts that they are to be construed and enforced according to New York law. The choice-of-law provision, in the absence of language expressly invoking the *Garrity* rule, or expressly excluding claims for punitive damages, is insufficient to remove the issue of punitive damages from the

arbitrator." For, "we cannot agree with the dissent's conclusion that the parties' choice-of-law provision evinces 'unequivocally' with the requisite specificity demanded by the United States Supreme Court that the parties intended to incorporate the *Garrity* rule disallowing punitive damages in an arbitration. *Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.* (4 N Y 3d 247 [2005]), upon whose *dicta* the dissent relies, involved application of the statute of limitations and does not speak to the issue *sub judice*." The dissenters argued that "*Diamond* and its progeny make clear that, even if the FAA applies to an agreement, the parties may still limit the arbitrator's power by invoking New York law. To do so, however, the parties must not only make the agreement subject to New York law, but must also make its 'enforcement' subject to New York law. By using such language, the parties 'unequivocally' invoke the limitations on arbitration under New York State law." And, here, "the provision stating that the agreement is to be 'construed and enforced' in accordance with the laws of New York suffices to invoke the *Garrity* rule."

Volpe v. Interpublic Group of Companies, Inc., 118 A D 3d 482 (1st Dept. 2014) – "The language in the employment agreement between the parties provides that New York law governs the agreement and its enforcement. Thus, as the motion court determined, the question of waiver of arbitration is properly decided by the court, not an arbitrator."

DeOliveira v. Custom Made Ventures LLC, N.Y.L.J., 1202729669485 (Civ.Ct. Queens Co. 2015)(Buggs, J.) – "The FAA preempts any State law which burdens an agreement to arbitrate," including General Business Law §399-c, which purports to invalidate mandatory arbitration clauses in contracts "for the sale or purchase of consumer goods."

ARBITRABLE DISPUTES

Matter of City of Syracuse (Syracuse Police Benevolent Association, Inc.), 119 A D 3d 1396 (4th Dept. 2014) – "'Where, as here, the C[ollective] B[argaining] A[greement] contains a broad arbitration clause, our determination of arbitrability is limited to "whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA"' [citations omitted]. If such a 'reasonable relationship' exists, it is the role of the arbitrator, and not the court, to 'make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them.'" Here, respondent asserted that the City "violated section 8.5 of the CBA by refusing to pay overtime wages to police officers who, during their off-duty hours, provide security at the airport." The Court concludes that the grievance is not arbitrable. "Although we agree with respondent that there is no statutory, constitutional or public policy prohibition against arbitration of the grievance [citations omitted], we conclude that the court properly granted the petition seeking a permanent stay of arbitration because the grievance is not reasonably related to the subject matter of the parties' CBA [citation omitted]. As noted, the grievance is

based on an alleged violation of section 8.5 of the CBA, which relates to compensation for officers who are 'called in' to perform 'ordered' overtime. The off-duty officers who work for G4S at the airport are not ordered to work overtime; rather, they volunteer to work for G4S during their off-duty hours. Moreover they are not 'called in' by the City when they make an arrest at the airport or otherwise engage in police functions. Indeed, respondent concedes that off-duty officers who provide private security at other venues, such as the Carrier Dome or the Destiny Mall, are not entitled under the CBA to overtime pay each time they engage in police functions, and we perceive no reason to reach a different result with respect to the airport."

PROVISIONAL REMEDIES IN AID OF ARBITRATION

Kadish v. First Midwest Securities, Inc., 115 A D 3d 445 (1st Dept. 2014) – "CPLR 7502(c) provides, in pertinent part, that the court may 'entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.'" Respondent cites to "multiple cases" in which Courts import the "usual three-prong test for preliminary injunctions under article 63 of the CPLR." But, "recent cases of this Court, however, continue to apply the "rendered ineffectual" standard with regard to a CPLR 7502(c) attachment in aid of arbitration [citations omitted], and we agree with this interpretation."

Astoria Equities 2000 LLC v. Halletts A Development Company, LLC, 47 Misc 3d 171 (Sup.Ct. Queens Co. 2014 (Ritholtz, J.) – "A court may issue a preliminary injunction in connection with an arbitration proceeding 'only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief' [citations omitted]. The party seeking the preliminary injunction must also make the tripartite showing required under CPLR article 63."

WAIVER OF ARBITRATION

Cusimano v. Schnurr, 120 A D 3d 142 (1st Dept. 2014) – "A party does not waive the right to arbitrate simply by pursuing litigation, but by 'engaging in protracted litigation that results in prejudice to the opposing party [citation omitted]. In determining what constitutes protracted litigation for the purposes of waiver, there is no bright line rule. Rather, the court should consider three factors: (1) the amount of time between the commencement of the action and the request for arbitration; (2) the amount of litigation thus far; and (3) proof of prejudice to the opposing party [citations omitted]. Indeed, 'the key to a waiver analysis is prejudice' [citation omitted]. Prejudice may either be substantive prejudice or result from excessive delay or costs caused by the moving party's pursuit of litigation prior to seeking arbitration [citation omitted], though cost alone is not sufficient to establish prejudice [citation omitted]. A party may be substantively prejudiced when the other party is attempting to relitigate an issue through

arbitration, has participated in substantial motion practice, or seeks arbitration after engaging in discovery that is unavailable in arbitration."

COMPELLING OR CHALLENGING ARBITRATION

Matter of Liberty Mutual Insurance Company v. Mohabir, 115 A D 3d 413 (1st Dept. 2014) – "'The 20-day time limit of CPLR 7503 [in which to seek to stay arbitration] is construed as a period of limitation, and the courts have no discretion to waive or extend the statutory period' [citations omitted]. However, 'a Statute of Limitations defense is waivable by a party, and failure to raise it does not deprive the court of jurisdiction.'" And, here, "respondents waived their statute of limitations defense when, after serving the request for arbitration a second time on July 31, 2007, they participated in the litigation for five years, during which time they failed to raise the CPLR 7503(c) defense in their opposition to petitioner's applications for a stay, in the prior appeal in which this Court ordered a framed issue hearing on coverage issues, or at the framed issue hearing itself."

Matter of Government Employees Insurance Company v. Terrelonge, 126 A D 3d 792 (2d Dept. 2015) – "CPLR 7503(c) states, in pertinent part, that 'an application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand.' Although the statutory provision indicates that the 20-day period begins to run when service is complete, case law indicates that the 20-day period begins to run only upon receipt of the notice of intention to arbitrate."

Matter of Travelers Property Casualty Company of America v. Archibald, 124 A D 3d 480 (1st Dept. 2015) – "The issue of whether an application to stay arbitration is 'made' (CPLR 7503[c]) when the petition is filed, as opposed to when it is served, is a purely legal one, hence it 'may properly be considered by this Court for the first time on appeal' [citations omitted]. In fact, an application is made when the petition is filed." Hence, the application for a stay was, here, timely "made."

CONFIRMING OR VACATING THE AWARD

Matter of Harris v. Board of Education of the City of New York, District of the City of New York, 46 Misc 3d 835 (Sup.Ct. Kings Co. 2014)(Rivera, J.) – "CPLR 7511 is the procedural vehicle for vacating or modifying an arbitration award. It provides the time frame and the grounds for applying for this relief. In the case at bar, there is no arbitration award to vacate or modify. Rather, the arbitrator has denied petitioner's motion to preclude the introduction of evidence and to dismiss the charges based on the preclusion. A decision to deny a motion to preclude the introduction of evidence is not an arbitration award within the intendment of CPLR 7511. It is at best an interlocutory ruling and not a final and definite award resolving the matter submitted for arbitration."

Matter of Amtrust Financial Services, Inc. v. Countrywide Insurance Company, N.Y.L.J., 1202729149954 (Sup.Ct. N.Y.Co. 2015)(Edmead, J.) – "Even where the arbitrator makes a mistake of fact or law, or disregards the plain words of the parties' agreement, the award is not subject to vacatur 'unless the court concludes that it is totally irrational or violative of a strong public policy' and thus in excess of the arbitrator's powers [citations omitted]. While the term 'irrationality' is oft bandied about in arbitration decisions and finds its way, almost inexorably, as the last of the losing litigator's long litany of laments in actions to vacate an arbitration award, there is precious little precedent to delineate in this context what 'irrational' means. The New York Court of Appeals recognizes 'irrationality' as a non-statutory ground for setting aside an arbitral award under New York law." An award "is 'irrational' if it gives a completely baseless construction or misconstrues the contract agreed to by the parties."

Matter of Slocum v. Madariaga, 123 A D 3d 1046 (2d Dept. 2014) – "The arbitrator awarded the petitioner $43,000 in damages based on the amount due under the subject contract, although the petitioner sought only $34,920 in damages for work done above and beyond the contract. Accordingly, the Supreme Court properly vacated the award as issued in excess of the arbitrator's authority."

New York City Transit Authority v. GEICO General Insurance Company, 46 Misc 3d 706 (Civ.Ct. N.Y.Co. 2014)(Cohen, J.) – "Respondent's subrogor and petitioner litigated, in an earlier court proceeding, the very same claim heard by the arbitrator. Specifically, a court heard the very same facts relating to subrogor's claim that petitioner was liable for her injuries. A jury evaluated these facts and made the determination that someone other than petitioner was 100% liable for subrogor's injuries. Hence, the claim brought by respondent in the arbitration, standing in the shoes of subrogor, arose out of the same factual transaction and had been fully litigated and determined by a court prior to the arbitration hearing. The arbitrator's decision to not give preclusive effect to a final determination made by a court was irrational."

Bauer v. Bauer, N.Y.L.J., 1202660753079 (Sup.Ct. Kings Co. 2014)(Walker, J.) – "Judiciary Law §5 states, in pertinent part: 'A court shall not be opened, or transact any business on Sunday, nor shall a court transact any business on a Saturday in any case where such day is kept as a holy day by any party to the case, except to receive a verdict or discharge a jury and for the receipt by the criminal court of the city of New York or a court of special sessions of a plea of guilty and the pronouncement of sentence thereon in any case in which such court has jurisdiction." Arbitration is a judicial proceeding and arbitrators perform a judicial function [citations omitted]. As such, Judiciary Law §5 has been held to apply to arbitration proceedings [citation omitted]. Accordingly, the arbitration proceedings and award herein are void upon the ground that at least one hearing was held on a Sunday."

Country-Wide Insurance Company v. New Century Acupuncture P.C., 47 Misc 3d 1216(A) (Civ.Ct. N.Y.Co. 2015)(Katz, J.) – "The failure of an arbitrator to disclose facts that might give rise to an inference of bias mandates vacatur of the arbitrator's award." Of course, "'a party to an arbitration may not sit idly back and rely exclusively upon the arbitrator's disclosure' where that party has 'actual knowledge of the arbitrator's bias, and of facts that reasonably should have prompted further, limited inquiry.'" But, as here, "'the arbitrator is in a far better position than the parties to determine and reveal those facts that might give rise to an inference of bias.'" Here, the regular and direct connections between the arbitrator and the attorneys for respondent requires vacatur of the award.

Matter of Pinkesz v. Wertzberger, N.Y.L.J., 1202671795388 (Sup.Ct. Kings Co. 2014) (Lewis, J.) – "Once an arbitrator has rendered an award pursuant to an applicable arbitration agreement, the arbitrator is generally deemed *functus officio*; which Black's Law Dictionary translates as 'having performed his or her office' and as 'without further authority or legal competence because the duties and functions of the original commission have been fully accomplished' [citation omitted]. The power to modify such award or otherwise bind the parties terminates upon its issuance [citations omitted]. An arbitrator thus improperly exceeds his or her authority by 'modifying the original arbitration award by rendering wholly new determinations on matters not addressed in the original award' [citation omitted], and 'any award rendered after the original award is null and void absent an agreement by the parties' [citation omitted]. CPLR 7509 and 7511(c) permit an arbitrator to modify an award only upon a written request by one of the parties within 20 days and only to correct a miscalculation or mistaken description, and award granted on an issue not submitted for arbitration or a defect of form."

ENFORCEMENT OF JUDGMENTS

Motorola Credit Corporation v. Standard Chartered Bank, 24 N Y 3d 149 (2014) – The impact of the Supreme Court's decision in *Daimler AG v. Bauman*, ___ U.S. ___, 134 S.Ct. 746 (2014), discussed at length above under "Jurisdiction," will likely also be felt with respect to enforcing judgments by executing on a judgment debtor's assets not located within New York, particularly assets located in an out-of-state bank account. To set the scene, an earlier "Update" reported on the Court of Appeals' decision in *Koehler v. The Bank of Bermuda, Ltd.*, 12 N Y 3d 533 (2009). In *Koehler*, a narrowly-divided Court of Appeals concluded that "a court sitting in New York may order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to CPLR article 52, when those stock certificates are located outside New York." In *Koehler*, the only connection the case had to New York was that the garnishee bank was "present" here – as

that term was understood, pre-*Daimler* – through a branch office. The underlying action was litigated in federal court in Maryland, plaintiff was a citizen of Pennsylvania, and the judgment debtor was a resident of Bermuda. Plaintiff registered the judgment in the Southern District of New York, and then commenced the turnover proceeding against the bank in that Court. When the bank demonstrated that the stock certificates were in Bermuda, the District Court dismissed the proceeding, relying "on the principle that a New York court cannot attach property that is not within the state." The Second Circuit certified the question of jurisdiction to the New York Court of Appeals, where the majority drew a distinction between a New York court's reach when the issue is attachment, and when it is enforcement of a judgment. "Enforcement proceedings and attachment proceedings, while similar in many ways, differ fundamentally in respect to a court's jurisdiction. While pre-judgment attachment is typically based on jurisdiction over property, post-judgment enforcement requires only jurisdiction over persons." In short, "article 52 post-judgment enforcement involves a proceeding against a person – its purpose is to demand that a person convert property to money for payment to a creditor – whereas article 62 attachment operates solely on property, keeping it out of a debtor's hands for a time." So, while, "'it is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction,'" CPLR Article 52 "contains no express territorial limitation barring the entry of a turnover order that requires a garnishee to transfer money or property into New York from another state or country," so long as the Court has personal jurisdiction over the garnishee. One issue unaddressed in *Koehler* is whether the Court, by its decision, affected the "separate entity rule," which provides that each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in other branches or at the home office. Thus, under that rule, a judgment creditor may enforce the judgment only with respect to assets held in the branch of the bank upon which the execution was served. Several lower Courts have, since *Koehler*, wrestled with that issue [*see, for example*, *Ayyash v. Koleilat*, 115 A D 3d 495 (1st Dept. 2014)]. Here, in *Motorola*, upon a certified question from the Second Circuit, the Court of Appeals, by a 5-2 vote, settles the question of the viability of the separate entity rule – at least with respect to New York branches of banks located in a foreign country. The majority makes clear that "in this case, we have no occasion to address whether the separate entity rule has any application to domestic bank branches in New York or elsewhere in the United States. The narrow question before us is whether the rule prevents the restraint of assets held in foreign bank accounts, and we limit our analysis to that inquiry." In addition, given the narrow scope of the certified question from the Second Circuit, the Court declined to pass upon "whether New York has personal jurisdiction" over the foreign bank in light of *Daimler*. Within those limitations, the majority concludes that the separate entity rule is a valid "component of New York's common law," essentially for three reasons: the furthering of "international comity," to "protect banks from being 'subject to competing claims' and the possibility of double liability," and because of "the 'intolerable burden' that would

otherwise be placed on banks to monitor and ascertain the status of bank accounts in numerous other branches." The majority rejected the argument that the Court had essentially eviscerated the separate entity rule in *Koehler*. "Notably absent from our decision in *Koehler* was any discussion of the separate entity rule. We discern two reasons for our silence on the subject. As an initial matter, the foreign bank did not raise the issue so we had no occasion to examine the doctrine. Second, the separate entity rule, as it has been applied by the courts, would not have aided the bank in *Koehler* because that case involved neither bank branches nor assets held in bank accounts. In short, we did not analyze, much less overrule, the separate entity doctrine in *Koehler*. Nor, as the dissent believes, is the rule irreconcilable with our holding in *Koehler* that the scope of CPLR article 52 is generally tied to the exercise of personal jurisdiction over a garnishee. As a longstanding common-law doctrine, the separate entity rule functions as a limiting principle in the context of international banking, particularly in situations involving attempts to restrain assets held in a garnishee bank's foreign branches. We therefore reject Motorola's view that *Koehler* decided the issue before us." The dissenters argued that, "in choosing this outmoded rule, the majority has engaged in improper judicial legislation, avoided the clear import of our recent decision in *Koehler* * * * and given short shrift to the compelling public policy reasons to reject such a rule." And, "in broader terms, today's holding permits banks doing business in New York to shield customer accounts held in branches outside of this country, thwarts efforts by judgment creditors to collect judgments, and allows even the most egregious and flagrant judgment debtors to make a mockery of our courts' duly entered judgments. In an age where banks are being held more accountable than ever for their actions vis-à-vis their customers, today's holding is a deviation from current public policy regarding the responsibilities of banks and a step in the wrong direction." The dissenters contended that the separate entity rule is neither expressly nor impliedly incorporated in CPLR Article 52, that the rule "is obsolete and runs counter to public policy," is not "necessary to promote comity," and "cannot be reconciled with *Koehler*." As noted above, given the narrow scope of the certified question, the Court of Appeals did not pass upon the issue whether the separate entity rule applies to executions served on New York branches of banks when the judgment debtor's account is with a branch located elsewhere in New York or in another state, rather than another country. But, while not addressed in *Motorola*, the Supreme Court's decision in *Daimler* may have already answered the question, at least with respect to banks with principal offices located in another state. If a corporate defendant is only subject to general jurisdiction where it is "at home," then, with respect to foreign banks with branch offices in New York, the "separate entity" rule may have been elevated to the status of due process.

Lease Finance Group, LLC v. Fiske, 46 Misc 3d 841 (Civ.Ct. N.Y.Co. 2014)(d'Auguste, J.) – Plaintiff/judgment-creditor served a restraining notice on a Wells Fargo branch in Pennsylvania, seeking to restrain an account owned by defendant/judgment-creditor in a Wells Fargo branch in Georgia. Noting that the Court of Appeals, in *Motorola Credit*

Corporation v. Standard Chartered Bank, discussed directly above, did not define the "scope" of the "separate entity" rule "in regard to domestic branches of banks located in foreign states," the Court here holds that "until there is an act of the New York Legislature or a pronouncement from the Court of Appeals, *stare decisis* requires this Court to apply case law from the Appellate Division First Department." And that Court has traditionally held that the separate entity rule applies with respect to accounts located in branches in sibling states. Thus, "because the Georgia branch of Wells Fargo was never served with a restraining notice in accordance with the separate entity rule, Lease Finance Group's service of its restraining notice on the Pennsylvania branch was insufficient to allow the default judgment of this Court to restrain Fiske's account in Georgia."

Vera v. Republic of Cuba, 2015 WL 1244050 (S.D.N.Y. 2015)(Hellerstein, J.) – Plaintiff, having secured a judgment against the Republic of Cuba, seeks post-judgment discovery from a number of banks, "pertaining to Cuba's foreign accounts 'in order to decide whether to seek recognition of his judgment abroad and, if so, in which countries and against which banks." The banks argue that, since they are not "at home" in New York, and therefore not subject to jurisdiction here under *Daimler AG v. Bauman*, ___ U.S. ___, 2014 WL 113486 (2014), they are not required to respond. "The question of where a corporation may be sued, the question addressed in *Daimler*, has no bearing on the situation here. This case involves attempts by a bank to refuse to answer the questions of a judgment creditor holding a valid judgment from this court and seeking to find assets within the custody and control of that bank. The judgment creditor seeks information and not, in this proceeding, a turnover of assets. Were *Daimler* to be read the way that Banco Bilbao argues, the United States would become a haven for banks seeking to evade the consequences of valid judgments against their depositors." Moreover, the Court concludes, the banks have consented to jurisdiction in New York pursuant to Banking Law §200(a).

Guerra v. Crescent Street Corp., 120 A D 3d 754 (2d Dept. 2014) – "'Since a money judgment is viable for 20 years, but a lien on real property is only effective for 10 years [citations omitted], the Legislature enacted CPLR 5014 to allow a judgment creditor to apply for a renewal of the lien by commencing an action for a renewal judgment' [citations omitted]. 'Pursuant to CPLR 5014(1), an action upon a money judgment may be maintained between the original parties where ten years have elapsed since the judgment was originally docketed' [citations omitted]. Thus, an action for a renewal judgment is not time-barred even when it is commenced more than 10 years after the original judgment was docketed [citation omitted]. Here, instead of commencing a new action, as required by CPLR 5014, the plaintiff moved in the instant, original action to renew the judgment lien. In view of the plaintiff's failure to commence a new action and thereby satisfy the procedural requirement of CPLR 5014, the Supreme Court properly

denied that branch of her motion which was to renew the judgment lien on the subject property."

Aish Hatorah New York, Inc. v. Fetman, N.Y.L.J., 1202721813508 (Sup.Ct. Kings Co. 2015)(Demarest, J.) – "CPLR 5222-a(c)(4) states: 'Information demonstrating that funds are exempt includes, but is not limited to, originals or copies of benefit award letters, checks, check stubs or any other document that discloses the source of the judgment debtor's income, *and bank records showing the last two months of account activity*'(emphasis by the Court). The use of the conjunctive 'and' in the statute, preceded by a comma separating the list of alternative forms of documents establishing the source of exempt funds from bank records, clearly indicates that, in addition to some form of proof as to the source of funds alleged to be exempt, bank records of account activity for the prior two months must be provided in order to satisfy the statutory prerequisites for recovery of damages and the penalty for bad faith in failing to instruct the bank to release funds that are demonstrated to be exempt. Such interpretation is logical, and consistent with the statutory purpose to place upon the judgment creditor the obligation to affirmatively act to release its restraint of exempt funds, in that, without such bank records, the judgment creditor would not be able to determine that the funds in the account were actually exempt funds."

Depetris v. Traina, N.Y.L.J., 1202728217932 (Sup.Ct. Suffolk Co. 2015)(Leis, J.) – Plaintiff obtained a judgment against an LLC, and seeks to enforce it against the LLC's principal by piercing the corporate veil. "In order to prevail in an action to pierce the corporate veil, a plaintiff must show that the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury [citations omitted]. The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their 'alter ego' without more, will not suffice to support the equitable relief of piercing the corporate veil [citations omitted]. It is well established that a business can lawfully be incorporated for the very purpose of enabling its proprietor to avoid personal liability [citation omitted]. Absent a showing that 'control and domination was used to commit wrong, fraud, or the breach of a legal duty, or a dishonest or unjust act' New York will not allow a piercing of the corporate veil [citation omitted]. Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use [citations omitted]. In addition, the decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances' [citation omitted]. 'Veil-piercing is a fact-laden claim that is not well suited for summary resolution.'"

Encalada v. CPS1 Realty LP, N.Y.L.J., 1202659811938 (Sup.Ct. N.Y.Co. 2014)(Jaffe, J.) – "Pursuant to CPLR 5223, a judgment creditor seeking to enforce a money judgment

may subpoena any person from entry of the judgment up until its satisfaction or vacatur [citation omitted]. A judgment creditor may subpoena a person to appear for a deposition [citation omitted], to produce records [citation omitted], and to answer questions [citation omitted]. Neither CPLR 5223 nor CPLR 5224 requires that the judgment debtor be notified of the subpoena [citations omitted]. As the discovery provisions of Article 52 govern here, there is no basis for reading into them the notice requirement of CPLR 2303(a) [citations omitted]. And, given the notice provisions otherwise set forth in Article 52 [citation omitted], the Legislature's failure to include a notice requirement in CPLR 5223 and 5224 indicates that the omission was intentional."

Carbo Industries, Inc. v. Alcus Fuel Oil, Inc., 46 Misc 3d 726 (Sup.Ct. Nassau Co. 2014)(Brown, J.) – "Plaintiff moves for an order pursuant to CPLR 5225 directing defendant James Alcus to execute and deliver all documents necessary to draw down the maximum amount of credit available on his two credit card credit line accounts with HSBC Bank and pay the same to the plaintiff." The Court denies the application. "Plaintiff fails to establish documentation or legal authority that a credit card line of credit is assignable or transferrable property, which defendant can be compelled to use to satisfy the subject judgment pursuant to Article 52 of the CPLR [citation omitted]. Determining otherwise would create an additional creditor for defendants, with little likelihood of repayment to the credit card company, who had no relationship or interest in the instant matter."

Cerrato v. Peter T. Roach & Associates, P.C., N.Y.L.J., 1202638796049 (Dist.Ct. Nassau Co. 2014)(Hirsh, J.) – "New York courts will not domesticate a default judgment entered in a sister state where the sister state did not have personal jurisdiction over the defendant." Here, the Connecticut plaintiff sued the New York law firm defendant in Connecticut for having made "numerous and persistent telephone calls on her cell phone, at home and at her place of employment" in an attempt "to collect the money alleged to be owed" to defendant's client, Citibank, in violation of the Federal Fair Debt Collection Practices Act. Although Connecticut's long arm statute reaches to the limits of due process, it does not grant jurisdiction on these facts. "In order for an out-of-state attorney to be subject to the jurisdiction of the courts in Connecticut, the attorney must engage in more than simply communicating with a Connecticut resident." Additionally, "traditional notions of fair play and substantial justice establish a New York State law firm is not subject to the jurisdiction of the courts of another state relating to activities performed in New York. If Cerrato's premise is accepted by this Court, then any New York attorney who makes a business related telephone call into another state would be subject to the jurisdiction of that state. This court concludes Roach's conduct is insufficient both on a transaction of business basis or on a substantial justice basis to subject it to the jurisdiction of the courts of Connecticut. Therefore, the judgment entered in favor of Cerrato cannot be domesticated in New York.

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Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Company, 117 A D 3d 609 (1st Dept. 2014) – Plaintiff moves for summary judgment in lieu of complaint to convert a money judgment of the courts of England into a New York judgment. Defendant opposes, arguing that New York lacks jurisdiction over defendant, and that defendant has no assets in the State. 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."

Lombard North Central PLC v. Johnson, N.Y.L.J., 1202668321142 (Sup.Ct. Nassau Co. 2014)(Winslow, J.) – "'Although CPLR article 53 generally provides that a foreign judgment will not be enforced in New York if the foreign court did not have personal jurisdiction over the defendant [citation omitted], an exception may be made if "prior to the commencement of the proceedings defendant had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved" [citation omitted] and was afforded fair notice of the foreign court proceeding that gave rise to the judgment.'"

Harvardsky Prumyslovy Holding, A.S.,-V Likvidaci v. Kozeny, 117 A D 3d 77 (1st Dept. 2014) – "We are called upon to decide whether the courts of this state must recognize a foreign country judgment issued by a criminal court awarding a sum of money as compensation for damages sustained by the victim of a fraudulent scheme." As here relevant, CPLR 5301(b) defines, as an enforceable foreign country judgment, "any

judgment of a foreign state granting or denying recovery of a sum of money, *other than* a judgment for taxes, a fine or other penalty" [emphasis added]. The judgment here, directing a criminal defendant to pay a sum of money as "compensation for damages to the victim" is "clearly" not one for taxes, nor is it a fine. The question remains, is it a "penalty"? The Court holds that, here, it is not. "Where, as here, the purpose of a monetary judgment is to compensate the victim for actual damages, it represents 'reparation to one aggrieved' [citation omitted] regardless of whether or not a particular treble-damages award may be said to constitute a penalty. Section 228(1) of the Czech Code of Criminal Procedure provides for victims of crimes to file a petition in a criminal proceeding for compensation of damages. Harvardsky's Czech counsel states that 'the nature of such claim is civil and its qualifications and calculation is done according to the civil law.'"

PICK THE DECISION 1.5

Gilbert Hodges obtained a money judgment in Supreme Court, New York County against William Skowron in the amount of $1,955,000. Skowron is a resident of New Jersey, and reputedly has a lot of cash in various bank accounts.

Hodges' lawyer believes that a significant amount of that cash is in accounts at Hudson City Savings Bank. Hudson City is headquartered in New Jersey, but it also has several branches in New York and Connecticut. The bank, of course, complies with all of the registration rules in order to do banking business in New York, as well as Connecticut. Hodges' lawyer therefore served an information subpoena on one of the New York branches, demanding details about any account Skowron may have in any of the bank's branches, wherever located.

The bank has objected to the scope of the subpoena. It is willing to reveal information with respect to the branch that was served. Indeed, in what its lawyer termed "an exceptional display of the spirit of cooperation and kindness," the bank is willing to reveal information with respect to all of its New York branches without requiring Hodges to serve a separate information subpoena on each one. But the bank refuses to divulge any information with respect to branches located in New Jersey or Connecticut.

Hodges has moved to compel full compliance with the subpoena. How does the Court rule?

1. The motion is **DENIED**. Under the Supreme Court's decision in *Daimler AG v. Baumann*, a New York court lacks general jurisdiction over a bank headquartered in New Jersey. There is no basis, on these facts, for long arm jurisdiction over the bank. The Court therefore lacks the power to direct the bank to respond to the subpoena.

2. The motion is **DENIED**. Because of the "separate entity rule," a Court can only compel compliance of any enforcement device with respect to the specific branch served with that device.

3. The motion is **GRANTED**. By obtaining the right to do business in New York, the bank has consented to jurisdiction here, at least with respect to information subpoenae. And as it only seeks information, and not direct enforcement of the

outstanding judgment itself, this subpoena is also not subject to the separate entity rule.

4. The motion is **GRANTED**. Hodges? Gil Hodges? Dat guy clearly belongs in the Hall of Fame. It is a crime to keep him out. Skowron? Moose Skowron? Dat bum isn't fit to shine Gil's shoes. Hodges wins. Fuhgeddaboudit.