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To be Argued by:
MICHAEL S. HILLER
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Supreme Court of the State of New York
Appellate Division – Second Department

Docket No.: 2022-07617

SCOTT EPSTEIN, individually and as a Partner of CANTOR, EPSTEIN & MAZZOLA, LLP,

Plaintiff-Appellant-Respondent,

- against -

ROBERT I. CANTOR and ROBERT I. CANTOR, PLLC,

Defendants-Respondents-Appellants,

- and -

BRYAN J. MAZZOLA, W. TODD BOYD, BOYD RICHARDS PARKER COLONELLI, P.L. and BOYD RICHARDS NY LLC,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT-RESPONDENT

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This Appellate Brief is submitted on behalf of Plaintiff-Appellant Scott Epstein, individually and as a partner of Cantor, Epstein & Mazzola, LLP ("Plaintiff" or "Epstein"), in support of his appeal of the Decision and Order ("Decision"), dated May 3, 2022: (i) denying Plaintiff's motion for renewal; and (ii) granting reargument of the lower court's prior order, issued December of 2020, *but only in part* ("Prior Order").[1]

PRELIMINARY STATEMENT

This action, Appeal and the Related Appeal (*see* n.1 below) arise out of a law firm break up. Epstein sued his former law partner Robert I. Cantor ("Cantor") after the latter misappropriated the entire good will of their law firm, Cantor, Epstein & Mazzola, LLP (the "Firm" or "CEM"), and delivered such good will to: (i) a new law firm he created without Epstein -- Defendant-Respondent Robert I. Cantor, PLLC ("Cantor's New Firm"); (ii) Bryan Mazzola ("Mazzola"), who is a former named partner of CEM; and (iii) W. Todd Boyd, Boyd Richards Parker Colonelli PL ("Boyd Florida") and Boyd Richards NY, LLC ("Boyd NY") (collectively, the "Boyd Defendants"). In his Complaint, Epstein demands compensatory damages:

[1] The instant Appeal ("Appeal") is related to another pending appeal, Case No.: 2020-09376 ("Related Appeal"), which has been fully perfected and is awaiting the calendaring of oral argument. Given that the Related Appeal has been fully perfected, the instant appellate brief will assume the Court's familiarity with the present case, and will reference only those aspects of the factual and procedural history necessary to frame the arguments herein.

(i) as against Cantor, for breach of a certain partnership agreement ("Partnership Agreement"); (ii) as against Cantor and Mazzola, for breaches of their fiduciary duties, violation of the New York State Partnership Law, an accounting, and conversion/misappropriation; (iii) as against Mazzola only, for faithless servant; and (iv) as against the Boyd Defendants, for their aiding and abetting such breaches, tortious interference with the Partnership Agreement, corporate raiding, unfair competition, and related claims (R.50-60).

The lower court, on pre-discovery CPLR 3211 motions, originally dismissed the Second through Eleventh Causes of Action ("Dismissed Claims"), purportedly "finding" as a matter of incontrovertible fact and law that the Firm had never been a partnership and that Epstein and Cantor had never been partners ("Non-Partnership Ruling") (R.69-73). In particular, the lower court ruled that the Dismissed Claims, *including, critically, those against Mazzola and the Boyd Defendants*, were largely based upon Epstein's status as a partner, and since the lower court "found" as a matter of incontrovertible fact and law under CPLR 3211(a)(1) that Epstein had never *been* a partner and the Firm had never *been* a partnership, the Dismissed Claims (again, including as against Mazzola and the Boyd Defendants) could not survive dismissal.

However, subsequent to issuance of the Prior Order, Cantor testified at a deposition in another case ("Subsequent Deposition") during which he made two crucial admissions: (i) that Epstein, in fact, *had* been a partner of the Firm until its dissolution; and (ii) that the Firm, in fact, *had* been a partnership ("Cantor's New Admissions") (R.97). Notably, in his affidavit in support of the motion to dismiss (which the lower court granted in the Prior Order), Cantor had sworn to precisely the opposite -- that Epstein had *never* been a partner and that the Firm had *never* been a partnership (R.61-68). And the lower court had based its dismissal upon the supposed absence of a partnership relation -- an allegation which we now know was false.

In addition to Cantor's New Admissions, Epstein, after issuance of the Prior Order, came into possession of an affidavit signed by another former partner of the CEM entity -- Edward Bailey ("Bailey" and "Bailey Affidavit"). In his Affidavit, Bailey confirmed that the Firm had been a partnership and that Epstein, not only had been a *partner* thereof, but also had, in fact, been an *equity* partner thereof and had regularly exercised veto power over Cantor's decision-making (R.198-201).

Given Cantor's New Admissions and the Bailey Affidavit ("New Evidence"), Epstein moved for renewal and reargument of the Prior Order (R.14-15). Epstein also perfected his Related Appeal of the Prior Order, and disclosed in his appellate

brief therein ("Related Appellate Brief), all of the New Evidence, and his intention to file the motion to renew and reargue (*See* Related Appellate Br. at 12, 15 and 46). Regrettably, the lower court denied renewal, and only *partially* granted reargument. In particular, the lower court ruled that, at a minimum, whether Epstein had been a partner and whether CEM had been a partnership constitute issues of fact not susceptible to dismissal under CPLR 3211(a)(1) (R.13). And on that basis, the lower court reinstated Second, Third, Fourth and Fifth Causes of Action as against Cantor. However, the lower court inexplicably failed to reinstate any of the Dismissed Claims as against Mazzola and the Boyd Defendants.

As reflected below, the Prior Order should have been vacated in its entirety -- not merely in part. Given that the Dismissed Claims as against Mazzola and the Boyd Defendants were dismissed based largely upon the lower court's Non-Partnership Ruling (*i.e.*, that there was never a partnership relation between Cantor and Epstein or as to CEM), and that Non-Partnership Ruling was subsequently vacated, it naturally follows that the Dismissed Claims, as against Mazzola and the Boyd Defendants should have been reinstated, just as the lower court reinstated them against Cantor.

STATEMENT OF NATURE AND FACTS OF THE CASE[2]

A. BACKGROUND

1. Epstein and Cantor Establish the Law Firm Partnership that Becomes Cantor, Epstein & Mazzola, LLP

At the time this action was commenced, Epstein had been a practicing attorney for over 35 years (R.107). During that time, Epstein had cultivated and developed close client relationships with liability insurance carriers that provide defense and indemnity liability insurance to co-ops, condominiums, their boards of directors and boards of managers, and their individual board members ("D&O Insurers"), as well as the parties insured by the D&O Insurers (the "D&O Insured Parties") (collectively with the D&O Insurers, Epstein's "D&O Clients") (R.107). As a result of those relationships, and the goodwill and trust that he had cultivated with the D&O Insurers, Epstein was chosen as, and remained, one of a select group of attorneys in private practice (otherwise known as panel counsel) whom the D&O Insurers regularly appointed to defend their D&O Insured Parties in co-op/condo defense litigation in and around New York City (R.107-08). Through those regular

[2] This section of the within Brief largely tracks the Appellate Brief filed in the Related Appeal ("Related Appellate Brief") and is reprinted herein merely to provide the requisite background and defined terms necessary to provide frames of reference for the legal argument section. To the extent that the Court has reviewed Related Appellate Brief, we respectfully suggest that the Court skip to the "New Facts" section hereof at p. 25 *infra.*

appointments, Epstein built a busy and profitable practice defending D&O Insured Parties in litigation on behalf of the D&O Insurers (Epstein's D&O Insurance Defense Practice, previously defined) (R.107).

In 1995, Epstein and Cantor agreed to form the Partnership. To that end, they formed a new limited liability partnership with the New York Secretary of State and named it Cantor & Epstein LLP, reflecting that Epstein and Cantor were the founding, and only partners of the Firm (R.108). Shortly thereafter, Epstein and Cantor changed the name of the Firm to Cantor, Epstein, Bailey & Degenshein, LLP, because Epstein and Cantor agreed to include the names of their then-two senior attorneys, Dale Degenshein ("Degenshein") and Edward Bailey (who later submitted the Affidavit in support of renewal); however, neither Bailey nor Degenshein were equity partners in the Firm (*Id.*).[3] The Firm's name was later changed to Cantor, Epstein & Mazzola, LLP (CEM, previously defined).

2. The Partnership Agreement

Upon the establishment of the Firm, Epstein and Cantor retained Attorney Brian Isaac to draft their Partnership Agreement memorializing the terms of their new partnership (R.108). Ironically, as confirmed by Attorney Brian Isaac, it was

[3] Notably, in his affidavit in support of renewal and reargument, Bailey confirmed that Cantor opposed the name change to Cantor, Epstein, Bailey & Degenshein, LLP, but that Epstein overruled Cantor on this issue (R.199).

Cantor who insisted that the Firm be structured as a partnership, and that Epstein and Cantor both be general partners, so that Cantor would be protected by the fiduciary duties that the partnership created between them would impose on Epstein (R.134). In particular, Cantor was concerned that, if Epstein were not made an equity partner, he (Epstein) could easily leave the Firm and take with him, the entire D&O Insurance Defense Practice -- which, as described below, constituted virtually all of Firm's clients -- to a different law firm without consequence (*Id*.).

Consistent with their intentions, the Partnership Agreement begins by making clear that Epstein and Cantor "agree to form the [P]artnership," and then, in case there were any doubt, proceeds to use the terms "partnership," "partners," or "partner" when referring to Epstein and Cantor 129 times (R.37-44). For example, §8.3, entitled "Non-Solicitation of Epstein's Clients in the Event of Breach," states, in part, that "the *partners herein* (*i.e.*, Epstein and Cantor) acknowledge that under *Cohen* and *Denburg* direct and indirect prohibitions on an attorneys' ability to practice law are generally proscribed; thus, this section of the Agreement has been drafted so as to protect the Partnership's 'legitimate interest in its own survival and well-being' ... and *the partners* explicitly recognize such fact" (R.43) (emphasis added).

In addition, §7.6 of the Partnership Agreement, entitled, "Entertainment Expenses of Partners," states, in relevant part, that "Cantor and Epstein will each incur those entertainment expenses each deems necessary for the development of the *Partnership's* business," and that "[t]he *partners* will review this policy as *they* deem necessary" (R.42).[4]

The Partnership Agreement also recognizes that Epstein would be contributing all of his D&O Clients to the Partnership (R.38). And, in fact, Epstein did contribute his D&O Clients to the Partnership, creating the Firm's D&O Insurance Defense Practice, which generated the overwhelming majority of the Firm's revenue and profit (at least 95% initially, and the bulk thereof for the next 20 years) (R.109). In fact, without Epstein's D&O Clients, neither Cantor individually, nor the Firm, could have sustained a law practice (R.109). It is for this reason that Epstein and Cantor included the provision in the Partnership Agreement (§8.3) prohibiting Cantor (or any other Firm attorney) from soliciting Epstein's D&O Clients if they decided to leave the Firm. Indeed, "the partners" -- *i.e.*, Epstein and Cantor -- "expressly recognize[d]" that this non-solicitation provision was "drafted so as to protect the Firm's 'legitimate interest in its own survival and well-being ...'"

[4] The foregoing constitutes mere representative examples of the 129 instances in the Partnership Agreement in which Cantor and Epstein referred to themselves as partners and the Firm as a partnership.

(R.43). In other words, the Firm could not survive without Epstein's D&O Clients.

The remainder of the Partnership Agreement sets forth the parties' arrangements on all other the terms of their partnership, servicing of clients, admission of new partners, dissolution, etc.[5] For instance, Epstein and Cantor agreed that Epstein would be a minority partner of the Firm, while Cantor would be the majority partner and have the primary role of managing and operating the Partnership on a day-to-day basis (R.109).

Nevertheless, §7.5 of the Partnership Agreement makes clear that Epstein had final approval over all personnel decisions relating to cases involving Epstein's D&O Clients, which, again, comprised virtually the entirety of the Firm's book of business (R.42). In addition, although Cantor was the majority partner, §7.2 of the Partnership Agreement provided a mechanism by which Epstein could, at his option, become an equal partner with Cantor and correspondingly take on an increased share of the Firm's day-to-day management (R.41). Attorney Brian Isaac, who drafted the Partnership Agreement, confirmed that the purpose of §7.2 was, not to give Epstein the option to become *a* partner, but rather to allow Epstein to increase his equity in the Firm to become an *equal* partner thereof (R.134).

[5] Mazzola became a partner in the Firm in or about 2007. Upon becoming a partner, Mazzola entered into an agreement in which he agreed to be bound by the Cantor/Epstein Partnership Agreement.

3. The Partnership Operates for over 20 Years

After its formation in 1995, Epstein and Cantor operated the Firm for over 20 years. During that time, Cantor was tasked with the obligation to file the Firm's partnership tax returns ("Partnership Tax Returns") (R.111). And each year for 20 years, with the filing of the Firm's Partnership Tax Returns, CEM, at Cantor's instance, filed Schedule K-1s with the IRS and issued copies to Epstein, always identifying him as a "general partner" (R.111). Schedule K-1s are tax documents that are only issued to, and filed for, a partnership's partners.

While Cantor was largely responsible for managing the day-to-day operations of the Firm, Epstein devoted a significant amount of his time to running the Firm's D&O Insurance Defense Practice, including, as noted above, deciding which attorneys and other Firm personnel would be staffed on matters for D&O Clients and litigating cases for the D&O Clients (R.110). Further, examples of the many other non-Partnership Agreement enumerated management tasks that Epstein handled include, *inter alia*: (i) from 1995 through June 3, 2016, Epstein was responsible for negotiating and executing any and all agreements for the commercial space rented and occupied by Firm (R.111); and (ii) in 2016, Epstein negotiated a maternity leave package with a Firm attorney, Jennifer L. Stewart (R.111). Also significantly, Epstein also personally guaranteed the Firm's sublease (R.191-97).

4. Cantor Unilaterally Decides to Terminate the Partnership and Conspires with Mazzola and Others to Surreptitiously Steal Epstein's D&O Clients and Insurance Defense Practice

In or about mid-to-late 2015, Cantor told Epstein that he wanted to retire from practicing law (R.112). Over the next several months, Cantor, Mazzola, Gary Erlich (another former attorney of the Firm), and Epstein attempted to agree upon terms for a potential buy-out of the equity in the Firm and other possible courses of action to continue CEM's operation (R.112). Tellingly, and signifying that Epstein was indeed a partner in CEM, Mazzola and Ehrlich eventually offered seven figures to buy out Cantor's *and Epstein's* equity in the Firm – *a fact which Cantor admits in his Affidavit* ("Cantor's Admission of Epstein's Equity") (R.65); however, as also confirmed in Cantor's Affidavit, Epstein vetoed the proposal on behalf of the Firm and against Cantor's wishes (R.113), thereby confirming that Epstein had ultimate authority on whether to sell an ownership interest (including his own) in the Firm.

Sometime in the Spring of 2016, Epstein learned that Mazzola, Ehrlich, and several other Firm attorneys (the "Departing Lawyers") had secretly been negotiating with Defendant-Respondent Boyd Florida, a Florida-based law firm, about joining that firm and establishing its first New York office (R.114). Worse, Epstein discovered that Cantor and the Departing Lawyers, particularly Mazzola and Ehrlich, were surreptitiously contacting Epstein's D&O Clients and falsely

representing to those D&O Clients that the Firm could no longer handle their legal matters and that, therefore, they should send their business with the Departing Lawyers to the Boyd Defendants (R.114). Cantor's and Mazzola's surreptitious solicitation of Epstein's D&O Clients blatantly violated the Partnership Agreement -- particularly §8.3, which expressly prohibited the solicitation of Epstein's D&O Clients -- as well as well-established New York statutory and common law. In essence, Cantor, despite having acknowledged that he could not legally proceed with the sale of the Firm's equity over Epstein's veto (R.107), surreptitiously went forward with the plan anyway, without Epstein's economic participation or consent.

Then, on or about June 6, 2016, Cantor, purportedly on behalf of CEM, but against Epstein's expressed wishes, contacted Epstein's D&O Clients in writing and informed them that the Departing Lawyers were leaving the Firm for another law firm – Defendant Boyd Richards (R.114). Remarkably, in those letters to Epstein's D&O Clients (the "False Solicitation Letters"), Cantor falsely represented that the Departing Lawyers, who were copied on the communications, would be soliciting their business and that the Firm (which would, of course, include Epstein) supposedly had no objection to the D&O Clients transferring their legal work to the Boyd Defendants (R.114). Cantor then began helping Mazzola and the other Departing Lawyers transfer Epstein's D&O Clients, and with them, the bulk of

CEM's D&O Insurance Defense Practice, to the Boyd Defendants (R.114).

Significantly, on June 3, 2016, just three days before Cantor sent his False Solicitation Letters to Epstein's D&O Clients, Cantor, Mazzola, and Ehrlich surreptitious entered into a new agreement (the "June 2016 Agreement") by which Cantor expressly promised Mazzola and Ehrlich that he would notify the clients listed on a "Schedule A" to that June 2016 Agreement that the Firm has no objection to the Departing Attorneys soliciting the legal business of the clients (listed on Schedule A)" (R.115). The clients listed on Schedule A to the June 2016 Agreement were most of Epstein's D&O Clients (R.115). In addition, as part of the June 2016 Agreement, Mazzola and Ehrlich agreed that Cantor could take with him to Cantor PLLC (the new law firm he was establishing without Epstein) the other remaining Firm clients, *including Epstein's* D&O Clients (R.116). In other words, Cantor secretly agreed with Mazzola and Ehrlich that he would help them steal most of Epstein's D&O Clients by falsely telling those D&O Clients that CEM had no objection to their solicitation by the Departing Lawyers, and, in exchange, Cantor secured for himself a valuable group of additional Epstein-originated clients. Cantor then did exactly as he promised just days later when he sent the False Solicitation Letters to Epstein's D&O Clients falsely representing that the Firm -- which, of course, included Epstein -- had no objection to the Departing Lawyers

soliciting Epstein's D&O Clients' business.

It bears emphasis that Epstein had not consented, and did not consent, to the solicitation of his D&O Clients (R.115). Moreover, Cantor's and the Departing Lawyers' representations to Epstein's D&O Clients, that CEM could no longer service their legal matters was also false, as Epstein had every intention to continue operating the Firm and maintaining its D&O Insurance Defense Practice (R.116). Indeed, in May and June 2016, Epstein was in discussions with other attorneys to work with him on matters representing the D&O Clients (R.116).

After he learned of Cantor and Mazzola's scheme, including their unauthorized communications with, and misrepresentations to, Epstein's D&O Clients, Epstein urged Cantor to cease all such unauthorized communications and solicitation (R116). Cantor refused, and continued to work with Mazzola, Ehrlich the other Departing Lawyers, and the Boyd Defendants to transfer the bulk of CEM's D&O Insurance Defense Practice (again, Epstein's clients) to Boyd Richards and/or its newly-established New York office, Defendant-Respondent Boyd New York (R.116).

B. PROCEDURAL HISTORY

Cantor's improper transfer of CEM's entire client base to the New Cantor Firm and the Boyd Defendants caused the entirety of the Firm's D&O Insurance

Defense Practice, which accounted for most of the Firm's revenue, to be eliminated (incredibly, Cantor substituted his new law firm, Cantor PLLC, for CEM on several open matters for the D&O Clients and continued working on them under the auspices of his newly-created law firm) (R.116-17). As a result, Epstein lost all of his D&O Clients, which he had worked tirelessly to accumulate over decades of practicing law. Epstein thus commenced this action to recover the damages, for an accounting, and obtain restitution against Cantor and the Boyd Defendants for their collective tortious misconduct.

Both Cantor and the Boyd Defendants moved to dismiss based upon supposed documentary evidence under CPLR 3211(a)(1).[6] In particular, Cantor and the Boyd Defendants argued that the Partnership Agreement supposedly demonstrated conclusively and irrefutably, as a matter of fact and law, that Epstein had never been a partner of CEM -- the law firm that he founded and which bears his name – and that CEM, which was formed as a limited liability partnership with the State of New York, was never an actual partnership. On this purported basis, Defendants argued that Epstein was never owed any fiduciary duties, had no right to seek relief under the Partnership Law, had no right to the assets that were misappropriated and converted, had no rights to seek relief on behalf of the Firm, and had no right to

[6] Cantor did not move to dismiss Epstein's breach of contract cause of action.

participate in Cantor's decision to literally transfer CEM's entire client base to his New Firm and to the Boyd Defendants. As such, according to Cantor and the Boyd Defendants, Epstein has no standing to assert any causes of action other than for breach of the Partnership Agreement as against Cantor only.

In opposition, Epstein submitted the Partnership Agreement and other evidence of the parties' partnership (*see infra*). This other evidence of the parties' partnership includes, *inter alia*:

i. CEM was founded as a limited liability partnership, which, as a matter of law, requires at least two partners;

ii. Epstein and Cantor were the only two partners in the Firm upon its formation (R.37-44);

iii. the Firm was established pursuant to §121-1500(a) of the New York Partnership Law, which provides for the creation of a partnership without limited partners (*Id.*), meaning that, not only was Epstein a "partner;" he was a "general partner;"

iv. the Firm has always borne Epstein's name;

v. the Firm filed Partnership Tax Returns and K-1s with the IRS, identifying Epstein as a "general partner" of the Partnership (R.111-12);

vi. Epstein made the most significant capital contribution to the Firm – namely, its entire client base – in the form of the D&O Insurance Defense Practice (R.107-09);

vii. Attorney Brian Isaac, who drafted the Partnership Agreement, confirmed that Epstein and Cantor intended to, and did, create a partnership in which both were general partners, and the Partnership Agreement reflects such intent (R.132-35);

viii. Epstein exercised control over the Firm's affairs, including the authority to select and approve which of the Firm's attorneys and other employees could be staffed on matters for the D&O Insurance Defense Practice (which, again, constituted virtually all the Firm's client base) (R.110-11);

ix. the Partnership identified Epstein as a partner as shown in the Marketing Materials (R.130-131); and

x. Cantor's Admission of Epstein's Equity (*i.e.*, that Epstein had the power to veto the sale of the Firm's equity and that Epstein would have participated in the sale proceeds had the sale of such equity proceeded) (R.65).[7]

[7] Hereinafter, the aforesaid indicia of partnership shall be referred to as the "Other Evidence of Partnership."

C. PRIOR ORDER

On December 11, 2020, the lower court issued its Prior Order. Remarkably, notwithstanding the overwhelming evidence demonstrating that Epstein had been a partner of CEM, including the terms of the Partnership Agreement itself and the Other Evidence of Partnership, the lower court held that the Partnership Agreement purportedly constitutes irrefutable "documentary evidence establish[ing] that the relationship between the parties was not a partnership ..." (R.72) -- that a Firm formed as Cantor & Epstein, *LLP*, with Partnership Formation Documents under §121-1500(a) of the Partnership Law, and which filed Partnership Tax Returns and issued K-1s to Epstein as a "general partner" for 20 years, and which further listed Epstein as a partner in its Marketing Materials and billed Epstein out as a "partner," was incontrovertibly and irrefutably *never* a partnership. As a result, the lower court granted the motions to dismiss the Second through Fifth Causes of Action against Cantor and Mazzola, all of which require as a predicate, the existence of a partnership relation (R.72).

Significantly for purposes of *this* Appeal, the lower court, after concluding that Epstein had supposedly never been a partner of the Firm and that the Firm had never been a partnership, also ruled that all of the claims against the Boyd Defendants also had to be dismissed. In particular, the lower court ruled that, since

Epstein had never been a partner and thus could not interpose a claim for breach of fiduciary duty against Cantor, such ruling precludes a claim against the Boyd Defendants for aiding and abetting such breach, unfair competition, tortious interference with the Partnership Agreement and related claims (*i.e.*, the Sixth through Eleventh Causes of Action) (R.72). In this regard, the lower court, in the Prior Order, ruled:

> As a result of Epstein not being a partner in the enterprise many of the claims in the complaint fail to state a cause of action. Epstein does not have a claim against the Boyd defendants for "corporate raiding", the Eighth cause of action, or unfair competition, the Tenth Cause of action. To the extent that such a claim might be brought they would have to be brought on behalf of the entity ....
>
> Epstein's claims against Mazzola and the Boyd defendants all suffer from similar defects. His claim for conversion fails because he [Epstein] had no ownership interest in the clients or the entity's files or information (R.72).

Thus, the lower court ruled that, based upon its determination that Epstein supposedly had never been a partnership of CEM and that such had purportedly never been a partnership, the claims against Mazzola and the Boyd Defendants could not survive dismissal either (*Id*.).

D. MOTION TO RENEW AND REARGUE

Epstein filed a motion to renew and reargue the Prior Order (R.14-16). In support of *renewal*, Epstein cited: (i) Cantor's New Admissions -- specifically,

Cantor's sworn testimony at deposition that the Firm had been a partnership and that Epstein had been a partner thereof (R.97); and (ii) the Bailey Affidavit, in which Bailey confirmed the truth of Cantor's New Admissions, and further pointed to a series of instances in which Epstein, as an "equity partner," had overruled management decisions made by Cantor over the years (R.198-201).

Separately, in support of *reargument*, Epstein cited Court of Appeals and Second Department precedent, confirming that the lower court had erred in ruling, as a matter of fact and law, that the Firm had never been a partnership and that Epstein had never been a partner thereof (R.202-31).

E. THE DECISION APPEALED FROM

The lower court denied renewal without explanation, and granted reargument, but only in part. With respect to renewal, the lower court referenced, but did not consider, Cantor's New Admissions, and never explained why it declined to do so (R.6-13). Instead, the lower court, after mentioning Cantor's New Admissions, merely turned its attention to that aspect of the motion that focused on reargument (R.9-13). The lower court relegated to a footnote its ruling that the Bailey Affidavit should have been submitted with the opposition to the CPLR 3211 motion to dismiss and that supposedly "no reasonable explanation" had been provided for its omission therefrom (R.12). However, the record confirms that Epstein provided a clear

explanation for why the Bailey Affidavit hadn't been previously submitted -- specifically, that Bailey had initially refused to submit an affidavit and instead disclosed that he would only appear in response to a subpoena (R.21). Bailey fully corroborated this account, attesting:

> 3. I did not care to voluntarily submit an affidavit in opposition to the herein defendants' motions to dismiss, but instead advised Mr. Epstein that I would obviously comply with a non-party deposition subpoena served upon me; I simply did not want to voluntarily embroil myself in the instant dispute between Messrs. Epstein and Cantor. However, upon learning of the Court's above-referenced Decision, I now feel compelled to address what I know to be are factual inaccuracies contained therein (R.198).[8]

Furthermore, the lower court failed to appreciate that the Prior Order was issued in response to a CPLR 3211 motion to dismiss filed prior to any discovery herein. And because Kings County Supreme Court does not contain an exception to CPLR 3214(b) (*see infra*), Defendants' original motion to dismiss automatically stayed discovery, thereby preventing Epstein from serving a subpoena and obtaining Bailey's deposition (or anyone else's).

As to reargument, the lower court reversed its Prior Order in part, ruling that there was, in fact, sufficient indicia of Epstein's partnership with Cantor to have defeated the motion to dismiss (R.12-13). Thus, the Partnership Law, accounting,

[8] The lower court likewise did not address this fact at all in its Decision denying renewal.

breach of fiduciary duty, and misappropriation/conversion claims were all reinstated, *but only as against Cantor* (R.13); *the lower court, without explanation, declined to reinstate any of the claims as against Mazzola or the Boyd Defendants even though such claims were dismissed based upon the Non-Partnership Ruling that the lower court vacated in the Decision in response to the motion to renew and reargue* (R.13).

QUESTIONS PRESENTED

1. Did the lower court err in denying renewal? Did the lower court properly disregard Cantor's New Admissions and the Bailey Affidavit? Was Bailey's refusal to submit an affidavit previously sufficient to constitute a reasonable explanation for Epstein's inability to produce it in opposition to the original motion to dismiss, particularly given that Bailey could not have been subpoenaed or deposed prior to issuance of the Prior Order?

2. Did the lower court err in granting reargument only in part? Given the lower court's determination in the Decision that there is, in fact, sufficient evidence to establish Epstein's partnership with Cantor, was it rational for the lower court to nonetheless adhere to its ruling in the Prior Order to dismiss the claims against the Boyd Defendants and Mazzola, which such claims were dismissed based upon the Non-Partnership Ruling that the lower court has since vacated as erroneous.

SUMMARY OF ARGUMENT

The lower court erred in denying renewal and should have reinstated the Dismissed Claims as against Mazzola and the Boyd Defendants. In its Prior Order, the lower court mistakenly ruled that the supposed absence of a partnership relation between Epstein and Cantor required dismissal of the Second through Eleventh Causes of Action. Cantor's New Admissions and the Bailey Affidavit confirm that Epstein, in fact, was Cantor's partner and that CEM was, in fact, a partnership. Indeed, as a matter of law, a defendant's admission that a partnership exists with the plaintiff precludes summary dismissal of partnership claims on the purported basis that the parties were never partners. As for the lower court's ruling that the Bailey Affidavit could have been submitted on the original CPLR 3211 motion to dismiss, such a conclusion is possible only by disregarding Bailey's acknowledgment that he had initially refused to provide an affidavit, and insisted upon being subpoenaed before he would provide testimony. An inability to procure a witness's affidavit, notwithstanding due diligence on the part of the opponent of dismissal, constitutes good cause for its omission from a previous opposition. As such, renewal should have been granted and the Dismissed Claims should have been reinstated as against Mazzola and the Boyd Defendants (Point I, *infra*).

Furthermore, independent of the New Evidence and renewal, the lower court's

failure to reinstate Epstein's claims against Mazzola and the Boyd Defendants constitutes clear error. The lower court's Prior Order was predicated almost entirely upon the Non-Partnership Ruling (R.72), which the lower court, in the Decision, fully vacated. Having ruled that Epstein and Cantor may very well have been partners -- indeed, the lower court observed in its Decision, that "it is unclear who else but Plaintiff [Epstein] could have been a partner thereof [to Cantor]". (R.13) -- the lower court's refusal to reinstate the Dismissed Claims as against the Boyd Defendants and Mazzola does not make sense. Simply put -- since the claims against Mazzola and Boyd Defendants were dismissed in the Prior Order based upon the ruling that Epstein and Cantor were never partners and that CEM supposedly had never been a partnership, then vacatur of that Non-Partnership Ruling requires reinstatement of the Dismissed Claims, not only as against Cantor, but also against Mazzola and the Boyd Defendants (Point II, *infra*).

ARGUMENT

POINT I: THE LOWER COURT ERRED IN DECLINING TO GRANT RENEWAL

"A motion to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination' and 'shall contain reasonable justification for the failure to present such facts on the prior motion.'" *Caronia v. Peluso*, 170 A.D.3d 649, 650 (2d Dep't. 2019) (*quoting* CPLR 2221). And new

facts may consist of evidence not previously available to the party seeking renewal. *Reeves v. Manufacturers Hanover Tr. Co.*, 117 A.D.2d 789, 790 (2d Dep't.1986) ("Where, as in the instant case, substantial 'new evidence [is presented] affecting the prior determination,' this court may decide a different conclusion is warranted on the renewed motion") (quotation omitted).

As shown below: (A) the New Evidence herein should have been considered by the lower court; and (B) such New Evidence required the grant of renewal and reinstatement of the Dismissed Claims.

A. THE NEW EVIDENCE SHOULD HAVE BEEN CONSIDERED BY THE LOWER COURT

Here, the New Evidence was not available to Epstein prior to issuance of the Prior Order, which was issued in December of 2020. The Subsequent Deposition during which Cantor made his New Admissions -- *i.e.*, that Epstein had, in fact, been a partner and that CEM had, in fact, been a partnership -- occurred in January and March of 2021 (R.97). Thus, there was no possible way for Epstein to have relied upon the Subsequent Deposition transcript since it did not exist at the time of the Prior Order. Such constitutes a reasonable justification for not having submitted such New Evidence. *Crosby v. Southport, LLC*, 169 A.D.3d 637, 639 (2d Dep't. 2019) ("Here, Southport submitted newly acquired deposition testimony in support of the motion which warranted a change in the prior determination denying its

motion for summary judgment. Accordingly, its motion for leave to renew should have been granted"); *see also Hurrell-Harring v. State*, 112 A.D.3d 1217, 1219 (3d Dep't. 2013) (denial of motion to renew, *reversed*: "these facts could not have been provided on the prior motion to compel given that the depositions had not yet occurred").

The Bailey Affidavit should also have been considered. As reflected *supra*, Epstein requested that Bailey submit an affidavit in opposition to the original motion to dismiss, but Bailey refused to provide any testimony in the absence of a subpoena (R.198). And since the prior motion was one to dismiss under CPLR 3211 before any discovery could be conducted (CPLR 3214(b)), Epstein had no opportunity to subpoena Bailey.[9] Because Epstein utilized due diligence in endeavoring to secure the Bailey Affidavit before the Prior Order was issued, such should have resulted in a finding of reasonable justification necessary for its consideration upon renewal. *See, e.g.*, *Ralat v. N.Y.C. Hous. Auth.*, 265 A.D.2d 185, 186 (1st Dep't. 1999) (renewal granted even though the plaintiff's attorney had obtained unsworn statements rather than affidavits in response to summary judgment and that "[t]he IAS Court should have granted the renewal branch of plaintiff's motion. Plaintiff's

[9] While Commercial Division Rules in New York County have suspended the stay provisions of CPLR 3214(b) (202.70 N.Y.C.R.R. '11(d)), Kings Supreme Court has no corresponding proviso.

counsel stated that despite diligent efforts, he was unable to obtain sworn affidavits from plaintiff's two witnesses until after the court's initial determination. We find this to be adequate grounds for renewal") (citation omitted); *accord Sirico v. F.G.G. Prods., Inc.*, 71 A.D.3d 429, 434 (1st Dep't. 2010) ("Defendant moved for summary judgment before plaintiffs had the opportunity to conduct discovery") *see also De Cicco v. Longendyke*, 37 A.D.3d 934, 935 (3d Dep't. 2007) (grant of renewal affirmed: "plaintiff had exercised due diligence in attempting to obtain a sworn affidavit from his witness prior to the court's original decision").

The lower court failed to provide any reasoning for its refusal to consider the Bailey Affidavit. Consequently, it is impossible to know what the lower court's rationale might have been. Nonetheless, it is plain that the Bailey Affidavit comprised useful information, as it: (i) corroborated Cantor's New Admissions that Epstein had been a partner and that CEM had been a partnership (R.200); (ii) supported Epstein's sworn statements that he had been deeply involved in the management of CEM (R.199-200) -- sworn statements which the lower court, without explanation on the Prior Order, ignored; and (iii) rebutted Cantor's allegations, made for the first time on renewal, that, while Epstein had been a partner, he owned no equity in the Firm (R.200) -- a sworn statement by Cantor which is directly inconsistent with Cantor's Admission of Epstein's Equity (*i.e.*, that offers to

purchase CEM's equity had been previously made, but that Epstein had vetoed the proposal even though, as Cantor conceded, Epstein would have received half of the proceeds of the sale of such equity (R.65).

* * * * * * * *

The lower court denied renewal, but failed to explain its refusal to consider Cantor's New Admissions -- *i.e.*, that Epstein had always been a partner and that CEM had always been a partnership. As shown in Point I(B) *infra*, Cantor's New Admissions require a finding that Epstein, in fact, was a partner and that CEM was a partnership -- not that there exist supposed issues of fact on the subject.

Furthermore, the lower court should have considered the Bailey Affidavit. The evidence comprising the Bailey Affidavit was not available previously because Bailey refused to provide it despite Epstein's requests, and Epstein never had the opportunity to depose Bailey, since CPLR 3214(b) stayed discovery while Defendants' motions to dismiss were pending. The lower court conclusively ruled that Epstein failed to offer a reasonable explanation for his inability to obtain the Bailey Affidavit earlier, but respectfully, the lower court's ruling cannot be squared with the record, especially in the context of Bailey's initial refusal to submit an affidavit and Epstein's uncontested exercise of due diligence in attempting to procure it.

For these reasons, the lower court should have considered the New Evidence and granted renewal.

B. THE NEW EVIDENCE REQUIRED A FINDING THAT EPSTEIN AND CANTOR WERE PARTNERS AND THAT, THUS, THE DISMISSED CLAIMS AS AGAINST MAZZOLA AND THE BOYD DEFENDANTS SHOULD HAVE BEEN REINSTATED

An admission confirming the status of a partner is binding upon the party making the admission. *Foley v. Kaplan*, 162 A.D.2d 155, 156 (1st Dep't. 1990) (denial of motion to dismiss complaint seeking dissolution and accounting in partnership dispute, affirmed) (*citing* N.Y. Partnership L. '62 and *Dreier v. Linden*, 70 A.D.2d 820 (1st Dep't. 1979)); *see also United States v. Carlin*, 948 F. Supp. 271, 276 (S.D.N.Y. 1996) ("the undisputed facts before this court clearly establishes [sic] Carlin's status as a partner of Park Drive. Martin Carlin admits to having entered into a partnership with Vlad Stevens and Steve Stevens"); *see also Claim of Heymann*, 192 A.D.2d 861, 861 (3d Dep't. 1993) (admission by plaintiff that she was a partner was binding and precluded her recovery of unemployment insurance: "in view of claimant's admission that she was a partner, there is substantial evidence in the record to support the conclusion by the Unemployment Insurance Appeal Board that claimant was not entitled to file a valid original claim for benefits").

Cantor's New Admissions are particularly significant here. It bears emphasis

that, on the original motion, which resulted in dismissal of ten of eleven causes of action, Cantor swore in his Affidavit that Epstein had never been a partner and CEM had never been a partnership (R.64). The lower court dismissed virtually the entire Complaint based upon this false premise (R.72). However, once subjected to cross-examination at a deposition, Cantor admitted that his Affidavit was false, and that he and Epstein had been partners and that CEM had always been a partnership (R.200). The record on the instant Appeal presents the precise circumstances that motions to renew are designed to remediate through the achievement of substantial justice.

As this Court aptly observed in *Adzer v. Rudin Mgt. Co.*:

> [W]e have consistently held that the Supreme Court is possessed of broad discretion in granting renewal, and the application of that discretion and the governing principles are to be *flexibly applied to advance the interests of justice*.

50 A.D.3d 1070, 1072 (2d Dep't. 2008) (*citing Heaven v. McGowan*, 40 A.D.3d 583 (2d Dep't. 2007); *Lafferty v. Eklecco, LLC*, 34 A.D.3d 754 (2d Dep't. 2006); *Petsako v. Zweig*, 8 A.D.3d 355 (2d Dep't. 2004); *Gomez v. Needham Capital Gp.*, Inc., 7 A.D.3d 568 (2d Dep't. 2004); *Bepat v. Chandler*, 2 A.D.3d 764 (2d Dep't. 2003); *Matter of Orange and Rockland Util. v. Assessor*, 304 A.D.2d 668 (2d Dep't. 2003)) (emphasis added).

Coupled with the Partnership Agreement (R.37-44) and the Other Evidence

of Partnership (R.212, 223-31), the New Evidence leaves no doubt that Cantor's original sworn statements that there was never any partnership between him and Epstein was absolutely false. The lower court's adherence to its original determination and refusal to reinstate the Dismissed Claims constituted clear error. And, as shown in Point II *infra*, such New Evidence, particularly in light of the Partnership Agreement and the Other Evidence of Partnership, coupled with the lower court's vacatur of the Non-Partnership Ruling, should have resulted in reinstatement of the Dismissed Claims as against Mazzola and the Boyd Defendants.

POINT II. THE LOWER COURT'S DECISION TO REINSTATE CLAIMS ONLY AS AGAINST CANTOR, AND NOT AGAINST MAZZOLA AND THE BOYD DEFENDANTS, IS IRRATIONAL AND SHOULD BE REVERSED

The lower court, in its Decision denying renewal but granting reargument only in part, just does not make sense, as it is internally inconsistent. As reflected *supra*, the lower court originally dismissed all of the claims against Mazzola and the Boyd Defendants, in large part, based upon the supposed absence of a partnership relation between Cantor and Epstein. It bears emphasis that, in this regard, the lower court, in its Prior Order, ruled:

> As a result of Epstein not being a partner in the enterprise many of the claims in the complaint fail to state a cause of action (R.72).

The lower court, in the Prior Order, then proceeded to list the various now-Dismissed Claims, one after the other, and explained how, because Epstein and Cantor supposedly were never partners -- a premise, which the record now confirms is absolutely false -- Epstein's now-Dismissed Claims against Mazzola and the Boyd Defendants fail to state causes of action. However, since the lower court vacated its Non-Partnership Ruling, the Dismissed Claims as against Mazzola and the Boyd Defendants should all have been reinstated.

In declining to reinstate the Dismissed Claims as against the Boyd Defendants, the lower court, again in conclusory fashion, decreed simply:

> This Court does not, however, find occasion to disturb its determinations as to Plaintiff's claims against the Boyd Defendants-EIGHT, NINE, TEN, and ELEVEN (R.13) (capitalization in original).

Respectfully, it makes no sense for the lower court to refuse to reinstate the Eighth through Eleventh Causes of Action as against the Boyd Defendants given that the sole predicate for their original dismissal was the Non-Partnership Ruling that the lower court subsequently acknowledged was erroneous. Indeed, the New Evidence, including especially Cantor's New Admissions, leave no doubt that Cantor and Epstein were, in fact, partners and that CEM was always a partnership until its dissolution (Point I(B), *supra*). Given the lower court's vacatur of the Non-Partnership Ruling, adherence to the Prior Order as to the Boyd Defendants simply

makes no sense.

As for Mazzola, the lower court adhered to its prior position, ruling that the Second and Third Causes of Action against him based upon his status as a partner of CEM had to remain dismissed because Epstein supposedly admitted that Mazzola resigned as a partner in 2013 (R.9). While we dispute that conclusion, we reserve that issue for the Related Appeal.

We do, however, take issue (on *this* Appeal) with the lower court's refusal to reinstate the remaining claims against Mazzola, which, as with the Boyd Defendants, hinged upon the Non-Partnership Ruling, which was vacated in the Decision. The lower court failed to provide any explanation for its conclusion, for example, why Epstein could not maintain a claim against Mazzola for unjust enrichment (the Seventh Cause of Action), or for aiding and abetting Cantor's breaches of fiduciary duty (Ninth Cause of Action) or why Mazzola could not be found liable for tortious interference with the Partnership Agreement (Eleventh Cause of Action). Since, as the lower court ruled (and as Cantor has since admitted), Epstein was a partner of CEM, which was a partnership, the Dismissed Claims which were based upon that partnership relationship should have been reinstated upon vacatur of the Non-Partnership Ruling. Respectfully, the lower court's decision-making just doesn't make sense, particularly given the record herein.

CONCLUSION

The lower court wisely reinstated the claims against Cantor; however, it committed clear errors of law and fact by failing to reinstate the Dismissed Claims against Mazzola and the Boyd Defendants, all of which were dismissed based upon the Non-Partnership Ruling, which was vacated and reversed as erroneous. As the lower court appeared to acknowledge, Epstein and Cantor were, in fact, partners and formed the partnership known as CEM. The partnership lasted over 20 years. The parties had a Partnership Agreement; filed Partnership Formation Documents which require the existence of a partnership with no limited partners, meaning that each partner was liable for the debts of the Firm they formed; regularly referred to Epstein as a partner; billed him out to clients as a partner; marketed him as a partner; and filed tax returns identifying Epstein as a general partner.

It is respectfully submitted that the Prior Order, which based upon the now-defunct Non-Partnership Ruling, should be vacated in its entirety and the Dismissed Claims – all of them – should be reinstated as against Mazzola and the Boyd Defendants.

We respectfully reserve our remaining arguments to the Related Appeal.

Dated: New York, New York
April 22, 2024

Respectfully submitted,

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By: /s/ *Michael S. Hiller*
Michael S. Hiller

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I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: April 22, 2024

STATEMENT PURSUANT TO CPLR 5531

Supreme Court of the State of New York
Appellate Division – Second Department

SCOTT EPSTEIN, individually and as a Partner of
CANTOR, EPSTEIN & MAZZOLA, LLP,

Plaintiff-Appellant-Respondent,

- against -

ROBERT I. CANTOR and ROBERT I. CANTOR, PLLC,

Defendants-Respondents-Appellants,

- and -

BRYAN J. MAZZOLA, W. TODD BOYD, BOYD RICHARDS PARKER
COLONELLI, P.L. and BOYD RICHARDS NY LLC,

Defendants-Respondents.

1. The index number of the case in the court below is 506730/2019.

2. The full names of the original parties are set forth above. There have been no changes.

3. This action was commenced in Supreme Court of the State of New York, Kings County.

4. The action was commenced on or about July 31, 2019 by filing of a Summons with Notice. Issue was then joined on or about December 16, 2020 by service of a Verified Answer by Defendants Robert I. Cantor and Robert I. Cantor PLLC.

5. This is an action brought about by breach of contract, breach of fiduciary duty, violation of New York State Partnership Law, accounting, misappropriation/conversion, violation of the faithless servant doctrine, unjust enrichment, corporate raiding, aiding and abetting, unfair competition and tortious interference with contract.

6. The appeal is from the Decision and Order of the Honorable Larry D. Martin, Dated August 19, 2022 and entered on August 23, 2022.

7. The appeal is being perfected on a full reproduced joint record.

CITATIONS

New York Official Reports

50 A.D.3d 1070, 856 N.Y.S.2d 674, 2008 N.Y. Slip Op. 04041

**1 Jadadic Adzer et al., Appellants

v

Rudin Management Co., Inc., et al., Respondents, et al., Defendants. (And a Third-Party Action.)

Supreme Court, Appellate Division, Second Department, New York
April 29, 2008

CITE TITLE AS: Adzer v Rudin Mgt. Co., Inc.

Bergman, Bergman, Goldberg & LaMonsoff, LLP (Pollack, Pollack, Isaac & De Cicco, New York, N.Y. [Brian J. Isaac], of counsel), for appellants.
Herzfeld & Rubin, P.C., New York, N.Y. (Miriam Skolnik and David B. Hamm of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Queens County (Weiss, J.), dated June 7, 2006, which granted the motion of the defendants Rudin Management Co., Inc., and Three Times Square Center Partners, LLP, for leave to renew and reargue their opposition to that branch of the plaintiffs' motion which was pursuant to CPLR 3126 to impose a sanction upon them for their failure to make disclosure, which was determined in an order dated November 5, 2004, and for leave to renew and reargue their opposition to that branch of the plaintiffs' subsequent motion which was, in effect, to strike their answer, which was determined in an order dated January 23, 2006, and, upon renewal and reargument, vacated so much of the order dated January 23, 2006, as struck the answer of those defendants.

Ordered that the order dated June 7, 2006 is modified, on the law, by adding a provision thereto directing that the attorneys for the defendants Rudin Management Co., Inc. and Three Times Square Center Partners, LLP, pay to the plaintiffs the sum of $1,500; as so modified, the order is affirmed, without costs or disbursements, and the time for the attorneys for the defendants Rudin Management Co., Inc. and Three Times Square Center Partners, LLP, to pay to the plaintiffs the sum of $1,500 is 30 days after service upon them of a copy of this decision and order. **2

The plaintiff Jadadic Adzer allegedly was injured in the sub-basement of the premises owned and managed by the defendants *1071 Rudin Management Co., Inc. and Three Times Square Center Partners, LLP (hereinafter the Rudin defendants), when a locker in the ladies' locker room fell on her. During the discovery process the parties engaged in motion practice which resulted in the court issuing a conditional order dated November 5, 2004, striking the Rudin defendants' answer unless they furnished to the plaintiffs, within a specified period of time, certain items of discovery demanded by the plaintiffs, or alternatively, provided a "detailed statement, made under oath," indicating, inter alia, that such items did not exist or were destroyed and the basis for such destruction.

Subsequently, the plaintiffs claimed that the discovery was not provided within the time specified in the conditional order and they moved, inter alia, in effect, to strike the Rudin defendants' answer. The Rudin defendants opposed the motion. In an order dated January 23, 2006 the court determined, among other things, that the Rudin defendants had not complied with the conditional order and struck their answer.

Thereafter, the Rudin defendants moved for leave to renew and reargue, among other things, that branch of the plaintiffs' prior motion which was, in effect, to strike their answer. In support of that motion, the Rudin defendants presented evidence, inter alia, that certain documents responsive to the plaintiffs' discovery demand had been removed from their possession, and that, in any event, the plaintiffs were not prejudiced by their inability to comply with that portion of the conditional order. In opposition, the plaintiffs asserted that this proof was inadequate because the Rudin defendants did not provide the alternative information required by the conditional order, namely, an affidavit explaining the inability to provide the documents in question. In reply, the Rudin defendants claimed that the lawyer handling the matter had left their employ when they closed their Jericho offices and the failure to comply with the court-authorized alternative was inadvertent. Based on that proof, the court granted the Rudin defendants' motion for leave to renew and reargue and thereupon vacated so much of its prior order dated January 23, 2006 as struck their answer. The court found that the Rudin defendants' failure to comply with the conditional order was

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not willful and contumacious, and that the plaintiffs had not been prejudiced by the delay in complying with discovery.

Sound jurisprudential principles underlie our determination that the Supreme Court providently exercised its discretion in granting the Rudin defendants leave to renew and reargue under the circumstances of this case. First, there is a strong ***1072** public policy which favors a determination on the merits (*see Storchevoy v Blinderman,* 303 AD2d 672 [2003]). Second, we have consistently held that the Supreme Court is possessed of broad discretion in granting renewal, and the application of that discretion and the governing principles are to be flexibly applied to advance the interests of justice (*see Heaven v McGowan,* 40 AD3d 583 [2007]; *Lafferty v Eklecco, LLC,* 34 AD3d 754 [2006]; *Petsako v Zweig,* 8 AD3d 355 [2004]; *Gomez v Needham Capital Group, Inc.,* 7 AD3d 568 [2004]; *Bepat v Chandler,* 2 AD3d 764 [2003]; *Matter of Orange & Rockland Util. v Assessor of Town of Haverstraw,* 304 AD2d 668 [2003]).

In this instance the Supreme Court, in essence, determined that the moving defendants had substantially complied with the conditional order or satisfactorily explained their noncompliance. More significantly, the court, in a well-reasoned decision, concluded that the intent of its prior directives had been sufficiently satisfied, to wit, that the plaintiffs were provided with sufficient discovery to proceed with the prosecution of the action. To second guess what the court ****3** believed to be its original intent and the manner in which it wanted discovery to proceed would elevate form over substance and would not further the interests of justice.

Notwithstanding the foregoing, and because we find that the plaintiffs were unnecessarily required to make successive motions in an effort to obtain the discovery responses, the Supreme Court improvidently exercised its discretion in failing to impose any penalty upon the attorneys for the Rudin defendants. While we agree that the ultimate penalty of striking the pleadings was not warranted, we conclude that the Supreme Court should have imposed a penalty upon the attorneys for the Rudin defendants in the sum of $1,500, payable to the plaintiffs (*see DeCintio v Ahmed,* 276 AD2d 463 [2000]). Lifson, J.P., Ritter, Santucci and Dillon, JJ., concur.

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New York Official Reports

2 A.D.3d 764, 769 N.Y.S.2d 731
(Mem), 2003 N.Y. Slip Op. 19947

***1** Yongwattie Bepat et al., Respondents

v

Gregory Chandler, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
2003-04477, 26516/01
December 29, 2003

CITE TITLE AS: Bepat v Chandler

In an action to recover damages for personal injuries, etc., the defendant appeals from an order of the Supreme Court, Queens County (Golar, J.), dated May 2, 2003, which granted the plaintiffs' motion for leave to renew their motion for leave to enter a judgment against the defendant upon his failure to appear or answer, and, upon renewal, granted that motion.

Ordered that the order is affirmed, with costs.

While a motion for leave to renew is generally based upon the discovery of material facts which were unknown to the movant at the time of the original motion (*see* CPLR 2221 [e] [2]), the Supreme Court has the discretion to grant renewal even upon facts known to the movant at that time (*see J. D. Structures v Waldbaum,* 282 AD2d 434 [2001]). Under the circumstances of this case, the Supreme Court properly exercised its discretion in granting renewal.

Upon renewal, the Supreme Court properly granted the plaintiffs' motion for leave to enter a judgment against the defendant upon his failure to appear or answer. The defendant failed to present either a reasonable excuse for his default in appearing or answering or a meritorious defense (*see Miles v Blue Label Trucking,* 232 AD2d 382 [1996]). Florio, J.P., Krausman, Luciano, Townes and Rivera, JJ., concur.

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New York Official Reports

170 A.D.3d 649, 96 N.Y.S.3d 75, 2019 N.Y. Slip Op. 01556

****1** Darlene Caronia, Respondent,

v

Matthew Peluso et al., Defendants, and Faculty-Student Association of the State University of New York at Stony Brook, Inc., Appellant. (And a Third-Party Action.)

Supreme Court, Appellate Division,
Second Department, New York
2017-00850, 22098/14
March 6, 2019

CITE TITLE AS: Caronia v Peluso

HEADNOTE

Motions and Orders
Reargument or Renewal
Failure to Offer Reasonable Justification for Not Presenting Documents on Original Motion

White Fleischner & Fino, LLP, New York, NY (Nancy Davis Lewis and Matthew Toker of counsel), for appellant.
Devitt Spellman Barrett, LLP, Smithtown, NY (John M. Denby of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Faculty-Student Association of the State University of New York at Stony Brook, Inc., appeals from an order of the Supreme Court, Suffolk County (Thomas F. Whelan, J.), dated November 18, 2016. The order, insofar as appealed from, denied that defendant's motion for leave to renew that branch of its prior cross motion which was for summary judgment dismissing the complaint insofar as asserted against it, which was denied in an order of the same court dated February 9, 2016.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action to recover damages allegedly sustained by her when a vehicle operated by the defendant Matthew Peluso (hereinafter Peluso), an employee of the defendant Faculty-Student Association of the State ***650** University of New York at Stony Brook, Inc. (hereinafter the FSA), while driving in reverse, hit the plaintiff's vehicle in the parking lot of the State University of New York at Stony Brook. After Peluso and his wife failed to answer the complaint, the plaintiff moved for leave to enter a default judgment against them and the FSA cross-moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against it. On February 9, 2016, the Supreme Court, inter alia, denied that branch of the FSA's cross motion which was for summary judgment on the ground that it failed, prima facie, to establish that it was not liable to the plaintiff under the doctrine of respondeat superior.

Thereafter, the FSA issued a subpoena for Peluso's deposition, which took place in June 2016. In August 2016, the FSA moved for leave to renew that branch of its cross motion which was for summary judgment, relying, inter alia, on Peluso's deposition testimony. In an order dated November 18, 2016, the Supreme Court denied the FSA's motion for leave to renew on the ground that it failed to explain why it had not obtained Peluso's testimony prior to making its original cross motion. The FSA appeals from that order.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]). "The requirement that a motion for renewal be based on new facts is a flexible one" (*Gonzalez v Vigo Constr. Corp.*, 69 AD3d 565, 566 [2010]; *see Matter of Serviss v Incorporated Vil. of Floral Park*, 164 AD3d 512 [2018]). "The new or additional facts presented 'either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion' " (*Matter of Serviss v Incorporated Vil. of Floral Park*, 164 AD3d at 513, quoting *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585, 586 [2012]; *see Cioffi v S.M. Foods, Inc.*, 142 AD3d 526, 529 [2016]). In either circumstance, however, the party seeking renewal must present " 'a reasonable excuse for the failure to present those facts on the prior motion' " (*Gonzalez v Vigo Constr. Corp.*, 69 AD3d at 566, quoting *Matter of Surdo v Levittown Pub. School Dist.*, 41 AD3d 486, 486 [2007]; *see Matter of Serviss v Incorporated Vil. of Floral Park*, 164 AD3d at 513). "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making

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their first factual presentation" (***651** *Matter of Serviss v Incorporated Vil. of Floral Park*, 164 AD3d at 513; *see Cioffi v S.M. Foods, Inc.*, 142 AD3d at 530). Where the party seeking renewal fails to provide a reasonable justification for not presenting the new facts on the prior motion, the court lacks discretion to grant renewal (*see Matter of Serviss v Incorporated Vil. of Floral Park*, 164 AD3d 512 [2018]; *Cioffi v S.M. Foods, Inc.*, 142 AD3d at 530).

Here, the FSA failed to provide a reasonable justification for not procuring Peluso's testimony prior to making its original cross motion for summary judgment (*see Eskenazi v Mackoul*, 92 AD3d 828, 829 [2012]). Accordingly, we agree with the Supreme Court's determination denying the FSA's motion for leave to renew that branch of its cross motion which was for summary judgment dismissing the complaint insofar as asserted against it. Rivera, J.P., Chambers, Cohen and Barros, JJ., concur.

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New York Official Reports

192 A.D.2d 861, 596 N.Y.S.2d 532

***861** In the Matter of the Claim of Monica G. Heymann, Appellant. John F. Hudacs, as Commissioner of Labor, Respondent.

Supreme Court, Appellate Division,
Third Department, New York
67038
(April 15, 1993)

CITE TITLE AS: Matter of Heymann (Hudacs)

Appeal from a decision of the Unemployment Insurance Appeal Board, filed January 7, 1992, which, *inter alia,* ruled that claimant was ineligible to receive unemployment insurance benefits because she did not have sufficient weeks of covered employment to file a valid original claim.

HEADNOTE

UNEMPLOYMENT INSURANCE BENEFITS
Disqualification --- Partners

(1) Claimant was general partner in two-person partnership; when partnership dissolved she applied for unemployment insurance benefits; members of partnership are not considered employees; thus, in view of claimant's admission that she was partner, there is substantial evidence in record to support conclusion by Unemployment Insurance Appeal Board that claimant was not entitled to file valid original claim for benefits --- Although claimant provided accurate information concerning her partnership status, she was erroneously paid benefits to which she was not entitled; Board, therefore, properly ruled benefits were recoverable.

Claimant was a general partner in a two-person partnership in the graphic design business. When the partnership dissolved she applied for unemployment insurance benefits. Although she was initially ruled eligible, upon further administrative review it was determined that because of her work as a partner, she did not have sufficient weeks of covered employment to qualify for benefits. Members of a partnership are not considered employees *(see,* CCH, NY Unemployment Ins Rep ¶ 1344). Thus, in view of claimant's admission that she was a partner, there is substantial evidence in the record to support the conclusion by the Unemployment Insurance Appeal Board that claimant was not entitled to file a valid original claim for benefits *(see generally, Matter of Slocum [Corsi],* 273 App Div 353; *see also, Matter of Gold [Catherwood],* 35 AD2d 887; *Matter of Wersba [Catherwood],* 27 AD2d 890).

In addition, although claimant provided accurate information concerning her partnership status, the fact remains that she was erroneously paid benefits to which she was not entitled. The Board, therefore, properly ruled that the benefits were recoverable (Labor Law § 597 [4]; *see, Matter of Simone [Estate of King--Hartnett],* 142 AD2d 768; *cf., Matter of Council [Roberts],* 132 AD2d 437). Claimant's remaining contentions have been considered and rejected for lack of merit.

Mikoll, J. P., Yesawich Jr., Mercure and Crew III, JJ., concur. Ordered that the decision is affirmed, without costs.

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New York Official Reports

169 A.D.3d 637, 94 N.Y.S.3d 109, 2019 N.Y. Slip Op. 00852

**1 Joseph K. Crosby et al., Respondents,

v

Southport, LLC, et al., Appellants, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York
150416/13, 2017-01041
February 6, 2019

CITE TITLE AS: Crosby v Southport, LLC

HEADNOTE

Negligence
Maintenance of Premises
Fall over Extension Cord in Bathroom—Failure to Show Lack of Inherent Danger

Cullen and Dykman LLP, New York, NY (Kevin C. McCaffrey, Timothy J. Flanagan, and Molly Blaase of counsel), for appellant Southport, LLC.
Haworth Coleman & Gerstman, LLC, New York, NY (Scott Haworth of counsel), for appellant Xerox State & Local Solutions, Inc.
Fortunato & Fortunato, PLLC, Brooklyn, NY (Louis A. Badolato and Annamarie Fortunato of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant Southport, LLC, appeals, and the defendant Xerox State & Local Solutions, Inc., separately appeals, from an order of the Supreme Court, Richmond County (Kim Dollard, **638 J.), dated January 6, 2017. The order, insofar as appealed from by the defendant Southport, LLC, denied that defendant's motion for leave to renew its prior motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, which was denied in an order of the same court dated June 3, 2016. The order, insofar as appealed from by the defendant Xerox State & Local Solutions, Inc., denied that defendant's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

Ordered that the order is reversed insofar as appealed from by the defendant Southport, LLC, that defendant's motion for leave to renew its prior motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted, upon renewal, so much of the order dated June 3, 2016, as denied that defendant's prior motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is vacated, and thereupon, that defendant's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted; and it is further,

Ordered that the order is affirmed insofar as appealed from by the defendant Xerox State & Local Solutions, Inc.; and it is further,

Ordered that one bill of costs is awarded to the plaintiffs, payable by the defendant Xerox State & Local Solutions, Inc.

The plaintiff Joseph Crosby (hereinafter Crosby) allegedly was injured while in a bathroom at premises leased by the defendant Xerox State & Local Solutions, Inc. (hereinafter Xerox), in a building owned by the defendant Southport, LLC (hereinafter Southport). Crosby approached a sink and stepped on an extension cord which was plugged into a portable water heater under the sink. He felt the cord roll under his foot, and then he fell backwards to the floor.

Crosby, and his wife suing derivatively, commenced this action against Southport, Xerox, and others to recover damages for personal injuries. Southport moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, arguing that it was an out-of-possession landlord which could not be held liable for Crosby's injuries. In an order dated June 3, 2016, the Supreme Court denied Southport's motion. Southport thereafter moved for leave to renew its motion based on newly obtained deposition testimony. In that testimony, a facilities department employee of Xerox stated that he had installed the extension cord because the outlet next to the portable water heater shorted out after water **639 from the sink spilled onto it, and that the problem with the outlet was not associated with any building-wide electrical problem. Xerox also moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, arguing, among other things, that the sole proximate cause of the accident was

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Crosby's failure to observe the open and obvious condition of the extension cord. In an order dated January 6, 2017, the Supreme Court denied both motions. Southport appeals from so much of the order as denied its motion for leave to renew its prior motion, while Xerox separately appeals from the denial of its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

The Supreme Court improvidently exercised its discretion in denying Southport's motion for leave to renew. A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination (*see* CPLR 2221 [e] [2]; *Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211 [2018]; *Perlman v Perlman*, 163 AD3d 730, 733 [2018]). Here, Southport submitted newly acquired deposition testimony in support of the motion which warranted a change in the prior determination denying its motion for summary judgment. Accordingly, its motion for leave to renew should have been granted (*see e.g. Buongiovanni v Hasin*, 162 AD3d 736, 738-739 [2018]; *NYCTL 2009-A Trust v Kimball Group, LLC*, 158 AD3d 635, 636 [2018]).

"An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a 'duty imposed by statute or assumed by contract or a course of conduct' " (*Casson v McConnell*, 148 AD3d 863, 864 [2017], quoting *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18 [2011]; *see Rivera v Nelson Realty, LLC*, 7 NY3d 530, 534 [2006]; *Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 642 [1996]; *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565-566 [1987]).

The new evidence submitted on Southport's renewal motion established that it did not create the allegedly defective condition, nor did it assume a duty in the lease or through a course of conduct to repair non-structural conditions in the subject bathroom. Moreover, the new evidence established, prima facie, that Southport did not retain sufficient control over, or have notice of, the conditions which allegedly caused Crosby's accident so as to subject it to liability. In opposition to this prima facie showing of entitlement to summary judgment, the plaintiffs failed to raise a triable issue of fact (*see* ***640** *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, upon renewal, the Supreme Court should have granted Southport's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

Under the circumstances of this case, we decline to award costs to Southport, since its renewal motion and renewed request for summary judgment were based on depositions that were not conducted until after the issuance of the June 3, 2016, order denying its initial motion for summary judgment. Had Southport more appropriately waited until all relevant depositions and disclosure had been concluded before making its initial motion for summary judgment, its ensuing motion for leave to renew, and this appeal from the denial of that motion, would have been unnecessary.

We agree with the Supreme Court's denial of Xerox's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. "[P]roof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence" (*Cupo v Karfunkel*, 1 AD3d 48, 52 [2003]; *see Lopez-Calderone v Lang-Viscogliosi*, 127 AD3d 1143, 1145 [2015]). Thus, to obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous (*see Cupo v Karfunkel*, 1 AD3d at 52). "In such circumstances, the condition which caused the accident cannot fairly be attributed to any negligent maintenance of the property" (*id.*).

Here, Xerox failed to establish, prima facie, that the subject extension cord was not an inherently dangerous tripping hazard (*see Klee v Cablevision Sys. Corp.*, 77 AD3d 794, 795 [2010]; *Villano v Strathmore Terrace Homeowners Assn., Inc.*, 76 AD3d 1061, 1062 [2010]), and, in any event, the affidavit of the plaintiffs' expert raised a triable issue of fact with respect to this issue (*see Julianne Oldham-Powers v Longwood Cent. Sch. Dist.*, 123 AD3d 681, 682-683 [2014]).

Xerox further failed to establish, prima facie, that Crosby's conduct was the sole proximate cause of his accident. It cannot be said as a matter of law that Crosby's act of walking toward the sink despite his previous observation of the extension cord was unforeseeable, or that it rose to such a level of culpability as to supersede the alleged negligence of Xerox and constitute the sole proximate cause of the accident (*see Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1319 [2012]; *Mooney v Petro, Inc.*, 51 AD3d 746, 747 [2008]; ***641** *Oliver v Tanning Bed, Inc.*, 50 AD3d 1259, 1261-1262 [2008]). Scheinkman, P.J., Mastro, Maltese and Barros, JJ., concur.

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New York
Official Reports

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Distinguished by Kirby v. Suburban Elec. Engineers Contractors, Inc., N.Y.A.D. 4 Dept., April 1, 2011

37 A.D.3d 934, 829 N.Y.S.2d
284, 2007 N.Y. Slip Op. 01042

**1 Vincent De Cicco, Respondent

v

John P. Longendyke, Appellant.

Supreme Court, Appellate Division,
Third Department, New York
501158
February 8, 2007

CITE TITLE AS: De Cicco v Longendyke

HEADNOTES

Motions and Orders
Reargument or Renewal

Negligence
Maintenance of Premises

In action by plaintiff, who was injured when he fell in hole or depression in defendant's yard, defendant was not entitled to summary judgment—considering plaintiff's description of accident and witness's observations, combined with defendant's acknowledgment regarding lack of lighting in area where plaintiff claimed to have fallen as well as his description of ongoing renovation projects in his yard, plaintiff offered something more than speculation in alleging that his injuries were caused by defendant's negligence.

Boeggeman, George, Hodges & Corde, P.C., Albany (Paul H. Hurley of counsel), for appellant.
Basch & Keegan, L.L.P., Kingston (Derek J. Spada of counsel), for respondent.

Cardona, P.J. Appeal from an order of the Supreme Court (Bradley, J.), entered January 6, 2006 in Ulster County, which, upon renewal, denied defendant's motion for summary judgment dismissing the complaint.

In July 2003, while an invited guest to a party at defendant's residence in the Town of Kingston, Ulster County, plaintiff allegedly sustained injuries to his leg after falling in a hole or depression in defendant's yard. According to plaintiff, the unlit area at the side of the house where he fell was "really dark" *935 and, as he stepped, "[t]here was some sort of like extra step, indentation, hole, ledge, or something like that." Plaintiff stated that after his foot unexpectedly went down "four to six inches," he tumbled forward, landing on his knees. He described the area where he fell as "grassy dirt."

Plaintiff commenced this negligence action in January 2004, asserting that his injuries were caused by defendant's failure to, among other things, adequately light the premises in the area where the accident allegedly occurred or warn visitors of irregularities on his property. Following joinder of issue, Supreme Court granted defendant's motion for summary judgment, concluding that plaintiff had offered no proof of a dangerous condition on defendant's land. Upon the submission by plaintiff of an affidavit from a nonparty witness, Megan O'Halloran, Supreme Court granted plaintiff's motion to renew and reversed its award of summary judgment **2 to defendant, finding that questions of fact necessitated a trial.

Initially, we are unpersuaded by defendant's contention that Supreme Court improperly granted plaintiff's motion to renew. Regardless of the merit of defendant's claim that the evidence contained in O'Halloran's affidavit was available prior to plaintiff's initial factual presentation, Supreme Court specifically acknowledged that plaintiff had exercised due diligence in attempting to obtain a sworn affidavit from his witness prior to the court's original decision. However, there was evidence that O'Halloran's relocation presented difficulties in securing the affidavit. Given the affidavits submitted by plaintiff, plaintiff's attorney and O'Halloran regarding the validity of those efforts as well as the witness's move to another part of the state, we cannot say that Supreme Court abused its discretion in concluding that plaintiff was reasonably justified in failing to originally present such evidence and granting his motion to renew (*see* CPLR 2221 [e] [3]; *compare Cippitelli v County of Schenectady*, 307 AD2d 658, 658 [2003]).

Turning to the merits, we conclude that Supreme Court did not err in denying defendant's summary judgment motion.

O'Halloran indicated in her affidavit that she was a guest at defendant's July 2003 party and, although she did not see plaintiff fall, she drove him to the hospital shortly afterwards. O'Halloran stated that, prior to doing so, plaintiff realized he no longer had his prescription medication and asked her to go retrieve it at "the side of the house near where he fell." In doing so, O'Halloran averred that she almost fell into a trench on defendant's property that was approximately "[five] inches deep and several feet wide." She then found plaintiff's medication next to that hole and returned it to him. ***936**

Defendant maintains that, among other things, plaintiff's vague account of the circumstances surrounding his fall mandates summary judgment in his favor. However, considering plaintiff's description of the accident and O'Halloran's observations, combined with, among other things, defendant's acknowledgment regarding the lack of lighting in the area where plaintiff claims to have fallen as well as his description of the ongoing renovation projects in his yard, we conclude that plaintiff offered "[s]omething more than speculation" in alleging that his injuries were caused by defendant's negligence (*Oliveira v County of Broome*, 5 AD3d 898, 899 [2004]; *see Gayle v City of New York*, 92 NY2d 936, 937 [1998]; *Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743 [1986]). Therefore, viewing the evidence and the logical inferences to be drawn therefrom in the light most favorable to plaintiff as the nonmoving party, summary judgment was properly denied (*see Green v Kalimian*, 257 AD2d 912, 913 [1999]; *Rekemeyer v Knickerbocker Furniture Co.*, 222 AD2d 873, 874 [1995]).

Mercure, Spain, Mugglin and Lahtinen, JJ., concur. Ordered that the order is affirmed, with costs.

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New York
Official Reports

70 A.D.2d 820, 417 N.Y.S.2d 496

Ronald Dreier, Appellant,

v.

Bella L. Linden et al., Respondents

Supreme Court, Appellate Division,
First Department, New York
June 14, 1979

CITE TITLE AS: Dreier v Linden

HEADNOTE

PARTNERSHIP
ACCOUNTING

(1) Attorney sues his former partners for accounting of firm's earnings and his share thereof during period of his membership in partnership and seeks compensation for certain services for his former firm performed thereafter; second cause, based on postpartnership services, was sent to Referee for calculation of amounts due, if any, for these services on quantum meruit basis --- Appellate Division expands reference to include two other issues not yet resolved --- Whatever agreement existed was oral only, and apparently marked by peculiar feature in that it was left to one certain partner to supplement shares of others as desired out of that partner's share; this can be regarded either as ‘clause‘ in agreement or as unenforceable generosity --- It is not entirely clear that plaintiff has received full amount due to him under terms of partnership agreement and since there is to be reference as to plaintiff's postpartnership services, this issue also sent to reference ---Evidence amply indicates that members of firm never gave thought at all to provisions for withdrawal of partner; solution is that in Jackson v Hunt, Hill & Betts (7 NY2d 180) for resolution of what should happen to unpaid or unbilled fees on withdrawal of partner, i.e., that plaintiff is entitled to his aliquot share of net proceeds not yet taken into firm's treasury at time of his retirement for services completed or inwork and not yet paid for, to be calculated on usual basis as to overhead or any other legitimate charge against gross --- This calculation is also made part of what is to be inquired into by Referee.

Judgment, Supreme Court, New York County, entered April 23, 1978, after bench trial, modified, on the law and the facts to vacate the first decretal paragraph thereof dismissing the first cause of action for accounting, to grant judgment for plaintiff-appellant thereon, and to direct that the reference ordered by the second decretal paragraph be expanded to include the issues tendered in that accounting, consistent with what is hereinafter set forth, and to vacate the third decretal paragraph which severs the second cause and the fourth decretal paragraph which holds the judgment final as to the first cause, and otherwise affirmed, without costs.

An attorney sues his former partners in a first cause of action for an accounting of the firm's earnings and his share thereof during the brief period of his membership in the partnership from January 1, 1970 to March 31, 1972; he remained thereafter in practice at the firm's office until May 20, 1972, during which time he performed certain services for his former firm, for which he seeks compensation in a second cause of action. Plaintiff's motion for summary judgment was denied, as to the first cause, issues of fact requiring trial as to the nature of the agreement between the parties. Trial Term found for defendants-respondents on this cause. The second cause, based on the postpartnership services, was sent to a referee for calculation of amounts due, if any, for these services on a *quantum meruit* basis. We expand the reference to include two other issues we find to be not as yet resolved. Unfortunately, whatever agreement existed was oral only, and apparently marked by a peculiar feature in that it was left to one certain partner to supplement the shares of others as desired out of that partner's share. Depending on how viewed, this can be regarded as a “clause” in the agreement or as unenforceable generosity. There is no necessity to decide this question at this time. Be that as it may, we cannot fault the finding of ***821** Trial Term that plaintiff's share was to be 8% of the net profits during the term of the partnership. However, there is a dispute as to this item, plaintiff claiming that he did not get this at all. We do not agree with Trial Term that it is entirely clear that “plaintiff has received the full amount due to him under the terms of the partnership agreement.” We are given no figures to sustain this. Since there is to be a reference in any event as to plaintiff's postpartnership services, we send this issue also to the reference, adding only that we do not agree with plaintiff that this calls for an hourly rate. The evidence amply indicates that the members of the firm never gave thought at all to provision for withdrawal of a partner, which brings into play the solution laid out in

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Jackson v Hunt, Hill & Betts (7 NY2d 180), for resolution of what should happen to unpaid or unbilled fees on withdrawal of a partner, i.e., that plaintiff is entitled to his aliquot share of the net proceeds not yet taken into the firm's treasury at the time of his retirement for services completed or in work and not yet paid for, to be calculated on the usual basis as to overhead or any other legitimate charge against gross. This calculation is also made part of what is to be inquired into by the referee. When plaintiff first came into the firm, it appears that he was allowed a portion of the "bountiful" partner's share of prospective proceeds carrying over from an unbilled or unpaid 1969 services. We find no conditions imposed upon this payment in the evidence, and it might even have been a goodwill arrival gift, but, and particularly in view of the fact that never until it actually happened had there been contemplation of the possibility that a partner might retire, it cannot be considered a *quid pro quo* for refusal to plaintiff of participation in the postpartnership division of unbilled or unpaid for services theretofore rendered during his term as a partner. There are thus three issues going to the referee: the accounting for plaintiff's 8%, plaintiff's claim for as yet unpaid services rendered clients during his partnership term, and evaluation of plaintiff's claim for postpartnership services to the firm. The findings at Trial Term are adopted to the extent indicated and where necessary, are deemed amended consonant with the foregoing.

Concur--Sandler, J. P., Bloom, Markewich, Silverman and Ross, JJ.

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New York Official Reports

162 A.D.2d 155, 556 N.Y.S.2d 92

Margaret A. R. Foley, as Executrix of Dermot G. Foley, Deceased, Respondent,

v.

Leo Kaplan et al., Appellants

Supreme Court, Appellate Division,
First Department, New York
40352, 40353
June 7, 1990

CITE TITLE AS: Foley v Kaplan

HEADNOTE

PARTNERSHIP
ACCOUNTING
Disclosure

(1) Complaint seeks dissolution of defendant partnership and accounting of decedent's partnership interest; since defendants admit decedent was partner at time of his death, complaint is factually and legally sufficient; discovery will involve defendant law firm's financial statements, tax returns and contingency fee arrangements; in light of parties' conduct to date, confidentiality restrictions upon products of discovery are appropriate; as plaintiff is entitled to broad discovery, there is no basis to strike defendants' document demands concerning decedent's partnership share, compensation agreements or fee arrangements.

Order, Supreme Court, New York County (Shirley Fingerhood, J.), entered on or about September 27, 1989, which denied defendants' CPLR 3211 (a) (5); (c) motion to dismiss the complaint, unanimously affirmed, without costs.

Order of said court and Justice, entered on or about January 8, 1990, which denied defendants' motion for a protective order seeking to impose confidentiality restrictions upon discovery and to strike certain interrogatories of plaintiff, andgranted ***156** in part plaintiff's cross motion for a protective order as against defendants' notice to produce documents, is unanimously modified, on the law, the facts, and in the exercise of discretion, to the extent of granting defendants' motion for a protective order as proposed in the record on appeal on pages 176-178, with the following addition to paragraph 4 thereof as to those to whom confidential information can be disclosed and those who can use such information: "f. experts retained by the parties for purposes of this litigation", all subject to the continuing control and order of the court, and denying plaintiff's cross motion for a protective order as to items numbers 2 and 3 of defendants' notice to produce documents dated October 13, 1989, and the order is otherwise affirmed, without costs.

The single cause of action in the complaint seeks, *inter alia*, dissolution of defendant partnership and an accounting of the decedent's partnership interest. Since defendants admit that the decedent was a partner at the time of his death, the complaint is factually and legally sufficient (Partnership Law § 62; *Dreier v Linden*, 70 AD2d 820). The discovery in this action will involve defendant law firm's financial statements, tax returns and contingency fee arrangements. In light of the parties' conduct to date, we believe confidentiality restrictions upon the products of discovery in this action, in the above form, are appropriate. As plaintiff is entitled to broad discovery, we see no basis to strike defendants' document demands concerning the decedent's partnership share, compensation agreements or fee arrangements. We have examined defendants' other contentions and find them to be without merit.

Concur -- Ross, J. P., Asch, Kassal, Wallach and Rubin, JJ.

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New York Official Reports

7 A.D.3d 568, 775 N.Y.S.2d 903
(Mem), 2004 N.Y. Slip Op. 03768

**1 Ana M. Gomez, Appellant

v

Needham Capital Group, Inc., et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York
May 10, 2004

CITE TITLE AS: Gomez v Needham Capital Group, Inc.

HEADNOTE

Motions and Orders
Reargument or Renewal

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Westchester County (Barone, J.), entered November 26, 2002, as granted the defendants' motion for leave to renew her prior motion, inter alia, for summary judgment on the issue of liability and, upon renewal, vacated its *569 prior orders entered May 3, 2002, and August 9, 2002, respectively, and, in effect, denied the motion for summary judgment on the issue of liability.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

"A motion to renew is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking leave to renew and therefore not brought to the court's attention" (*Natale v Samel & Assoc.,* 264 AD2d 384, 385 [1999]). However, this requirement is a flexible one and the court, in its discretion, may **2 grant renewal, in the interest of justice, upon facts which were known to the movant where the movant offers a reasonable justification for failing to submit them on the earlier motion (*see Hasmath v Cameb,* 5 AD3d 438 [2004]; *Bepat v Chandler,* 2 AD3d 764 [2003]; *Vita v Alstom Signaling,* 308 AD2d 582 [2003]; *cf. Morrison v Rosenberg,* 278 AD2d 392 [2000]; *Cole-Hatchard v Grand Union,* 270 AD2d 447 [2000]). Under the circumstances of this case, the Supreme Court properly exercised its discretion in granting leave to renew.

Upon renewal, the Supreme Court properly vacated its prior orders, and, in effect, denied the plaintiff's motion for summary judgment on the issue of liability. There are triable issues of fact with respect to liability for the subject accident (*see* CPLR 3212; *see generally Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Florio, J.P., Smith, Crane and Rivera, JJ., concur.

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New York Official Reports

40 A.D.3d 583, 835 N.Y.S.2d
641, 2007 N.Y. Slip Op. 03883

****1** Lorna Heaven et al., Appellants

v

Edward McGowan, Jr., et al., Respondents.

Supreme Court, Appellate Division,
Second Department, New York
2005-10319, 2005-10320, 22927/99
May 1, 2007

CITE TITLE AS: Heaven v McGowan

HEADNOTES

Fraud
Factual Misrepresentation

Motion for summary judgment dismissing complaint should have been denied in action in which plaintiffs alleged that they were induced to transfer their property to entity created and owned by defendant as result of defendant's mischaracterization of transaction as refinance—although contract of sale and deed executed and acknowledged by plaintiffs demonstrated plaintiffs' knowledge that transaction was sale of property, plaintiffs raised triable issues of fact on basis of individual plaintiff's affidavit, in which she asserted that defendant "told us that he would help us refinance the mortgage" and that "market value of our house is approximately $200,000"—assertion that arrangement was represented to be refinance was not denied by defendants; based on record as whole, including defendant's admission that he used term "refinance" to refer to sale-leaseback transaction, triable issues of fact remained as to whether defendant made such misrepresentations to mislead and confuse plaintiffs into entering into transaction and as to whether plaintiffs justifiably relied upon those misrepresentations—defendants failed to establish their entitlement to judgment with respect to allegations of breach of fiduciary duty.

Motions and Orders

Reargument or Renewal

Mark S. Friedlander, New York, N.Y., for appellants.
John M. Giordano, P.C., New York, N.Y., for respondents.

In an action, inter alia, to recover damages for fraud, the plaintiffs appeal, as limited by their brief, from (1) so much of an order of the Supreme Court, Queens County (Glover, J.), dated April 3, 2000, as granted that branch of the defendants' motion which was for summary judgment dismissing the complaint, and (2) so much of an order of the same court (Rosengarten, J.), dated September 2, 2005, as denied that branch of their motion which was for leave to renew that branch of the defendants' prior motion which was for summary judgment dismissing the complaint.

Ordered that the order dated September 2, 2005 is reversed insofar as appealed from, on the law, the motion for leave to renew is granted, upon renewal, so much of the order dated April 3, 2000, as granted that branch of the defendants' motion which was for summary judgment dismissing the complaint is ***584** vacated, and that branch of the defendants' motion which was for summary judgment dismissing the complaint is denied; and it is further,

Ordered that the appeal from the order dated April 3, 2000 is dismissed as academic; and it is further,

Ordered that one bill of costs is awarded to the plaintiffs.

The plaintiff Tomlinson Living Trust (hereinafter the Trust) was created in 1996 as an irrevocable inter vivos trust, and owned residential real property in Cambria Heights, Queens (hereinafter the property), with a market value as of 2000 in the sum of $200,000. The plaintiff Paula Heaven (hereinafter Paula) is both the trustee and a beneficiary of the Trust, and the plaintiff ****2** Lorna Heaven (hereinafter Lorna) is also a beneficiary of the Trust.

Facing foreclosure, the plaintiffs consulted with the defendant Edward M. McGowan, Jr., an attorney who represented the Trust. The plaintiffs alleged that, on the basis of McGowan's representations, they entered into an agreement with him which they believed accomplished a refinance of their mortgage on the property. The documents that the plaintiffs signed, however, actually effected a sale of the property to the defendant New World Investment Trust (hereinafter New World), an entity created and owned by McGowan, for the sum of $92,000 and a leaseback by the plaintiffs at a monthly

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rent greater than their mortgage payments had been. When the plaintiffs fell behind on their "rental payments" to McGowan and New World, McGowan unsuccessfully commenced a summary holdover proceeding against the plaintiffs in the Civil Court, Queens County. The plaintiffs then commenced this action to recover damages for fraud, among other things, alleging that they were induced to transfer the property to New World and McGowan as a result of McGowan's mischaracterization of the transaction as a refinance.

Fraud consists of "a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury" (*Jo Ann Homes at Bellmore v Dworetz,* 25 NY2d 112, 119 [1969]; *see Avecia, Inc. v Kerner,* 299 AD2d 380 [2002]; *Cohen v Houseconnect Realty Corp.,* 289 AD2d 277, 278 [2001]). Thus, in order to prevail on a cause of action alleging fraud, the plaintiffs must demonstrate that (1) the defendant made material representations that were false, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) the plaintiff justifiably relied on the defendant's representations, and (4) the ***585** plaintiff was injured as a result of the defendant's representations (*see Channel Master Corp. v Aluminium Ltd. Sales,* 4 NY2d 403, 407 [1958]; *Cohen v Houseconnect Realty Corp., supra; 113-14 Owners Corp. v Gertz,* 123 AD2d 850, 851 [1986]).

The defendants met their initial burden of establishing their entitlement to summary judgment on the fraud claim by submitting documentary evidence in the form of the real estate contract of sale dated July 5, 1997, and the recorded deed executed and acknowledged by the plaintiffs on May 29, 1998, demonstrating the plaintiffs' knowledge that the transaction was an actual sale of the property (*see Alvarez v Prospect Hosp.,* 68 NY2d 320, 326 [1986]). However, in opposition, the plaintiffs raised triable issues of fact, precluding the granting of summary judgment, on the basis of Lorna's affidavit, in which she asserted that McGowan "told us that he would help us refinance the mortgage" and that the "market value of our house is approximately $200,000."

The assertion that the arrangement between the parties was represented to be a refinance was not denied by the defendants in either their pleadings or their motion papers. In particular, the fifth affirmative defense set forth in the verified answer avers that the term "refinance" is "commonly" used to refer to a sale-leaseback transaction, and is a "proper" description for a "sale-leaseback" transaction. Based on the record as a whole, including McGowan's own admission that he used the term "refinance" to refer to the sale-leaseback transaction, triable issues of fact remain as to whether McGowan made such misrepresentations to mislead and confuse the plaintiffs into entering into the transaction and as to whether the plaintiffs justifiably relied upon those misrepresentations (*see Franco v English,* 210 AD2d 630, 634-635 [1994]; *Koncelik v Abady,* 179 AD2d 942, 944 [1992]).

Moreover, the defendants failed to establish their prima facie entitlement to judgment as a matter of law with respect to the plaintiffs' allegations of a breach of fiduciary duty. The ****3** exhibits upon which the defendants relied in this regard controvert their contention that there was no fiduciary relationship between McGowan and the plaintiffs. The language of the Trust, prepared by McGowan, identified him as either trust counsel or as the advisor to Paula, as trustee. An attorney for a trustee is liable for breach of a fiduciary duty to third-party beneficiaries of the trust when the attorney has placed his or her self-interest above that of the trustee (*see Matter of People,* 303 NY 423, 431 [1952]; *see also Chinello v Nixon, Hargrave, Devans & Doyle, LLP,* 15 AD3d 894, 895-896 [2005]). Additional evidence of the fiduciary ***586** relationship may be found in the waivers McGowan had Paula and Lorna execute with respect to the sale-leaseback agreement.

The Supreme Court improvidently exercised its discretion in denying that branch of the plaintiffs' motion which was for leave to renew. A motion for leave to renew must generally (1) be based upon new facts not offered on the prior motion that would change the prior determination and (2) set forth a reasonable justification for the failure to present such facts on the prior motion (*see* CPLR 2221 [e] [2], [3]; *O'Connell v Post,* 27 AD3d 631 [2006]; *Renna v Gullo,* 19 AD3d 472 [2005]). However, these requirements are "flexible . . . and the court, in its discretion, may grant renewal, in the interest of justice, upon facts which were known to the movant where the movant offers a reasonable justification for failing to submit them on the earlier motion" (*Gomez v Needham Capital Group, Inc.,* 7 AD3d 568, 569 [2004]; *Bepat v Chandler,* 2 AD3d 764 [2003]).

Here, the plaintiffs provided a reasonable excuse for their failure to submit an affidavit from Paula in opposition to the defendants' motion in 2000. Any prejudice that might have inured to the defendants as a result of the plaintiffs' delay in making the renewal motion was, at least in part, the result of the defendants' five-year delay in serving the April 3,

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2000 order with notice of its entry. Accordingly, the Supreme Court should have granted that branch of the plaintiffs' motion which was for leave to renew and, upon renewal, should have denied that branch of the defendants' motion which was for summary judgment dismissing the complaint.

In light of our determination on the appeal from the order dated September 2, 2005, the appeal from the order dated April 3, 2000 has been rendered academic, and must be dismissed on that ground. Miller, J.P., Spolzino, Ritter and Lifson, JJ., concur.

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New York Official Reports

112 A.D.3d 1217, 977 N.Y.S.2d 449, 2013 N.Y. Slip Op. 08504

**1 Kimberly Hurrell-Harring et al., on Behalf of Themselves and All Others Similarly Situated, Appellants

v

State of New York et al., Defendants, and County of Suffolk, Respondent.

Supreme Court, Appellate Division, Third Department, New York
December 19, 2013

CITE TITLE AS: Hurrell-Harring v State of New York

HEADNOTES

Disclosure
Discovery and Inspection
Denial of Motion to Compel

Disclosure
Examination before Trial
Production of Municipal Employees

Schulte Roth Zabel, LLP, New York City (Kristie M. Blase of counsel), and New York Civil Liberties Union Foundation, New York City, for appellants.
Dennis M. Brown, County Attorney, Hauppauge (John R. Petrowski of counsel), for respondent.

Peters, P.J. Appeals (1) from that part of an order of the Supreme Court (Devine, J.), entered December 16, 2012 in Albany County, which denied plaintiffs' motion to compel certain discovery from defendant County of Suffolk, and (2) from that part of an order of said court, entered January 30, 2013 in Albany County, which denied plaintiffs' motion to renew.

The underlying facts of this class action lawsuit challenging the adequacy of defendant State of New York's public defense system are fully documented in our prior decisions (81 AD3d 69 [2011]; 75 AD3d 667 [2010]; 66 AD3d 84 [2009], *mod* 15 NY3d 8 [2010]).[1] Following **2 extensive discovery, plaintiffs moved to compel defendant County of Suffolk (hereinafter defendant), among others, to provide complete responses to their discovery requests and to produce knowledgeable witnesses in response to their deposition notices. Supreme Court, noting that defendant had attested to having produced all relevant and material documents in its possession and that depositions had been scheduled for several of its representatives, denied plaintiffs' motion as it pertained to defendant. Shortly after that order was entered, depositions were conducted of three witnesses produced by defendant in response to plaintiffs' demands. Plaintiffs thereafter *1218 moved for leave to renew their motion, arguing that information acquired during the depositions indicated that defendant had not fully complied with their discovery requests and that the witnesses produced were not knowledgeable about several topics set forth in the deposition notices. Supreme Court ordered defendant to provide certain limited budgetary and contractual documents identified by plaintiffs in their moving papers, but otherwise denied the motion. Plaintiffs appeal from those parts of both orders as denied their motions.

Supreme Court did not err in denying plaintiffs' motion to compel as it pertained to defendant. Plaintiffs' initial discovery demands requested that defendant produce all documents concerning contracts related to its provision of publicly funded legal representation, the funding and resources available to prosecution and public defense services, and the monitoring, oversight and supervision of the public defense system. They also subsequently sought all documents in defendant's possession, custody or control related to the four named plaintiffs prosecuted within the county. Defendant produced certain responsive documents, stated that it did not possess information responsive to several of plaintiffs' other requests and, in opposition to the motion, counsel affirmed that defendant had complied with its disclosure obligations. There was no evidence presented on the motion that defendant had access to or was withholding any of the requested documents. Under these circumstances, we cannot say that Supreme Court abused its broad discretion in determining that defendant had complied, to the extent possible, with plaintiffs' document demands (*see Matter of Scaccia*, 66 AD3d 1247, 1250 [2009]).

We do find, however, that Supreme Court erred in denying plaintiffs' motion to renew in certain respects. To be entitled

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to renewal, plaintiffs were required to provide new facts that would change the prior determination as well as a justifiable excuse for not providing such facts earlier (*see* CPLR 2221 [e] [2], [3]; *Webber v Scarano-Osika*, 94 AD3d 1304, 1305 [2012]; *Premo v Rosa*, 93 AD3d 919, 920 [2012]). "While we generally decline to disturb the decision to grant or deny a motion to renew, we will do so if there was an abuse of discretion" (*M & R Ginsburg, LLC v Orange Canyon Dev. Co., LLC*, 84 AD3d 1470, 1472 [2011] [internal quotation marks and citation omitted]; *see Premo v Rosa*, 93 AD3d at 920; *First Union National Bank v Williams*, 45 AD3d 1029, 1030 [2007]).

In support of the motion to renew, plaintiffs proffered, among other things, portions of the deposition testimony of three witnesses produced by defendant subsequent to Supreme Court's ***1219** denial of plaintiffs' motion to compel. Testimony adduced from these witnesses revealed the existence of several categories of responsive documents in defendant's possession that were not produced. Connie Corso, defendant's Budget Director, referred to a number of budget documents relating to defendant's provision of indigent legal representation, including (1) annual call letters soliciting budget requests from county agencies, (2) data from defendant's budget computer system, (3) budget modification requests submitted by the Legal Aid Society of Suffolk ****3** County, Inc., and (4) policies and procedures used by the office of defendant's comptroller to determine which expenses are eligible for reimbursement from defendant. Furthermore, Mark McCarthy, a records officer from defendant's Sheriff's Office, testified to the existence of a log book recording attorney visits with incarcerated clients,[2] as well as inmate records contained in a computer database maintained by the Sheriff's Office. Notably, McCarthy stated that he was never asked to pull records for the present lawsuit, nor was he aware of anyone else in his office having been asked to search for documents responsive to plaintiffs' requests.

These newly discovered facts would have changed the prior determination denying in its entirety plaintiffs' motion to compel as it related to defendant. Because such documentation was requested by plaintiffs in their discovery demands and is material and relevant to their claims attacking the adequacy of indigent legal representation in the five counties at issue, it was subject to disclosure (*see* CPLR 3101 [a]; *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000]; *Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau*, 80 AD3d 199, 200 [2010]; *Davis v Cornerstone Tel. Co., LLC*, 78 AD3d 1263, 1264 [2010]). Furthermore, these facts could not have been provided on the prior motion to compel given that the depositions had not yet occurred (*see M & R Ginsburg, LLC v Orange Canyon Dev. Co., LLC*, 84 AD3d at 1472; *Seifts v Markle*, 211 AD2d 848, 849 [1995]). Thus, to the extent set forth above, plaintiffs were entitled to renewal of their motion to compel defendant to conduct a diligent search for and provide complete responses to their document requests.[3]

Renewal of that part of plaintiffs' motion which sought the ***1220** production of knowledgeable witnesses should have, to a large extent, also been granted. "While a municipality, in the first instance, has the right to determine which of its officers or employees with knowledge of the facts may appear for an examination before trial, a plaintiff may demand the production of additional witnesses, upon a showing that the representative already deposed had insufficient knowledge or was otherwise inadequate" (*McNeill v City of New York*, 40 AD3d 823, 825 [2007] [citations omitted]; *see Pomilio-Young v City of New York*, 7 AD3d 600, 600 [2004]; *Thomas v Benedictine Hosp.*, 296 AD2d 781, 783 [2002]; *D & S Realty Dev. v Town of Huntington*, 295 AD2d 306, 308 [2002]; *Lotz v Albany Med. Ctr. Hosp.*, 85 AD2d 836, 837 [1981]).

Plaintiffs requested production of individuals most knowledgeable about various topics. Defendant produced Corso, McCarthy and Joseph Jerger, a representative from defendant's Probation Department, in response. We find that plaintiffs failed to demonstrate that Jerger possessed insufficient knowledge concerning the subject matter raised in the deposition related to ****4** the Probation Department, or that he was otherwise inadequate. As to Corso and McCarthy, while they were able to testify regarding some of the noticed topics, they had little—if any—knowledge as to several critical topics, such as: the allocation of, and the policies and procedures relating to, funding and other resources for the investigation and prosecution of criminal cases (District Attorney's Office Notice, Topics 4 and 8); the training, supervision and case loads of attorneys prosecuting criminal cases (District Attorney's Office Notice, Topics 5, 6 and 7); and policies and procedures relating to legal services available to, and attorney visitation and communications with, incarcerated indigent criminal defendants (Sheriff's Office Notice, Topics 7, 9 and 11). Like the documents that were requested—but not provided—by defendant, these matters bear upon several material and relevant issues in this case related to plaintiffs' claim that indigent criminal defendants in the county are constructively denied counsel, such as the alleged lack of parity between the funding

and resources available to criminal legal defense providers and criminal prosecutors, and the purported lack of access that indigent criminal defendants have to their attorneys. Accordingly, plaintiffs must be given the opportunity to depose witnesses possessing sufficient knowledge on the aforementioned topics (*see McNeill v City of New York*, 40 AD3d at 825; ***1221** *Ramos v New York City Hous. Auth.*, 202 AD2d 563, 563-564 [1994]; *JMJ Contract Mgt. v Ingersoll-Rand Co.*, 100 AD2d 291, 292 [1984]).

Lahtinen, Spain and Egan Jr., JJ., concur. Ordered that the order entered December 16, 2012 is affirmed, without costs. Ordered that the order entered January 30, 2013 is modified, on the law, without costs, by reversing so much thereof as denied that portion of plaintiffs' motion to renew as sought to compel defendant County of Suffolk (1) to produce, for deposition by plaintiffs, witnesses possessing sufficient knowledge as to (a) the allocation of, and the policies and procedures relating to, funding and other resources for the investigation and prosecution of criminal cases, (b) the training, supervision and caseloads of attorneys prosecuting criminal cases, and (c) policies and procedures relating to legal services available to, and attorney visitation and communications with, incarcerated indigent criminal defendants; and (2) to diligently search for and produce (a) all budget documents relating to the provision of public defense including, but not limited to, (i) annual call letters soliciting budget requests from county agencies, (ii) data from said defendant's budget computer system, (iii) budget modification requests submitted by the Legal Aid Society of Suffolk County, Inc., and (iv) policies and procedures used by said defendant's comptroller's office to determine which expenses are eligible for reimbursement from said defendant, (b) inmate records related to the named plaintiffs who were prosecuted in said defendant, and (c) attorney visitation logs recording visits with incarcerated clients from January 1, 2006 to present; motion granted to said extent; and, as so modified, affirmed.

FOOTNOTES

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Footnotes

1 Plaintiffs have also appealed Supreme Court's December 14, 2012 order denying their motion to withdraw certain plaintiffs as named class representatives in this action (112 AD3d 1213 [2013] [decided herewith]).

2 McCarthy noted that attorney visitation logs are discarded after five years.

3 While plaintiffs now additionally argue that defendant failed to conduct a comprehensive search for electronically stored information responsive to their discovery requests and provided insufficient documents and responses to their request for information relating to funding and resources for criminal prosecutions, they presented nothing on the renewal motion to demonstrate the inadequacy or incompleteness of defendant's responses in that regard.

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New York Official Reports

34 A.D.3d 754, 826 N.Y.S.2d
617, 2006 N.Y. Slip Op. 08939

**1 Joyce Lafferty et al., Appellants
v
Eklecco, LLC, Doing Business as
Palisades Center Mall, et al., Respondents.

Supreme Court, Appellate Division,
Second Department, New York
2005-09692, 2005-11500, 2470/05
November 28, 2006

CITE TITLE AS: Lafferty v Eklecco, LLC

HEADNOTES

Motions and Orders
Reargument or Renewal

Trial
Place of Trial
Demand for Change of Venue

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from (1) so much of an order of the Supreme Court, Rockland County (Smith, J.), entered September 28, 2005, as granted the defendants' motion pursuant to CPLR 510 and 511 to change the venue of the action from Rockland County to Onondaga County and denied their cross motion pursuant to CPLR 510 (3) to retain venue in Rockland County, and (2) so much of an order of the same court dated October 27, 2005 as denied that branch of their motion which was for leave to renew.

Ordered that the order dated October 27, 2005 is reversed insofar as appealed from, on the law and in the exercise of discretion, that branch of the plaintiffs' motion which was for leave to renew is granted and, upon renewal, the defendants' motion to change venue from Rockland County to Onondaga County is denied, the plaintiffs' cross motion to retain venue in Rockland County is granted, and the order entered September 28, 2005 is vacated; and it is further,

Ordered that the appeal from the order entered September 28, 2005 is dismissed as academic in light of our determination of the appeal from the order dated October 27, 2005; and it is further, **2

Ordered that the plaintiffs are awarded one bill of costs.

It is well settled that a motion for leave to renew must be supported by new or additional facts which, at the time of a prior motion, were not known to the party seeking renewal, and, consequently, not made known to the court (*see* CPLR 2221 [e]*; Hasmath v Cameb,* 5 AD3d 438, 439 [2004]). "However, this requirement is a flexible one and the court, in its discretion, may grant renewal, in the interest of justice, upon facts which were known to the movant where the movant offers a *755 reasonable justification for failing to submit them on the earlier motion" (*Gomez v Needham Capital Group, Inc.,* 7 AD3d 568, 569 [2004]; *Hasmath v Cameb, supra* at 439; *Bepat v Chandler,* 2 AD3d 764 [2003]). Here, the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiffs' motion which was for leave to renew, as they provided a reasonable excuse for their failure to offer the evidence on the original motion and cross motion (*see Gershon v Goldberg,* 30 AD3d 372, 374 [2006]; *Hasmath v Cameb, supra* at 439; CPLR 2221 [e] [3]).

Moreover, upon renewal, the motion to change venue should have been denied, and the cross motion to retain venue in Rockland County based upon "the convenience of material witnesses and the ends of justice" (CPLR 510 [3]) should have been granted. The papers submitted by the plaintiffs contained (1) the names, addresses, and occupations of numerous prospective witnesses, (2) the facts to which the witnesses will testify at trial, (3) a statement that the witnesses are willing to testify, and (4) a statement that the witnesses would be greatly inconvenienced if the venue of the action was not retained in Rockland County (*see Gangi v DaimlerChrysler Corp.,* 14 AD3d 482 [2005]; *Professional Veh. Leasing v Continuing Dev. Servs.,* 275 AD2d 313 [2000]; *O'Brien v Vassar Bros. Hosp.,* 207 AD2d 169, 172-173 [1995]). Further, the convenience of local government officials, such as police officers, is of paramount importance because they should not be kept from their duties unnecessarily (*see Professional Veh. Leasing v Continuing Dev. Servs., supra* at 314; *Chimirri v Evergreen Am. Corp.,* 211 AD2d 743, 744 [1995]). The convenience of the treating physicians is also a strong factor in favor of retaining venue in Rockland County (*see Mavrakis*

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v Waldbaums, Inc., 302 AD2d 501, 502 [2003]). Adams, J.P., Krausman, Rivera and Lifson, JJ., concur.

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New York Official Reports

304 A.D.2d 668, 758 N.Y.S.2d 151, 2003 N.Y. Slip Op. 13067

In the Matter of Orange and Rockland Utilities, Inc., et al., Respondents,

v.

Assessor of the Town of Haverstraw et al., Appellants. (And Five Other Identical Titles.)

Supreme Court, Appellate Division, Second Department, New York
2002-01494, 2002-01495, 2002-09217, 4133/95, 4238/99, 4239/99, 4346/96, 4424/97, 4639/98
(April 14, 2003)

CITE TITLE AS: Matter of Orange & Rockland Util. v Assessor of Town of Haverstraw

HEADNOTES

CONTRACTS
FORMATION OF CONTRACT

(1) It was error to grant motion to enforce parties' Memorandum of Agreement, which purports to settle real property tax certiorari proceedings involving parties, and lacks following material terms: (1) specific assessment reductions, (2) particular properties affected, and (3) specific years in which adjustments are to be made.

MOTIONS AND ORDERS
REARGUMENT OR RENEWAL

(2) It was error to grant leave to renew where petitioner submitted same evidence it submitted on its prior motion together with additional affidavits purporting to explain significance of this evidence.

In six related proceedings pursuant to Real Property Tax Law article 7, the Assessor of the Town of Haverstraw, the Board of Review of the Town of Haverstraw, the Town of Haverstraw, and the Haverstraw-Stony Point Central School District appeal (1), as limited by their brief, from so much of an order of the Supreme Court, Rockland County (Rosato, J.), dated January 25, 2002, as granted that branch of the motion of the petitioner Southern Energy Bowline, LLC, which was for leave to renew its prior motion to enforce a settlement agreement and, upon renewal, inter alia, granted the motion to ***669** enforce the settlement agreement, (2) from a judgment of the same court, dated January 29, 2002, which is in favor of the petitioner Southern Energy Bowline, LLC, and against them in the principal sum of $28,000,000, and (3) from a judgment of the same court, dated January 29, 2002, which is in favor of the petitioner Orange and Rockland Utilities, Inc., and against them in the principal sum of $1,000,000. Justice Mastro has been substituted for the late Justice O'Brien (*see* 22 NYCRR 670.1 [c]).

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgments are reversed, on the law, that branch of the motion which was for leave to renew is denied, and the order is modified accordingly; and it is further,

Ordered that one bill of costs is awarded to the appellants.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the proceeding (*see Matter of Aho,* 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeals from the judgments (*see* CPLR 5501 [a] [1]).

A motion for leave to renew must be based upon new or additional facts which, although in existence at the time of the original motion, were not made known to the party seeking renewal, and therefore, were not known to the court (*see* CPLR 2221 [e]; *Morrison v Rosenberg,* 278 AD2d 392 [2000]). "While a motion for leave generally should be based on newly-discovered facts, the rule is flexible, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided the movant offers a reasonable justification for the failure to submit the additional facts on the original motion" (*Bloom v Primus Automotive Fin. Servs.,* 292 AD2d 410 [2002]). "Leave to renew is not warranted where the factual material

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adduced in connection with the subsequent motion is merely cumulative with respect to the factual material submitted in connection with the original motion" (*Stone v Bridgehampton Race Circuit,* 244 AD2d 403 [1997]).

In support of its motion, inter alia, for leave to renew, the petitioner Southern Energy Bowline, LLC (hereinafter Southern) submitted the same evidence it submitted on its prior motion together with additional affidavits purporting to explain the significance of this evidence. Southern's explanation of the significance of this information was not new information, but rather, it was is merely cumulative evidence which could not ***670** form the basis of a renewal motion. Southern's argument that it was precluded from submitting the allegedly new information on the prior motion by the Supreme Court's direction limiting the parties' briefs is without merit. Consequently, the Supreme Court improperly granted leave to renew.

In any event, upon granting renewal, the Supreme Court erred in granting the motion to enforce the parties' memorandum of agreement (hereinafter the MOA). "If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Cobble Hill Nursing Home v Henry & Warren Corp.,* 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]; *see also Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.,* 78 NY2d 88 [1991]). The MOA, which purports to settle the real property tax certiorari proceedings involving the parties, lacks the following material terms: (1) the specific assessment reductions, (2) the particular properties affected, and (3) the specific years in which the adjustments are to be made. Consequently, the MOA is unenforceable.

Ritter, J.P., Feuerstein, Luciano and Mastro, JJ., concur.

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New York Official Reports

8 A.D.3d 355, 777 N.Y.S.2d 765
(Mem), 2004 N.Y. Slip Op. 04691

**1 Bridget Petsako, Appellant

v

Morris Zweig, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
June 7, 2004

CITE TITLE AS: Petsako v Zweig

In an action, inter alia, to impose a constructive trust on the proceeds of the sale of certain real property, the plaintiff appeals from an order of the Supreme Court, Queens County (Dollard, J.), dated July 7, 2003, which granted the defendant's motion, denominated as one for leave to reargue, but deemed one for leave to renew, the defendant's prior motion to vacate his defaults in timely answering the complaint and in opposing the plaintiff's motion for a default judgment which was denied in an order of the same court dated April 21, 2003, and upon renewal, granted the motion to vacate.

Ordered that the order is affirmed, with costs.

The defendant's motion, although denominated as one for *356 leave to reargue, was properly deemed one for leave to renew since it was supported by new evidence. The requirement that a motion for leave to renew be based upon newly-discovered facts is a flexible one, and a court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion (*see Karlin v Bridges,* 172 AD2d 644 [1991]). Under the circumstances of this case, the Supreme Court properly exercised its discretion to grant the defendant's motion, in effect, for leave to renew his prior motion (*see Karlin v Bridges, supra)*. Furthermore, upon renewal, the court properly granted the defendant's prior motion to vacate his defaults in timely answering the complaint and in opposing the plaintiff's motion for a default judgment. The defendant established reasonable **2 excuses for the brief delay in interposing an answer and the delay in opposing the motion for a default judgment and also proffered meritorious defenses to the causes of action asserted in the complaint (*see Quis v Bolden,* 298 AD2d 375 [2002]). Smith, J.P., Goldstein, Adams, Rivera and Lifson, JJ., concur.

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New York Official Reports

265 A.D.2d 185, 693 N.Y.S.2d
561, 1999 N.Y. Slip Op. 06645

Ana C. Ralat, Appellant,

v.

New York City Housing Authority, Respondent.

Supreme Court, Appellate Division,
First Department, New York
1193, 1193A
(October 7, 1999)

CITE TITLE AS: Ralat v New York City Hous. Auth.

HEADNOTE

PUBLIC AUTHORITIES
CLAIMS AGAINST PUBLIC AUTHORITIES
Snow and Ice

(1) Order which granted motion for summary judgment dismissing complaint, and order which denied reargument, reversed, motion to renew granted, and upon renewal, motion for summary judgment denied and complaint reinstated--plaintiff commenced action against New York City Housing Authority (NYCHA) after she slipped and fell on patch of snow-covered ice on February 23, 1994; two of plaintiff's friends witnessed accident; although 2.3 inches of precipitation fell on date of plaintiff's accident, plaintiff contends injuries were caused by defendant's negligent failure to remove pre-existing accumulations of ice or snow from earlier snowfalls that month--NYCHA argued it could not be liable for plaintiff's injuries because she slipped on icy sidewalk during ongoing snowfall, and it was under no duty to act until reasonable time after cessation of storm; plaintiff submitted her testimony from her General Municipal Law § 50-h hearing and deposition, as well as unsworn statements from two eyewitnesses stating that dangerous icy condition had existed in area for some time prior to plaintiff's accident--IAS Court should have granted renewal branch of plaintiff's motion; plaintiff's counsel stated that despite diligent efforts, he was unable to obtain sworn affidavits from plaintiff's two witnesses until after court's initial determination--defendant's motion for summary judgment should have been denied on merits; climatological reports submitted by NYCHA reveal existence of substantial accumulations of snow or ice on ground for almost entire month of February; thus, IAS Court's assumption that warm temperatures must have completely melted prior accumulation was clearly inaccurate--furthermore, in their sworn affidavits submitted on renewal, plaintiff's witnesses both describe having observed plaintiff slip and fall on “large patch of ice”; they also stated that icy “problem” on sidewalk existed for at least week prior to plaintiff's accident, and that they had observed other tenants slipping and falling on ice in same area--thus, there was sufficient evidence from which jury could infer that plaintiff's fall was caused by pre-existing ice, and not light snowfall on day of accident.

Reargument denied; resettlement granted to the extent of recalling the unpublished decision and order of this Court entered on July 15, 1999 (Appeal Nos. 1193-1193A) and to resettle it to read as follows:

Order, Supreme Court, Bronx County (Lottie Wilkins, J.), entered March 12, 1998, which granted defendant's motion for summary judgment dismissing the complaint, and order, same court and Justice, entered October 1, 1998, which deemed plaintiff's motion for reargument and renewal as one for reargument only, and denied reargument, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, plaintiff's motion to renew granted, and upon renewal, defendant's motion for summary judgment denied and the complaint reinstated.

Plaintiff commenced this personal injury action against the New York City Housing Authority (NYCHA) after she slipped and fell on a large patch of snow-covered ice on February 23, 1994. Two of plaintiff's friends witnessed the accident. Although 2.3 inches of precipitation fell on the date of plaintiff's accident, it is plaintiff's contention that her injuries were caused by defendant's negligent failure to remove pre-existing accumulations of ice or snow from earlier snowfalls that month.

NYCHA moved for summary judgment arguing that it could not be liable for plaintiff's injuries because she slipped on an icy sidewalk during an ongoing snowfall, and it was under no duty to act until a reasonable time after cessation of the storm (*see, Valentine v City of New York,* 86 AD2d 381,

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affd 57 NY2d 932). In opposition, plaintiff submitted her testimony from her General Municipal Law § 50-h hearing and deposition, as well as unsworn statements from the two eyewitnesses stating that the dangerous icy condition had existed in the area for some ***186** time prior to plaintiff's accident. The IAS Court granted defendant's motion for summary judgment, finding plaintiff's claim of a pre-existing ice condition merely speculative in light of weather reports showing unseasonably high temperatures for several days prior to plaintiff's fall. Plaintiff's motion for reargument and renewal was deemed a motion for reargument only, because the sworn affidavits recently obtained from plaintiff's two witnesses were, in the IAS Court's view, not newly discovered. Reargument was denied.

Initially, the IAS Court should have granted the renewal branch of plaintiff's motion. Plaintiff's counsel stated that despite diligent efforts, he was unable to obtain sworn affidavits from plaintiff's two witnesses until after the court's initial determination. We find this to be adequate grounds for renewal (*see, Tesa v Transit Auth.,* 184 AD2d 421, 423).

We further conclude that defendant's motion for summary judgment should have been denied on the merits. The climatological reports submitted by NYCHA reveal the existence of substantial accumulations of snow or ice on the ground for almost the entire month of February. This accumulation was due primarily to a 7.2 inch snowfall on February 8th and a 12.8 inch snowfall on February 11th. While there was no precipitation in the 12 days preceding plaintiff's fall, an accumulation of seven inches remained on the ground a mere three days before the accident, and at least one inch the day before. Thus, the IAS Court's assumption that the warm temperatures must have completely melted the prior accumulation was clearly inaccurate. In any event, these accumulation levels, taken at the Central Park weather station, are not dispositive as to how much accumulation remained at the site of plaintiff's accident in the Bronx.

Furthermore, in their sworn affidavits submitted on renewal, plaintiff's witnesses both describe having observed plaintiff slip and fall on a "large patch of ice." Significantly, they also stated that the icy "problem" on the sidewalk existed for at least a week prior to plaintiff's accident, and that they had observed other tenants from the Edenwald Housing Project slipping and falling on ice in the same area. These first-hand observations of an icy condition in existence well prior to plaintiff's accident, in addition to the weather data establishing residual accumulation from earlier storms, constitute sufficient evidence from which a jury could infer that plaintiff's fall was caused by the pre-existing ice, and not the light snowfall on the day of the accident (*see, Tubens v New York City Hous. Auth.,* 248 AD2d 291; *Candelier v City of New York,* 129 AD2d 145, 149). ***187**

Bernstein v City of New York (69 NY2d 1020) is distinguishable. In that case, the Court of Appeals held that it was "wholly speculative" for the jury to have concluded that the plaintiff's January 15th fall resulted from the residue of a January 9th snowfall of .4 inches, of which only a trace amount remained the next morning, rather than the 8 to 10 inches of snow that fell between January 13th and January 15th (*supra,* at 1022). Here, in contrast, a jury's finding of a pre-existing ice condition would rest on the sworn statements of plaintiff's witnesses and the weather data, which is evidence, not speculation (*see, Tubens v New York City Hous. Auth., supra*). The weight to be given that evidence, of course, is a question for the trier of fact.

Concur--Sullivan, J. P., Tom, Mazzarelli, Rubin and Friedman, JJ.

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New York Official Reports

117 A.D.2d 789, 499 N.Y.S.2d 429

David Reeves, Respondent,

v.

Manufacturers Hanover Trust Co. et al., Defendants, and Community Mutual Savings Bank of Southern New York, Also Known as Community Savings & Loan Association, et al., Appellants.

Supreme Court, Appellate Division,
Second Department, New York
3951 E
February 24, 1986

CITE TITLE AS: Reeves v Manufacturers Hanover Trust Co.

HEADNOTES

COURTS
LAW OF THE CASE

(1) Doctrine of law of the case does not require Appellate Division to adhere to its decision upon prior appeal where substantial new evidence is presented affecting prior determination; accordingly, court may decide different conclusion is warranted on renewed motion for summary judgment.

TORTS
FALSE IMPRISONMENT

(2) In action to recover damages for false imprisonment, order denying defendants' renewed motion for summary judgment is reversed, motion is granted and complaint is dismissed --- In prior appeal, it was held that trial is required to determine basis for defendant's belief that plaintiff was felon and whether there was intent to confine him, and since that decision, depositions of defendant and two police detectives who were involved in arrest of plaintiff were taken and police investigation file was obtained; upon this new evidence, defendants renewed their motion for summary judgment --- Given this expanded record, there is no longer any reasonable basis for determination that defendants are liable to plaintiff for false imprisonment; no reasonable inference can be drawn from present record that defendants intended to confine plaintiff or that defendant lacked reasonable cause for her belief in plaintiff's culpability; under circumstances, refusal to dismiss plaintiff's cause of action would have unjustifiably chilling effect upon citizens voluntarily providing useful information to law enforcement authorities.

OPINION OF THE COURT

Mollen, P. J., Gibbons, Thompson and Brown, JJ., concur.

In an action to recover damages for false imprisonment, defendants Kathleen Garrett and Community Mutual Savings Bank of Southern New York, also known as Community Savings & Loan Association, appeal from an order of the Supreme Court, Westchester County (Gurahian, J.), dated March 8, 1985, which denied their renewed motion for summary judgment.

Order reversed, on the law, with costs, motion granted and complaint dismissed as to appellants.

In a prior appeal in this case, this court held that a "trial is required to determine the basis for defendant Garrett's belief that plaintiff was the felon *** and whether there was an intent to confine him" *(Reeves v. Manufacturers Hanover Trust Co.*, 88 AD2d 972, 973). The court thus modified an order of Special Term (Walsh, J.), insofar as it granted appellants' motion for summary judgment as to plaintiff's cause of action for false imprisonment. Since that decision, the depositions of defendant Garrett and the two police detectives who were involved in the arrest of plaintiff were taken and the police investigation file was obtained. Upon this new evidence, appellants renewed their motion for summary judgment.

Given this expanded record, we conclude that there is no longer any reasonable basis for a determination that appellants are liable to plaintiff for false imprisonment, and, therefore, we hold that Special Term erred in denying appellants' renewed motion for summary judgment *(see, Veras v. Truth Verification Corp.*, 87 AD2d 381, 384, *affd* 57 NY2d 947). No reasonable inference can be drawn from the present record that appellants intended to confine plaintiff

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or that defendant Garrett lacked reasonable cause for her belief in plaintiff's culpability. Under these circumstances, a refusal to dismiss plaintiff's cause of action would have an unjustifiably chilling ***790** effect upon citizens voluntarily providing useful information to law enforcement authorities *(see, Stearns v. New York City Tr. Auth.*, 24 Misc 2d 216, 217, *affd* 12 AD2d 451).

Finally, we note that the doctrine of the law of the case does not require us to adhere to our decision upon the prior appeal. Where, as in the instant case, substantial "new evidence [is presented] affecting the prior determination", this court may decide a different conclusion is warranted on the renewed motion *(Foley v. Roche*, 86 AD2d 887).

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New York
Official Reports

KeyCite Yellow Flag - Negative Treatment
Distinguished by Wright v. Emigrant Sav. Bank, N.Y.A.D. 1 Dept., December 3, 2013

71 A.D.3d 429, 896 N.Y.S.2d 61, 2010 N.Y. Slip Op. 01733

**1 Phyllis J. Sirico et al., Appellants

v

F.G.G. Productions, Inc., Respondent.

Supreme Court, Appellate Division,
First Department, New York
March 4, 2010

CITE TITLE AS: Sirico v F.G.G. Prods., Inc.

HEADNOTES

Motions and Orders
Reargument or Renewal

Equity
Laches

In action concerning music recordings made during 1960s by vocal group comprised of plaintiffs, alleging that defendant corporation had not paid artist's royalties and licensing income over past 40 years, plaintiffs' claims were not automatically barred by laches; defendant failed to show that plaintiffs' delay hampered its ability to defend against their claims.

Frauds, Statute of
Agreement Not to be Performed within One Year
Agreement to Pay Artist's Royalties Extending Beyond One Year

Limitation of Actions
When Cause of Action Accrues
Unjust Enrichment Claim

In action concerning music recordings made during 1960s by vocal group comprised of plaintiffs, alleging that defendant corporation had not paid artist's royalties and licensing income over past 40 years, plaintiffs' unjust enrichment claims were time-barred by six-year statute of limitations because they accrued in 1960s, when plaintiffs made recordings for which they sought compensation.

Limitation of Actions
When Cause of Action Accrues
Breach of Contract Claim—Recurring Obligation to Pay Artist's Royalties on Musical Recordings

In action concerning music recordings made during 1960s by vocal group comprised of plaintiffs, alleging that defendant corporation had not paid artist's royalties and licensing income over past 40 years, claim for royalties earned during six years before action was commenced was viable as it accrued each time defendant allegedly breached its recurring obligation.

Civil Rights
Commercial Use of Name

Civil Rights
Commercial Use of Photograph

*430

Baker & Hostetler LLP, New York (Oren J. Warshavsky of counsel), for appellants. Christopher R. Whent, New York, for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 22, 2008, which, to the extent appealable, denied plaintiffs' motion to renew a prior order granting defendant partial summary judgment, unanimously reversed, on the law, without costs, and the motion granted. Order, same court (Karla Moskowitz, J.), entered January 4, 2008, which, to the extent appealed from, granted defendant's motion for summary dismissal of the complaint, unanimously modified, on the law, without costs, the motion denied with respect to the first and sixth causes of action, those claims reinstated, and otherwise affirmed.

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This action concerns music recordings from the 1960s featuring performances by the vocal group known as the Angels, including their well-known 1963 recording, "My Boyfriend's Back," which over the years has sold more than a million units in various formats. Defendant (FGG) produced the recordings. Plaintiffs commenced this action in 2005, alleging in the verified complaint and bill of particulars that in or about 1960, FGG entered into a written recording contract with the Angels, then composed of plaintiff Phyllis Allbut, suing here as Phyllis Sirico, her sister Barbara Allbut, and lead singer Linda Jansen.[1] In exchange for Sirico's performances on recordings that FGG produced and owned, plaintiffs allege that FGG agreed to pay her artist's royalties for sales of phonograph records and other products containing the recordings, and a share of FGG's income from licensing the use of the recordings by third parties. Plaintiffs state that they do not have a copy of the contract and do not know the specific method for calculating royalties.

In 1962, plaintiffs further allege, Jansen left the group, and plaintiff Peggy Davison, suing here as Peggy Davidson, replaced her as lead singer. Plaintiffs allege that Davidson never entered into a written or oral contract with FGG, but FGG's representatives told her she would be paid royalties, and provided her with a contract to that effect which was never executed.

Starting in 1963, plaintiffs performed for FGG as members of the Angels on "My Boyfriend's Back" and several other recordings. Their central allegation is that FGG has not paid them their full share of royalties and licensing income over the past 40-odd years. Davidson ****2** also claims that FGG exploited her image, voice and name to market the recordings without her consent.

The verified complaint purports to state the following causes of action: by Sirico, for breach of written contract; by Davidson, ***431** for breach of "implied contract"; and by Sirico and Davidson, for the equitable claims of unjust enrichment, an accounting, and, in the alternative, rescission. Finally, Davidson asserts a claim of violation of Civil Rights Law § 51. Defendant's answer counterclaimed against Sirico for costs arising from Davidson's claims, on the ground that Davidson performed at Sirico's behest.

Before discovery commenced, defendant moved for summary judgment dismissing the complaint and on its counterclaim. Defendant's principal, Richard Gottehrer, provided an affidavit that disputes most of plaintiffs' factual allegations. Gottehrer states that he formed FGG with his partners, Gerald Goldstein and Robert Feldman, in 1963, while they were working as staff songwriters for a music publisher. As aspiring record producers, the songwriters would, at their own expense, produce recordings of their songs performed by artists they had engaged, with the aim of selling the rights in the recordings to established record labels.

After composing "My Boyfriend's Back," Gottehrer and his partners asked the Angels to record it. According to Gottehrer, " 'The Angels' were the Allbut sisters [Sirico and her sister Barbara], who might be joined by such other vocalists as they engaged." Gottehrer alleges that by 1961, the Allbuts were performing and recording as the Angels along with Linda Jansen, who they described as their "employee," and who was in 1962 replaced by Davidson.

Gottehrer further alleges that when "My Boyfriend's Back" was recorded in 1963, the Allbuts were already parties to a March 1963 recording contract with a production company called Sabina Records, and a separate personal management contract with one Gerald Granahan.[2] Under the recording contract, the Allbuts had agreed to record exclusively for Sabina for a two-year term ending March 23, 1965, and in exchange for their performances they would receive specified royalties based on record sales, to be paid semiannually. Gottehrer states that the partners did not learn of the Sabina contracts until after they had recorded "My Boyfriend's Back" "on spec" and found a record label, Smash Records, which wanted to buy the rights to the recording.

At that point, Gottehrer continues, FGG "bought out" the Allbuts from the Sabina contract and from their management contract. Gottehrer denies that FGG ever entered into a rec ***432** ording agreement with Davidson or purchased any agreement to which she was a party.

Gottehrer states that FGG had rendered royalty statements to the Allbuts until 1964, when they flatly refused to record any more for FGG In or about January 1965, Gottehrer claims, FGG's attorney notified the Allbuts' attorney that it was suspending the recording contract. Gottehrer also alleges that by late 1964, the Allbuts and Davidson were recording for another label under a different name, and later signed a recording contract as the Angels with still another label. He contends that their actions breached the exclusivity provision of their agreement and forfeited their rights to royalties for the FGG recordings.

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As documentary evidence on the summary judgment motion, defendant submitted an incomplete and partially illegible copy of the Allbuts' contract with Sabina Records. It also ****3** submitted a letter, dated April 10, 1963, by which the Allbuts consented to the assignment to FGG of the Sabina Records contract and the personal management contract. The letter indicates that the Allbuts agreed that payment of $2,000 to Sabina and $1,000 to Sabina's owner would be deducted from the first royalties payable to them as FGG artists. Finally, defendant submitted biographies about, discographies of, and interviews with the Angels, which were obtained from various internet Web sites.

In opposition to the motion for summary judgment, plaintiffs submitted only their counsel's affirmation and a memorandum of law. In the January 2008 order, Supreme Court granted defendant's motion and dismissed the complaint, finding defendant had made a prima facie showing that it was entitled to judgment to which plaintiffs had offered virtually no opposition, since neither the affirmation nor the memorandum of law had any evidentiary value. The court also denied summary judgment to defendant on its counterclaim against Sirico, severed it, and directed that it continue.

In May 2008, plaintiffs moved for renewal and reargument,[3] contending that the allegations in Gottehrer's affidavit were conclusory and unsupported by any proof, and noting that defendant had moved for summary judgment before plaintiffs had the opportunity to conduct discovery. For those reasons, plaintiffs argued, they believed their factual allegations in the complaint and bill of particulars should have withstood the motion for summary dismissal. ***433**

In connection with their motion to renew, plaintiffs submitted "affidavits" witnessed by out-of-state notaries that were questionable as to proper form. Davidson states that she understood from representations by FGG's owners, including Gottehrer, that FGG would pay her the same royalties as the Allbuts for recording as a member of the Angels. According to Davidson, FGG had made one "negligible" royalty payment to each of the three women. Davidson adds that she never signed any agreement when joining the group and never signed any waiver or release of any of her rights, and claims that FGG used her voice, name and image to sell records. Davidson denied that the Angels ever refused to record for FGG

In a similar affidavit, Sirico states that all three women believed that as a member of the Angels, Davidson was entitled to FGG's royalties, and in fact FGG gave each of the women one royalty check. She denies having breached her contract by refusing to perform for FGG, and states that she recorded for another label only after the exclusivity period of the contract had expired.

Defendant opposed plaintiffs' motion and cross-moved for sanctions, contending that renewal should be denied because plaintiffs' affidavits did not contain any newly discovered evidence that could not have been submitted previously. Defendant also claimed that the affidavits were improper because the out-of-state notaries' acknowledgments did not state that plaintiffs' statements were sworn to in their presence.

The court held that the motion for reargument was untimely, and plaintiffs' affidavits in support of the renewal were deficient because they were unsworn, but in any event were insufficient to defeat defendant's prima facie showing. It noted that Davidson did not provide any details about the terms of her alleged contract with FGG, and held that plaintiffs had not justified their failure to submit admissible evidence to oppose the summary judgment motion, concluding that ****4** "[o]n this record—riddled with procedural mistakes and deficiencies—there is no reason for the Court to exercise its discretion and overlook plaintiffs' repeated oversights."

There is, of course, no appeal from denial of reargument. However, the denial of renewal is reversed. "Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (*see* CPLR 2221 [e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice" (*Mejia v Nanni*, 307 AD2d 870, 871 [2003]). While plaintiffs should have submitted admissible evidence to oppose the summary judgment mo ***434** tion, their failure is excusable. Defendant moved for summary judgment before plaintiffs had the opportunity to conduct discovery, and plaintiffs' counsel reasonably believed that defendant had failed to make a prima facie showing of entitlement to judgment.

FGG's claims that the Allbuts breached their contract are, at this stage, conclusory (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005] [a conclusory affidavit does not establish the prima facie burden of a proponent for summary judgment]). Gottehrer's claim that the Allbuts breached the exclusivity provision before March 25,

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1965, which is the only circumstance under which they would have forfeited royalties, is based in part on hearsay.

Contrary to the renewal court's ruling, plaintiffs' affidavits are admissible. Each contains the affiant's statement that she was duly sworn and believes the affidavit's contents to be true and correct, and the notary's statement that the affiant personally appeared, proved her identity, and "did further acknowledge that she executed the foregoing for the purposes therein contained" (*see Feldman v Feldman*, 280 AD2d 276, 277 [2001]; *Collins v AA Truck Renting Corp.*, 209 AD2d 363 [1994] [notary "is presumed to have acted within his or her jurisdiction and carried out his or her duties as required by law"]).

Having granted leave to renew, we turn to the merits of the summary judgment motion. As a threshold matter, we find that plaintiffs' claims are not automatically barred by laches. While defendant contended it was prejudiced by plaintiffs' delay, it has not yet shown that the delay hampered its ability to defend against their claims (*see Commissioners of the State Ins. Fund v Ramos*, 63 AD3d 453 [2009]; *see also Continental Cas. Co. v Employers Ins. Co. of Wausau*, 60 AD3d 128, 137-138 [2008]).

Except for Sirico's claim for breach of contract and Davidson's claim for violation of the Civil Rights Law, all of the claims were properly dismissed on the grounds that they were time-barred, violated the statute of frauds, or failed to state a cause of action. Davidson's alleged implied contract for royalties would be unenforceable since any agreement to pay royalties extending beyond one year must be in writing to satisfy the statute of frauds (*see Melwani v Jain*, 281 AD2d 276 [2001]). Plaintiffs' unjust enrichment claims are time-barred by the six-year statute of limitations (*see* CPLR 213 [1]) because they accrued in the 1960s, when plaintiffs made the recordings for which they seek compensation (*see Petracca v Petracca*, 305 AD2d 566, 567 [2003]). Plaintiffs lack the requisite fiduciary relationship with FGG that is a predicate to an equitable claim for an accounting ***435** (*see Brigham v McCabe*, 27 AD2d 100, 105 [1966], *affd* 20 NY2d 525 [1967]), although Sirico may be entitled to obtain accounting or royalty information through discovery. Finally, the equitable claim for rescission fails because plaintiffs have a complete and adequate remedy at law (*see Rudman v Cowles Communications*, 30 NY2d 1, 13 [1972]). ****5**

However, plaintiffs' affidavits, when read together with the complaint and bill of particulars, raise questions of fact as to whether FGG breached Sirico's contractual rights to royalties and violated Davidson's statutory protection against invasion of privacy. While the statute of limitations bars much of Sirico's breach-of-contract cause of action, her claim for royalties, if any, earned during the six years before this action was commenced, is viable at this preliminary stage, as it accrued each time FGG allegedly breached its recurring obligation (*see Bulova Watch Co. v Celotex Corp.*, 46 NY2d 606, 611 [1979]; *Beller v William Penn Life Ins. Co. of N.Y.*, 8 AD3d 310, 313-314 [2004]).

Davidson's claim under Civil Rights Law § 51 may also be viable, since the statute prohibits the use of a person's "name, portrait, picture or voice" for advertising or trade purposes without written consent, and it is undisputed that Davidson had no written contract of any kind with FGG (*see Harlock v Scott Kay, Inc.*, 14 AD3d 343, 344 [2005]). That claim survives only to the extent it concerns offending material published within one year of the date this action was filed (*see* CPLR 215 [3]; *Nussenzweig v diCorcia*, 9 NY3d 184 [2007]; *Costanza v Seinfeld*, 279 AD2d 255 [2001]). Although FGG argues that Davidson implicitly consented to the exploitation of her name and image by performing on the company's recordings, the requirement of a writing is explicit in the statute. FGG also alleges that it has never used Davidson's image and likeness since it assigned its rights in the Angels' recordings to Smash Records in 1963, but it fails to make a prima facie showing of that allegation. Concur—Tom, J.P., Saxe, Nardelli, Renwick and Freedman, JJ. **[Prior Case History: 2008 NY Slip Op 32333(U).]**

FOOTNOTES

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Footnotes

1 The latter two persons are not parties to this action.

2 It can be inferred from the record that Granahan was a principal of Sabina Records.

3 A prior motion for renewal and reargument had been denied in April. Plaintiffs have not appealed that order.

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KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Cadle Co. v. Newhouse, S.D.N.Y., August 16, 2002

948 F.Supp. 271
United States District Court, S.D. New York.

UNITED STATES of America, Plaintiff,
v.
Martin CARLIN, Barbara Carlin, Park Drive Manor Partnership, Gold Hawk Joint Venture, LRSE Realty Corporation and Free Lunch, Inc., Defendants.

No. 92 Civ. 8553 (BDP)
|
Nov. 18, 1996.

Synopsis
United States brought action to reduce federal tax lien filed against taxpayer to judgment, to set aside conveyance of taxpayer's real property and for declaration that federal tax lien on property had priority over interests of third parties. United States moved for summary judgment. The District Court, Parker, J., held that: (1) taxpayer's unsupported assertions were inadequate to defeat summary judgment; (2) taxpayer's conveyance of his property to his wife was constructively fraudulent; (3) subsequent conveyances of property were made with intent to defraud; (4) federal tax lien had priority over judgment creditor's interest in property; and (5) creditor's purchase of property was subject to federal tax lien.

Motion granted.

West Headnotes (13)

[1] **Summary Judgment** Personal knowledge; hearsay

Nonmovant's unsupported assertions in affidavit which were not based on personal knowledge were inadequate to defeat summary judgment motion. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

3 Cases that cite this headnote

[2] **Internal Revenue** Withholding from wages

Employers are required to pay on quarterly basis to Internal Revenue Service (IRS) federal income and social security taxes which are withheld from employees wages; employer who fails to pay withheld funds is liable for their payment. 26 U.S.C.A. § 7501(a).

[3] **Internal Revenue** Presumption of regularity

Internal Revenue Service (IRS) tax assessments are entitled to presumption of correctness.

1 Case that cites this headnote

[4] **Internal Revenue** Presumptions and Burden of Proof

Taxpayer who wishes to challenge validity of tax deficiency assessment bears burden of production and persuasion.

[5] **Fraudulent Conveyances** Want or insufficiency of consideration

Under New York law, taxpayer's voluntary conveyance of his real property to his wife for no consideration was constructively fraudulent where conveyance was made when he was indebted to United States for federal taxes and was in millions of dollars of debt. N.Y.McKinney's Debtor and Creditor Law § 273.

[6] **Fraudulent Conveyances** Insolvency

When transfer is made without consideration, initial burden to demonstrate solvency in fraudulent conveyance action is on defendant.

2 Cases that cite this headnote

[7] **Fraudulent Conveyances** Intent to defraud pre-existing creditors

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Under New York law, finding that subsequent conveyances of delinquent taxpayer's property from taxpayer's spouse to corporation in which she was sole officer and from corporation to another corporation in which taxpayer's cousin was sole officer were made with actual intent to defraud was supported by evidence that spouse conveyed property for no consideration and corporation conveyed property for inadequate consideration and, thus, conveyances could be set aside for benefit of United States for unpaid taxes. N.Y.McKinney's Debtor and Creditor Law § 276.

2 Cases that cite this headnote

[8] **Fraudulent Conveyances** Intent to Defraud Pre-Existing Creditors

Fraudulent Conveyances Want or Insufficiency Element of Fraud

Under New York law, when conveyance was made intent to defraud creditors is proven, conveyance will be set aside regardless of adequacy of consideration. N.Y.McKinney's Debtor and Creditor Law § 276.

5 Cases that cite this headnote

[9] **Fraudulent Conveyances** Intent to Defraud Pre-Existing Creditors

For purposes of New York statute regarding conveyances made with intent to defraud, intent need not be shown by direct evidence and is normally inferred from circumstances surrounding transfer such as close relationships among parties, secrecy and haste in making transfer, inadequacy of consideration and transferor's knowledge of creditor's claims and any inability to pay them. N.Y.McKinney's Debtor and Creditor Law § 276.

9 Cases that cite this headnote

[10] **Fraudulent Conveyances** Intent to Defraud Pre-Existing Creditors

Fraudulent Conveyances Intent of grantor in general

For purposes of New York statute regarding conveyances made with intent to defraud, only actual intent to hinder and delay need be established, not actual intent to defraud, and lack of fair consideration gives rise to rebuttable presumption of fraudulent intent. N.Y.McKinney's Debtor and Creditor Law § 276.

16 Cases that cite this headnote

[11] **Internal Revenue** Judicial proceedings, rights acquired by

Tax lien of Internal Revenue Service (IRS) on taxpayer's property had priority over judgment creditor's interest in taxpayer's property where IRS made assessments against taxpayer and filed notice of federal tax lien against taxpayer before creditor recorded its judgment. 26 U.S.C.A. § 6321.

4 Cases that cite this headnote

[12] **Internal Revenue** Assessment

Internal Revenue Duration

Federal tax lien is deemed to arise at time that assessment is made, even when lien has not been recorded, and continues until amount of liability set forth in assessment is satisfied. 26 U.S.C.A. § 6321.

3 Cases that cite this headnote

[13] **Internal Revenue** Assignments and other transfers

Junior lienholder's purchase at nonjudicial sale of taxpayer's property which was subject to senior lien by Internal Revenue Service (IRS) was subject to and did not disturb federal tax lien where IRS received no notice of sale. 26 U.S.C.A. § 7425.

2 Cases that cite this headnote

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Attorneys and Law Firms

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Martin Paul Solomon, New York City, for defendants Martin Carlin, Barbara Carlin, LRSE Realty Corp. and Free Lunch, Inc.

Michael S. Etkin, Gold & Wachtel, New York City, for defendant Gold Hawk Joint Venture.

Adam M. Schuman, Corbin Silverman & Sanseverino, New York City, for defendant New York Federal Sav. Bank.

MEMORANDUM DECISION AND ORDER

PARKER, District Judge.

The United States of America brings this action (1) to reduce to judgment a federal tax lien filed against defendant Park Drive Manor Partnership ("Park Drive" or "the partnership") and its partners; (2) to set aside the conveyance of Park Drive partner Martin Carlin's interest in real property located at 175 Crary Avenue, Mount Vernon, New York ("Mount Vernon realty") to defendant Barbara Carlin; and (3) for an order declaring that the Internal Revenue Service's ("IRS") lien on the Mount Vernon realty has priority over the interests of defendants Barbara Carlin, LRSE Realty Corporation ("LRSE"), Free Lunch, Inc., and Gold Hawk Joint Venture ("Gold Hawk"). Before the Court is the Government's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth, the Government's motion is granted.

FACTS

Recognizing that on a motion for summary judgment all factual ambiguities and reasonable inferences are drawn in the nonmoving party's favor, *see Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 444–45 (2d Cir.1980), the following unopposed facts are properly before the Court for purposes of this motion.

In 1985, Martin Carlin, along with two brothers, Vlad Stevens and Steve Stevens, purchased a building complex known as the Park Drive Manor apartments, located at 600 West Harvey Street in Philadelphia, Pennsylvania. A 1985 federal partnership tax return identified Martin Carlin and both Stevens brothers, by name and social security number, as partners of the Park Drive Manor Partnership and lists the partnership's address as 600 West Harvey Street, Philadelphia.

On February 23, 1987, the IRS assessed a tax deficiency against Park Drive in the amount of $22,351.55 for unpaid tax obligations under 26 U.S.C. §§ 6671–6672. On March 30, 1987, the IRS issued another assessment against Park Drive in the amount of $20,088.98. The assessments against Park Drive and its partners arose out of the partnership's unpaid payroll tax obligations for the taxable quarters ending September 30, 1986 and December 31, 1986. On July 14, 1987, the IRS filed its notice of federal tax lien against Park Drive in the Westchester County Clerk's office.

Approximately six weeks later, on August 26, 1987, Martin Carlin conveyed his interest in the Mount Vernon realty to his wife, Barbara Carlin, a transfer for which he received no consideration. On March 28, 1988, Barbara Carlin, in turn, transferred that interest to an entity appropriately named Free ***274** Lunch, of which she was the sole officer. She received no consideration for the transfer. Later that year, Free Lunch conveyed its interest in the property to LRSE, an entity whose sole officer was Martin Carlin's cousin, Michael Jaffe. That conveyance was made for inadequate consideration.[1] Despite notice and due demand, Park Drive and the partners of Park Drive have neglected to pay in full the outstanding assessed liability and accrued statutory interest.

Meanwhile, in May 1987, Gold Hawk obtained a judgment against Martin Carlin in Texas in the amount of $7,928,519.41. Gold Hawk filed a transcript of judgment in the Southern District of New York on July 14, 1987 and recorded its judgment in the Westchester County Clerk's office on July 23, 1987. On or about July 23, 1987, Gold Hawk delivered its judgment against Martin Carlin for execution to the Westchester County Sheriff, who scheduled and issued a notice of nonjudicial sale of the Mount Vernon realty. No notice of the sale was provided to the IRS. On July 18, 1988, Gold Hawk purchased the Mount Vernon realty by a Sheriff's deed which was recorded in the Westchester County Clerk's office on July 29, 1988.

As of December 22, 1995, the taxpayer liability on the assessments issued against Park Drive, including accrued interest and accrued lien costs, totaled $114,798.58. On November 24, 1992, the Government instituted this action against defendants and, on February 2, 1996, moved for

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summary judgment, arguing that there were no genuine issues of material fact concerning the underlying tax liability of Park Drive or the priority of its interests in the Mount Vernon realty over those of the defendants.

DISCUSSION

A. Standard For Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, "a motion for summary judgment must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party must initially satisfy a burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323–25, 106 S.Ct. 2548, 2552–54, 91 L.Ed.2d 265 (1986); *see also Gallo v. Prudential Residential Servs. Ltd.,* 22 F.3d 1219, 1223 (2d Cir.1994). The burden then shifts to the nonmoving party to come forward with "specific facts, showing that there is a genuine issue of fact for trial," Fed.R.Civ.P. 56(e), by a showing sufficient to establish the existence of every element essential to the party's case, and on which the party will bear the burden of proof at trial. The Court cannot try issues of fact, but can only determine whether there are issues to be tried. *Donahue v. Windsor Locks Bd. of Fire Com'rs,* 834 F.2d 54, 58 (2d Cir.1987). When making that determination, the Court is to inquire whether there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for the party." *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510–11, 91 L.Ed.2d 202 (1986).

In deciding whether a genuine issue of material fact exists, "the court is required to draw all factual inferences in favor of the party against whom summary judgment is sought." *Ramseur v. Chase Manhattan Bank,* 865 F.2d 460, 465 (2d Cir.1989). A ***275** genuine issue, however, "is not created by a mere allegation in the pleadings ..., nor by surmise or conjecture on the part of the litigants." *United States v. Potamkin Cadillac Corp.,* 689 F.2d 379, 381 (2d Cir.1982) (citations omitted); *Knight v. United States Fire Ins. Co.,* 804 F.2d 9, 11–12 (2d Cir.1986), *cert. denied,* 480 U.S. 932, 107 S.Ct. 1570, 94 L.Ed.2d 762 (1987). Indeed, Rule 56(e) of the Federal Rules of Civil Procedure requires that affidavits opposing summary judgment "be made on personal knowledge." Fed.R.Civ.P. 56(e). Thus, unsupported denial, upon information and belief, is insufficient to raise any issue of fact so as to defeat a motion for summary judgment. *Baker v. Latham Sparrowbush Assoc.,* 72 F.3d 246, 255 (2d Cir.1995); *Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff,* 638 F.Supp. 714, 720 (S.D.N.Y.1986).

Under Rule 3(g) of the Civil Rules for the United States District Courts for the Eastern and Southern Districts of New York ("Rule 3(g)"), upon any motion for summary judgment, the moving party must submit a statement of the material facts as to which that party contends there is no genuine issue to be tried. The nonmoving party, in response to the movant's statement of facts not in dispute, must submit a counter-statement of facts in dispute. Those facts not disputed are deemed admitted unless controverted by the statement required to be served by the opposing party. Rule 3(g). *See Russell v. Selsky,* 35 F.3d 55, 58 (2d Cir.1994).

In support of its motion for summary judgment, the Government submitted a Rule 3(g) statement setting forth the material facts as to which the Government contended there was no genuine dispute. ("Rule 3(g) Statement"). The Government's Rule 3(g) Statement, *inter alia,* advert to the 1985 federal partnership tax return that clearly identifies Martin Carlin as a partner of the Park Drive Manor Partnership, 600 West Harvey Street in Philadelphia, Rule 3(g) Statement ¶ 3; the tax assessments made against Park Drive in the total amount of $42,440.53, Rule 3(g) Statement ¶ 4; and the sequence of events surrounding the multiple, intrafamily conveyances of the Mount Vernon realty. Rule 3(g) Statement ¶¶ 8–11.

Only defendants Martin Carlin, Barbara Carlin, LRSE, and Free Lunch filed a response to the Government's summary judgment motion. Defendants' 3(g) statement, however, does not controvert any of the material facts supporting the Government's motion for summary judgment.[2] Because the defendants' opposing papers raise no genuine issue and fail to controvert the facts recited in the Government's Rule 3(g) statement, those facts are deemed admitted. Rule 3(g); ***276** *San Filippo v. United States Trust Company of New York, Inc.,* 737 F.2d 246, 247 (2d Cir.1984).

B. Federal Tax Liens on the Park Drive Manor Partnership

[1] **[2]** Under the Internal Revenue Code, employers are required to withhold federal income and social security taxes from their employees' wages. Employers must keep the withheld funds "in trust for the United States," 26 U.S.C.

§ 7501(a), and pay the funds to the IRS on a quarterly basis. *Fiataruolo v. United States,* 8 F.3d 930, 938 (2d Cir.1993). An employer who fails to pay the withheld funds is liable for their payment. The assessments against Park Drive were made pursuant to 26 U.S.C. §§ 6671–6672 because of partnership's willful failure to collect, truthfully account for, and pay over to the United States the income and Federal Insurance Contributions Act taxes withheld from the wages of employees of Park Manor.[3]

[3] **[4]** Internal Revenue Service tax assessments, like those issued against Park Drive, are entitled to a presumption of correctness. *United States v. McCombs,* 30 F.3d 310, 318 (2d Cir.1994); *Llorente v. Commissioner of Internal Revenue,* 649 F.2d 152, 156 (2d Cir.1981). Thus, a taxpayer who wishes to challenge the validity of a tax deficiency assessment bears the burden of production and persuasion. *United States v. Janis,* 428 U.S. 433, 440, 96 S.Ct. 3021, 3025, 49 L.Ed.2d 1046 (1976); *McCombs,* 30 F.3d at 318; *DeLorenzo v. United States,* 555 F.2d 27, 29 (2d Cir.1977). Defendants do not contest Park Drive's tax liability or in any way challenge the accuracy of the assessments made against the partnership.

Martin Carlin alone attempts to immunize himself from liability by calling into question his status as a partner of Park Drive. Martin Carlin asserts, on "information and belief," that he never had any association with, or knowledge of, an entity called Park Drive Manor Partnership. In opposing a summary judgment motion, however, an adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see Randell v. United States,* 64 F.3d 101, 108 (2d Cir.1995), *cert. denied,* 519 U.S. 815, 117 S.Ct. 65, 136 L.Ed.2d 26 (1996). Facts alleged in Carlin's affidavit in opposition to the Government's summary judgment motion did not purport to be made on personal knowledge as required under Rule 56(e) of the Federal Rules of Civil Procedure. As unsupported assertions they were inadequate to defeat a motion for summary judgment. *Randell,* 64 F.3d at 109; *Potamkin Cadillac Corp.,* 689 F.2d at 381.

Not only are Martin Carlin's assertions unsubstantiated, but the undisputed facts before this court clearly establishes Carlin's status as a partner of Park Drive. Martin Carlin admits to having entered into a partnership with Vlad Stevens and Steve Stevens for the purpose of purchasing "a building complex known as Park Drive Manor Apartments in Philadelphia, Pennsylvania." Carlin Dep. at 15–16. Vlad Stevens identified Martin Carlin as a co-partner of the Park Drive Manor Partnership. Decl. of Vlad Stevens ¶ 6. The federal partnership tax returns, IRS Forms 941 and 1065, list Martin Carlin as a partner of the Park Drive Manor Partnership. Those returns contain a partner identification number for each partner, including Martin Carlin.

In light of the presumption of correctness afforded to government tax assessments and the failure of defendants to introduce any evidence rebutting Park Drive's underlying tax liability, the assessments rendered against the partnership are taken as accurate. Furthermore, since Martin Carlin has failed to establish that a genuine issue exists as to his status as partner of Park Drive, this Court finds that he is jointly and severally ***277** liable, under N.Y. Partnership Law § 26, for the partnership's tax assessments.

C. Conveyances of the Mount Vernon Realty

[5] The Government further moves this Court to set aside the transfer of Martin Carlin's interest in the Mount Vernon realty to his wife Barbara Carlin on the grounds that the conveyance was effected to place the property beyond the reach of Martin Carlin's creditors, including the IRS. The Government argues that the conveyance was constructively fraudulent under New York's Debtor and Creditor Law § 273.

Section 273 of New York's Debtor and Creditor Law states:

> [e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation incurred without a fair consideration.

N.Y.Debt. & Cred.Law § 273. Thus, to establish a fraudulent conveyance under this provision, the Government must prove that (1) Martin Carlin conveyed the property to his wife, (2) Martin Carlin was or would thereby have become insolvent at the time he made the conveyance, and (3) he made the conveyance without fair consideration.

[6] The uncontested facts in this case support the Government's claim. It is undisputed that Martin Carlin conveyed his interest in the Mount Vernon realty to his wife voluntarily and without consideration. Furthermore, Martin Carlin conveyed the realty at a time that he was indebted to the United States for federal taxes, and, according to his own testimony, in over $80 million of debt. Carlin Dep. at 35. When a transfer is made without consideration, the initial

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burden to demonstrate solvency is on the defendant. *ACLI Government Securities, Inc. v. Rhoades,* 653 F.Supp. 1388, 1393 (S.D.N.Y.1987), *aff'd,* 842 F.2d 1287 (2d Cir.1988).

Here, defendants have adduced no evidence that Martin Carlin was solvent at the time of the conveyance, nor have they otherwise challenged the Government's showing that Martin Carlin was, in fact, insolvent at the time of the conveyance. Accordingly, this Court finds that the August 26, 1987 conveyance was fraudulent under section 273 of the N.Y. Debtor & Creditor Law.[4]

[7] This Court further finds that the subsequent conveyances of the Mount Vernon realty, first from Barbara Carlin to Free Lunch and then from Free Lunch to LRSE Realty, were fraudulent under section 276 of New York's Debtor & Creditor Law. Section 276 provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." N.Y.Debt. & Cred.Law § 276.

[8] **[9]** **[10]** Where actual intent to defraud creditors is proven, the conveyance will be set aside regardless of the adequacy of consideration. *McCombs,* 30 F.3d at 328. Under section 276, intent need not be shown by direct evidence and is normally inferred from the circumstances surrounding the transfer. *Id.; In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d 1032, 1041 (2d Cir.1984); *ACLI Government Securities,* 653 F.Supp. at 1394. Factors to consider include close relationships among the parties, secrecy and haste in making transfer, inadequacy of consideration, and the transferor's knowledge of creditor's claims and any inability to pay them. *McCombs,* 30 F.3d at 328. Only an actual intent to hinder and delay need be established, not an actual intent to defraud, and lack of fair consideration gives rise to a rebuttable presumption of fraudulent intent. ***278** *Atlanta Shipping Corp., Inc. v. Chemical Bank,* 631 F.Supp. 335, 346–47 (S.D.N.Y.1986), *aff'd,* 818 F.2d 240 (2d Cir.1987).

The conveyances to Free Lunch and LRSE had all of the indicia of fraudulent intent. On or about March 28, 1988, Barbara Carlin transferred her interest in the Mount Vernon realty to Free Lunch, an entity of which she was the sole officer, for no consideration. Free Lunch's later conveyance of its interest in the Mount Vernon realty to LRSE, an entity whose sole officer was Martin Carlin's cousin, Michael Jaffe, was also for inadequate consideration. Thus, plaintiff has asserted sufficient facts to establish a presumption of fraudulent intent. Those facts remain unchallenged by defendants.

Where a conveyance is fraudulent as to a creditor, that creditor, when his claim has matured, may have the conveyance set aside to the extent necessary to satisfy his claim. N.Y.Debt. & Cred.Law § 278(1)(a). Having determined that the conveyances of the Mount Vernon realty to (1) Barbara Carlin, (2) Free Lunch, and (3) LRSE were independently fraudulent, this Court orders that those conveyances be set aside.

D. Priority of the IRS's Lien on the Mount Vernon Realty

[11] The remaining issue is the Government's request for an order declaring that the IRS's lien on the realty has priority over the interests of defendant Gold Hawk.

[12] Section 6321 of Title 26 authorizes the Government to impose a tax lien upon property of defaulting taxpayers. 26 U.S.C. § 6321; *see McCombs,* 30 F.3d at 321; *United States v. 110–118 Riverside Tenants Corp.,* 886 F.2d 514, 518 (2d Cir.1989), *cert. denied,* 495 U.S. 956, 110 S.Ct. 2560, 109 L.Ed.2d 743 (1990). Courts have long held that priority of federal tax liens is to be determined by the rule of "first in time, first in right." *United States v. New Britain,* 347 U.S. 81, 85, 74 S.Ct. 367, 370, 98 L.Ed. 520 (1954); *110–118 Riverside Tenants Corp.,* 886 F.2d at 518. A federal tax lien is deemed to arise at the time that the assessment is made, even where the lien has not been recorded, and continues until the amount of liability set forth in the assessment is satisfied. *McCombs,* 30 F.3d at 321; *Don King Productions, Inc. v. Thomas,* 945 F.2d 529, 534 (2d Cir.1991).

Once a lien is imposed, the sale of any property on which the United States has such a lien is subject to notice requirements set forth in 26 U.S.C. § 7425(c)(1). Notice of sale must be given in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary of Treasury. 26 U.S.C. § 7425(c)(1). Moreover, the judicial sale of property in which the United States holds a tax lien is made subject to, and without disturbing, the United States' tax liens. 26 U.S.C. § 7425(b); *see Berlin v. United States,* 535 F.Supp. 298 (E.D.N.Y.1982) (holding that sheriff's execution sale, pursuant to a junior judgment lien, did not extinguish the senior tax lien of the IRS even where the plaintiff complied with all federal and state notice requirements).

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The uncontested facts before the Court clearly establish the priority of the IRS's tax liens over the interests of defendant Gold Hawk. The IRS made its assessments on February 27, 1987 and March 30, 1987 and, on July 14, 1987, filed a notice of federal tax lien against the partnership in the Westchester County Clerk's office.

Meanwhile, defendant Gold Hawk did not record its judgment in the Westchester County Clerk's office until July 23, 1987, nine days after the IRS filed its notice of lien and almost four months after the IRS made its final assessment against Park Drive. Gold Hawk's judgment lien was, therefore, second in time to the IRS's senior federal tax lien.

[13] Thus, when Gold Hawk subsequently arranged for the Westchester County Sheriff to schedule a nonjudicial sale of the Mount Vernon realty, Gold Hawk was obligated, pursuant to 26 U.S.C. § 7425, to provide the IRS, as senior lien holder, with notice of the sale. The sale, of which the IRS received no notice, resulted in the property being sold to Gold Hawk by Sheriff's deed. Accordingly, that sale was made subject to, and without disturbing, the federal tax lien. *See* 26 U.S.C. § 7425(b).

*279 CONCLUSION

For the reasons set forth above, the Government's motion for summary judgment is granted pursuant to Fed.R.Civ.P. 56. The government shall submit a proposed judgment consistent with this opinion by December 2, 1996 on five days notice to defendants.

SO ORDERED.

All Citations

948 F.Supp. 271, 80 A.F.T.R.2d 97-7810, 97-1 USTC P 50,302

Footnotes

1 On September 27, 1995, the Government and counsel for Barbara Carlin appeared before Magistrate Judge Fox for reconsideration of sanctions imposed on Barbara Carlin for her repeated failure to appear for deposition. After determining that Barbara Carlin's noncompliance was due to wilfulness and bad faith rather than any inability to comply, Magistrate Judge Fox made the following findings of fact in accordance with Fed.R.Civ.P. 37(b)(2):

> Barbara Carlin can identify no consideration supporting her husband, Martin Carlin's, conveyance of his interest in the reality [sic] located at 175 Creary [sic] Avenue, Mount Vernon, New York (the "Realty") to her on August 26, 1987.... Barbara Carlin's subsequent conveyance of the Realty to defendant, Free Lunch Incorporated ("Free Lunch") ... was, again, for no consideration. And third, Free Lunch's conveyance of it's [sic] interest in property to LRSE Realty Corporation ... was for inadequate consideration.

2 Without addressing the Government's recitation of facts not in dispute, defendants' 3(g) statement simply asserts that "legal title to [the Mount Vernon realty] was taken in the name of Park Drive Associates, Inc.," and that "equitable title to the property was to be held by Park Drive Associates, Ltd., a California limited partnership." We presume that these statements are intended to call into question the existence of the Park Drive Manor Partnership and to raise the inference that Martin Carlin was not, in fact, a partner of a partnership so named. The statements are supported by a 1994 letter of a nonparty attorney who had represented Martin Carlin and the Stevens brothers in connection with their purchase of Park Drive Manor apartments and the purported cover sheet of the closing papers for the purchase of the Park Drive Manor Apartments. This Court finds that neither document raises a genuine issue of material fact that would preclude summary judgment.

The letter merely establishes that an attorney who represented Carlin and the Stevens brothers "as local counsel for limited purposes" was "not aware of the Park Drive Manor Partnership." The attorney's "awareness" of the partnership has no real probative value as to whether the partnership in fact existed or owned the Park Drive Manor apartment complex.

The cover sheet for the closing papers similarly lacks evidentiary value for the purposes of this motion. The cover sheet states: "Property Title: Legal Title, Park Drive Associates, Inc., a Pennsylvania corporation ... Equitable Title, Park Drive Associates, Ltd., a California limited partnership." It further reflects that the closing date for the sale and purchase of the Park Drive Manor apartment complex was October 30, 1985, over one year before the tax assessments at issue in the

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underlying action were made. The cover sheet does not dispute the existence of the Park Drive Manor Partnership in 1986, during which the unpaid tax obligations leading to the assessment arose or in any way contradict the facts adduced by the government, most notably the existence of the federal tax return filed by the Park Drive Manor Partnership reporting the income derived from the apartment complex which it owned.

3 26 U.S.C. § 6672 provides in pertinent part:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully failed to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat such tax or the payment thereof, shall ... be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid for.

4 The Government further contends that the conveyance was fraudulent on the grounds that it was made (1) for inadequate consideration at a time when the transferor believed that he would incur debts beyond his ability to pay, N.Y.Debt. & Cred.Law § 275; and (2) with the actual intent to defraud the IRS. N.Y.Debt. & Cred.Law § 276. Having determined that the conveyance to Barbara Carlin was fraudulent under section 273, this Court need not consider whether the conveyance was fraudulent under those alternative theories.

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Compilation of Codes, Rules and Regulations of the State of New York
Title 22. Judiciary
Subtitle A. Judicial Administration.
Chapter II. Uniform Rules for the New York State Trial Courts
Part 202. Uniform Civil Rules for the Supreme Court and the County Court (Refs & Annos)

22 NYCRR 202.70

Section 202.70. Rules of the Commercial Division of the Supreme Court

Effective: February 14, 2024
Currentness

(a) *Monetary Thresholds*. Except as set forth in subdivision (b), the monetary thresholds of the Commercial Division, exclusive of punitive damages, interest, costs, disbursements and counsel fees claimed, are established as follows:

Albany County	$50,000
Bronx County	$75,000
Eighth Judicial District	$100,000
Kings County	$150,000
Nassau County	$200,000
New York County	$500,000
Onondaga County	$50,000
Queens County	$100,000
Seventh Judicial District	$50,000
Suffolk County	$100,000
Westchester County	$100,000

(b) *Commercial cases*

Actions in which the principal claims involve or consist of the following will be heard in the Commercial Division provided that the monetary threshold is met or equitable or declaratory relief is sought:

(1) Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g., unfair competition), or statutory and/or common law violation where the breach or violation is alleged to arise out of business dealings (e.g., sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, and other business agreements; technology transactions and/or commercial disputes involving or arising out of technology; trade secrets; restrictive covenants; and employment agreements not including claims that principally involve alleged discriminatory practices);

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(2) transactions governed by the Uniform Commercial Code (exclusive of those concerning individual cooperative or condominium units);

(3) transactions involving commercial real property, including Yellowstone injunctions and excluding actions for the payment of rent only;

(4) shareholder derivative actions--without consideration of the monetary threshold;

(5) commercial class actions--without consideration of the monetary threshold;

(6) business transactions involving or arising out of dealings with commercial banks and other financial institutions;

(7) Internal affairs of business organizations;

(8) malpractice by accountants or actuaries, and legal malpractice arising out of representation in commercial matters;

(9) environmental insurance coverage;

(10) commercial insurance coverage (*e.g.*, directors and officers, errors and omissions, and business interruption coverage);

(11) dissolution of corporations, partnerships, limited liability companies, limited liability partnerships and joint ventures--without consideration of the monetary threshold; and

(12) applications to stay or compel arbitration and affirm or disaffirm arbitration awards and related injunctive relief pursuant to CPLR Article 75 involving any of the foregoing enumerated commercial issues. Where the applicable arbitration agreement provides for the arbitration to be heard outside the United States, the monetary threshold set forth in section 202.70(a) shall not apply.

(c) *Non-commercial cases*. The following will not be heard in the Commercial Division even if the monetary threshold is met:

(1) Suits to collect professional fees;

(2) Cases seeking a declaratory judgment as to insurance coverage for personal injury or property damage;

(3) Residential real estate disputes, including landlord-tenant matters, and commercial real estate disputes involving the payment of rent only;

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(4) Home improvement contracts involving residential properties consisting of one to four residential units or individual units in any residential building, including cooperative or condominium units;

(5) Proceedings to enforce a judgment regardless of the nature of the underlying case;

(6) First-party insurance claims and actions by insurers to collect premiums or rescind non-commercial policies; and

(7) Attorney malpractice actions except as otherwise provided in paragraph (b)(8).

(d) *Assignment to the Commercial Division*.

(1) Within 90 days following service of the complaint, any party may seek assignment of a case to the Commercial Division by filing a Request for Judicial Intervention (RJI) that attaches a completed Commercial Division RJI Addendum certifying that the case meets the jurisdictional requirements for Commercial Division assignment set forth in subdivisions (a), (b) and (c) of this section. Except as provided in subdivision (e) below, failure to file an RJI pursuant to this subdivision precludes a party from seeking assignment of the case to the Commercial Division.

(2) Subject to meeting the jurisdictional requirements of subdivisions (a), (b) and (c) of this section and filing an RJI in compliance with subsection (d)(1) above, the parties to a contract may consent to the exclusive jurisdiction of the Commercial Division of the Supreme Court by including such consent in their contract. A sample choice of forum provision can be found at Appendix C to these Rules of the Commercial Division. Alternatively, subject to meeting the jurisdictional and procedural requirements applicable to the Commercial Division and the federal courts, the parties to a contract may consent to the exclusive jurisdiction of either the Commercial Division of the Supreme Court or the federal courts in New York State by including such consent in their contract. An alternative sample choice of forum provision to that effect can also be found at Appendix C to these Rules of the Commercial Division. In addition, the parties to a contract may consent to having New York law apply to their contract, or any dispute under the contract. A sample choice of law provision can be found at Appendix D to these Rules of the Commercial Division.

(e) *Transfer into the Commercial Division*. If an RJI is filed within the 90-day period following service of the complaint and the case is assigned to a noncommercial part because the filing party did not designate the case as “commercial” on the RJI, any other party may apply by letter application (with a copy to all parties) to the Administrative Judge, within ten days after receipt of a copy of the RJI, for a transfer of the case into the Commercial Division. Further, notwithstanding the time periods set forth in subdivisions (d) and (e) of this section, for good cause shown for the delay a party may seek the transfer of a case to the Commercial Division by letter application (with a copy to all parties) to the Administrative Judge. In addition, a non-Commercial Division justice to whom a case is assigned may sua sponte request the Administrative Judge to transfer a case that meets the jurisdictional requirements for Commercial Division assignment set forth in subdivisions (a), (b) and (c) of this section to the Commercial Division. The determinations of the Administrative Judge with respect to any letter applications or requests under this subdivision shall be final and subject to no further administrative review or appeal.

(f) *Transfer from the Commercial Division*.

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(1) In the discretion of the Commercial Division justice assigned, if a case does not fall within the jurisdiction of the Commercial Division as set forth in this section, it shall be transferred to a non-commercial part of the court.

(2) Any party aggrieved by a transfer of a case to a non-commercial part may seek review by letter application (with a copy to all parties) to the administrative judge within ten days of receipt of the designation of the case to a non-commercial part. The determination of the administrative judge shall be final and subject to no further administrative review or appeal.

(g) *Rules of practice for the Commercial Division.* Unless these rules of practice for the Commercial Division provide specifically to the contrary, the rules of Part 202 also shall apply to the Commercial Division, except that Rules 7 through 15 shall supersede section 202.12 (Preliminary Conference) and Rules 16 through 24 shall supersede section 202.8 (Motion Procedure).

PREAMBLE

Created in 1995, today's Commercial Division of the New York State Supreme Court is an efficient, sophisticated, up-to-date court dealing with challenging commercial cases. From its inception, the Commercial Division has had as its primary goal the cost-effective, predictable and fair adjudication of complex commercial cases. By virtue of its specialized subject matter jurisdiction, exceptional judicial expertise, rules and procedures dedicated to commercial practice, and commitment to high standards of attorney professionalism, the Division has established itself at the forefront of worldwide commercial litigation in the twenty-first century.

(1) Jurisdiction and Judiciary

The subject matter jurisdiction of the Commercial Division - including both substantial monetary thresholds and carefully chosen case types (see §202.70[a] and [b]) - is designed to ensure that it is the forum of resolution of the most complex and consequential commercial matters commenced in New York's courts. Accordingly, the Division's judges are chosen for their extensive experience in resolving sophisticated commercial disputes. Unlike jurists in other civil parts in New York's court system, Commercial Division justices devote themselves almost exclusively to these complex commercial matters.

(2) Rules and Procedures

Since its inception, the Commercial Division has implemented rules, procedures and forms especially designed to address the unique problems of commercial practice. Such rules have addressed a wide range of matters such as proportionality in discovery, optional accelerated adjudication, robust expert disclosure, limits on depositions and interrogatories, streamlined privilege logs, special rules concerning entity depositions, model forms to facilitate discovery, expedited resolution of discovery disputes, simplification of bench trials, time limits on all trials, streamlined presentation of evidence at trials, and a strong commitment to early case disposition through the Division's alternative dispute resolution program. Equally important, through the work of the Commercial Division Advisory Council - a committee of commercial practitioners, corporate in-house counsel and jurists devoted to the Division's excellence - the Commercial Division has become a recognized leader in court system innovation, demonstrating an unparalleled creativity and flexibility in development of rules and practices.

(3) The Commercial Division Bar

Finally, the work of the Commercial Division has prospered through the strong cooperative spirit of the bar practicing before it. The subject matter jurisdiction of the court, the pace of high-stakes commercial practice, the sophistication of the judiciary and the specialized rules of the Division require that the practicing bar be held rigorously to a standard of commitment and

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professionalism of the highest caliber. For example, the failure to appear (or the appearance without proper preparation) at scheduled court dates, depositions or hearings is generally viewed as highly improper in the Commercial Division, and can readily result in the imposition of sanctions and penalties as permitted under statute and court rule (see, e.g., CPLR 3126; see also 22 NYCRR Part 130). At the same time, the Commercial Division's judiciary is strongly committed to the ongoing development of New York's commercial bar and, in that spirit, has instituted practices encouraging the participation of less experienced members of that bar in substantive and meaningful ways (including presentation of motions or examination of witnesses) in matters before it. In this manner, the Division seeks to ensure the continued development of the highest quality of commercial bar in New York State.

(4) Conclusion

“New York is the center of world commerce, the headquarters of international finance, the home of America's leading businesses. As such, it strongly needs a modern, well-staffed, properly equipped forum for the swift, fair and expert resolution of significant commercial disputes.” In 1995, those words introduced the New York State Bar Association's report proposing the creation of the Commercial Division (N.Y. St. Bar Ass'n, A Commercial Court For New York [Jan. 1995]). Since then, they have served as the central rationale for the Division's commitment to excellence in the administration of the rule of law in business in New York. The practice rules of the Commercial Division, set forth below, are a crucial component of that commitment, and are designed to be a dynamic counterpart to the innovative and efficient business practices which are so essential to the economic health of our State and nation.

Rule 1. Appearance by Counsel with Knowledge and Authority.

(a) Counsel who appear in the Commercial Division must be fully familiar with the case in regard to which they appear and fully authorized to enter into agreements, both substantive and procedural, on behalf of their clients. Counsel should also be prepared to discuss any motions that have been submitted and are outstanding. Failure to comply with this rule may be regarded as a default and dealt with appropriately. See Rule 12.

(b) Consistent with the requirements of Rule 11-c. counsel for all parties who appear at the preliminary conference shall be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery. Counsel may bring a client representative or outside expert to assist in such discussions.

(c) It is important that counsel be on time for all scheduled appearances.

(d) Counsel may request the court's permission to participate in court conferences and oral arguments of motions from remote locations through use of videoconferencing or other technologies. Such requests will be granted in the court's discretion for good cause shown; however, nothing contained in this subsection (d) is intended to limit any rights which counsel may otherwise have to participate in court proceedings by appearing in person.

Rule 2. Settlements and Discontinuances. If an action is settled, discontinued, or otherwise disposed of, counsel shall immediately inform the court by e-filing a copy of the stipulation and by a letter directed to the clerk of the part along with notice to chambers via telephone or e-mail. This notification shall be made in addition to the filing of a stipulation with the County Clerk. The parties need not reveal the terms of a settlement, but must notify the court that a resolution has been reached and that both sides have agreed to discontinue the case. In addition to notifying the court of a settlement or discontinuance, counsel shall withdraw any pending motions and any pending appeals.

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Rule 3. Alternative Dispute Resolution (ADR); Settlement Conference Before a Justice Other Than the Justice Assigned to the Case.

(a) At any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator or neutral evaluator for the purpose of helping to achieve a resolution of all or some of the issues presented in the litigation. Counsel are encouraged to work together to select a mediator or neutral evaluator that is mutually acceptable and may wish to consult any list of approved neutrals in the county where the case is pending. Additionally, counsel for all parties may stipulate to having the case determined by a summary jury trial pursuant to any applicable local rules or, in the absence of a controlling local rule, with permission of the court.

(b) Should counsel wish to proceed with a settlement conference before a justice other than the justice assigned to the case, counsel may jointly request that the assigned justice grant such a separate settlement conference. This request may be made at any time in the litigation. Such request will be granted in the discretion of the justice assigned to the case upon finding that such a separate settlement conference would be beneficial to the parties and the court and would further the interests of justice. If the request is granted, the assigned justice shall make appropriate arrangements for the designation of a "settlement judge."

Rule 4. Electronic Submission of Papers.

In cases not pending in the New York State Courts Electronic Filing System, the court may permit counsel to communicate with the court and each other by e-mail. In the court's discretion, counsel may be requested to provide a copy of any submitted papers as the court directs.

Rule 5. Information on Cases. Information on future court appearances and case developments can be found at the court system's eCourts site (www.nycourts.gov/ecourts). Neither the court nor the court clerk will be responsible for notifying the parties of scheduled court appearances, although the court or the court clerk may do so at their discretion.

Rule 6. Form of Papers.

(a) All papers submitted to the Commercial Division shall not be inconsistent with CPLR 2101 and section 202.5(a). Papers shall be double-spaced and contain print no smaller than twelve-point, or 8½ x 11 inch paper, bearing margins no smaller than one inch. Unless otherwise directed by the Court or provided in the Court's individual rules, all text in briefs and affidavits, including footnotes, shall use proportionally spaced 12-point serif typeface. Papers also shall comply with Part 130 of the Rules of the Chief Administrator. Each electronically-submitted memorandum of law and, where appropriate, affidavit and affirmation shall include bookmarks providing a listing of the document's contents and facilitating easy navigation by the reader within the document.

(b) For purposes of this Rule, a hyperlink means an electronic link between one document and another, and a bookmark means an electronic link permitting navigation among different parts of a single document. Material made accessible by hyperlinking does not thereby become part of the record, and citations to authorities shall appear in standard citation form, even if also hyperlinked.

(c) Each electronically submitted memorandum of law or other document that cites to another document previously filed with NYSCEF shall include a hyperlink to the NYSCEF docket entry for the cited document enabling access to the cited document through the hyperlink. Hyperlinks may not provide access to documents filed under seal or otherwise not in the public record. Cited documents filed with NYSCEF that are accessible through bookmarks in the electronically submitted document need not also be hyperlinked.

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(1) The Court may require that electronically submitted memoranda of law include hyperlinks to cited court decisions, statutes, rules, regulations, treatises, and other legal authorities in either legal research databases to which the Court has access or in state or federal government websites. If the Court does not require such hyperlinking, parties are nonetheless encouraged to hyperlink such citations unless otherwise directed by the Court.

(2) If a party certifies in good faith that it cannot include hyperlinks as required by this Rule or the Court without undue burden, due to limitations in its office technology or other showing of good cause, the Court may excuse the party from any otherwise applicable hyperlinking requirement.

(d) Interlineation of Responsive Pleadings

(1) For every responsive pleading, the party preparing the responsive pleading shall interlineate each allegation of the pleading to which it is responding with the party's response to that allegation, and in doing so, shall preserve the content and numbering of the allegation.

(2) The party who prepared a pleading to which a responsive pleading is required shall, upon request, promptly provide a copy of its pleading in the same word processing software application in which the pleading was prepared to the party preparing the responsive pleading.

Rule 7. Preliminary Conference; Request. A preliminary conference shall be held within 45 days of assignment of the case to a Commercial Division justice, or as soon thereafter as is practicable. Except for good cause shown, no preliminary conference shall be adjourned more than once or for more than 30 days. If a request for judicial intervention is accompanied by a dispositive motion, the preliminary conference shall take place within 30 days following the decision of such motion (if not rendered moot) or at such earlier date as scheduled by the justice presiding. Notice of the preliminary conference date will be sent by the court at least five days prior thereto.

Rule 8. Consultation prior to Preliminary and Compliance Conferences.

(a) Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other topics to be discussed at the conference, including electronic discovery, as set forth in Rule 11-c, and the timing and scope of expert disclosure under Rule 13(c); (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

Rule 9. Accelerated Adjudication Actions.

(a) This rule is applicable to all actions, except to class actions brought under Article 9 of the CPLR, in which the court by written consent of the parties is authorized to apply the accelerated adjudication procedures of the Commercial Division of the Supreme Court. One way for parties to express their consent to this accelerated adjudication process is by using specific language in a contract, such as: “Subject to the requirements for a case to be heard in the Commercial Division, the parties agree to submit to the exclusive jurisdiction of the Commercial Division, New York State Supreme Court and to the application of the

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Court's accelerated procedures, in connection with any dispute, claim or controversy arising out of or relating to this agreement, or the breach, termination, enforcement or validity thereof."

(b) In any matter proceeding through the accelerated process, all pre-trial proceedings, including all discovery, pre-trial motions and mandatory mediation, shall be completed and the parties shall be ready for trial within nine (9) months from the date of filing of a Request of Judicial Intervention (RJI).

(c) In any accelerated action, the court shall deem the parties to have irrevocably waived:

(1) any objections based on lack of personal jurisdiction or the doctrine of forum non conveniens;

(2) the right to trial by jury;

(3) the right to recover punitive or exemplary damages;

(4) the right to any interlocutory appeal; and

(5) the right to discovery, except to such discovery as the parties might otherwise agree or as follows:

(i) There shall be no more than seven (7) interrogatories and five (5) requests to admit;

(ii) Absent a showing of good cause, there shall be no more than seven (7) discovery depositions per side with no deposition to exceed seven (7) hours in length. Such depositions can be done either in person at the location of the deponent, a party or their counsel or in real time by any electronic video device; and

(iii) Documents requested by the parties shall be limited to those relevant to a claim or defense in the action and shall be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain.

(d) In any accelerated action, the description of custodians shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute. In other respects, electronic discovery shall proceed as set forth in Rule 11-c.

Rule 9-a. Immediate Trial or Pre-Trial Evidentiary Hearing. Subject to meeting the requirements of CPLR 2218, 3211(c) or 3212(c), parties are encouraged to demonstrate on a motion to the court when a pre-trial evidentiary hearing or immediate trial may be effective in resolving a factual issue sufficient to effect the disposition of a material part of the case. Motions where a hearing or trial on a material factual issue may be particularly useful in disposition of a material part of a case, include, but are not limited to:

(a) Dispositive motions to dismiss or motions for summary judgment;

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(b) Preliminary injunction motions, including but not limited to those instances where the parties are willing to consent to the hearing being on the merits;

(c) Spoliation of evidence motions where the issue of spoliation impacts the ultimate outcome of the action;

(d) Jurisdictional motions where issues, including application of long arm jurisdiction, may be dispositive;

(e) Statute of limitations motions; and

(f) Class action certification motions.

In advance of an immediate trial or evidentiary hearing, the parties may request, if necessary, that the court direct limited expedited discovery targeting the factual issue to be tried.

Rule 9-b. Referees. Counsel should be aware that in accordance with CPLR 4301 and 4317(a), on consent of the parties, and with the agreement of the Court, any person may be appointed by the Court to act in place of the assigned Supreme Court Justice, to determine any or all issues or to perform any act, with all the powers of the Supreme Court.

Rule 10. Submission of Information; Certification Relating to Alternative Dispute Resolution.

At the preliminary conference, counsel shall be prepared to furnish the court with the following: (i) a complete caption, including the index number; (ii) the name, address, telephone number, e-mail address and fax number of all counsel; (iii) the dates the action was commenced and issue joined; (iv) a statement as to what motions, if any, are anticipated; and (v) copies of any decisions previously rendered in the case. Counsel for each party shall also submit to the court at the preliminary conference and each subsequent compliance or status conference, and separately serve and file, a statement, in a form prescribed by the Office of Court Administration, certifying that counsel has discussed with the party the availability of alternative dispute resolution mechanisms provided by the Commercial Division and/or private ADR providers, and stating whether the party is presently willing to pursue mediation at some point during the litigation. In addition, the statement to be submitted by counsel shall contain categories of information about the case prescribed by the Office of Court Administration which may assist the court, counsel and the parties in considering the role mediation might play in the resolution of the case.

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

x

Part: ___

Index No.: ___

Plaintiff(s),

- against -

ALTERNATIVE DISPUTE RESOLUTION ("ADR") ATTORNEY CERTIFICATION

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Defendant(s).

x

Pursuant to Rule 10 of the Commercial Division Rules, I certify that I have discussed with my client any Alternative Dispute Resolution options available through the Commercial Division and those offered by private entities. My client:

() presently wishes to jointly engage a mediator at an appropriate time to aid settlement.

() does not presently wish to jointly engage a mediator at an appropriate time to aid settlement.

This case involves the following (check all that are applicable):

[] an ongoing business or personal relationship among the parties

[] an employment agreement

[] a business transaction involving a commercial bank or other financial institution

[] commercial insurance coverage or environmental insurance coverage

[] construction litigation

[] the amount in issue is less than double the jurisdictional threshold amount for the Commercial Division in this County or Judicial District

[] issues that appear to require creative or flexible solutions

Dated: _____

Signature: _____

Attorney Name and Address:

_____

ATTORNEY FOR:

_____

Note: This certification must be served and filed pursuant to Rule 10 of the Commercial Division Rules, with a copy submitted to the court at the time of the Preliminary Conference and each subsequent Compliance or Status Conference. A separate certification is required for each party represented.

Editorial Note: This rule is amended through Court Notices, effective January 1, 2018.

Rule 11. Discovery.

Preamble to Rule 11. Acknowledging that discovery is one of the most expensive, time-consuming aspects of litigating a commercial case, the Commercial Division aims to provide practitioners with a mechanism for streamlining the discovery process to lessen the amount of time required to complete discovery and to reduce the cost of conducting discovery. It

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is important that counsel's discovery requests. including depositions, are both proportional and reasonable in light of the complexity of the case and the amount of proof that is required for the cause of action.

(a) The court may direct plaintiff to produce a document stating clearly and concisely the issues in the case prior to the preliminary conference. If there are counterclaims, the court may direct the party asserting such counterclaims to produce a document stating clearly and concisely the issues asserted in the counterclaims. The court may also direct plaintiff and counterclaim plaintiff to each produce a document stating each of the elements in the causes of action at issue and the facts needed to establish their case.

(b) The court may further direct, if a defendant filed a motion to dismiss and the court dismissed some but not all of the causes of action, plaintiff and counterclaim plaintiff to revisit the documents to again state, clearly and concisely, the issues remaining in the case, the elements of each cause of action and the facts needed to establish their case.

(c) Any written description of a party's claims/defenses provided under this Rule is not binding and does not limit the scope of a party's pleadings.

(d) The preliminary conference will result in the issuance by the court of a preliminary conference order. Where appropriate, the order will contain specific provisions for means of early disposition of the case, such as (i) directions for submission to the alternative dispute resolution program, including, in all cases in which the parties certify their willingness to pursue mediation pursuant to Rule 10, provision of a specific date by which a mediator shall be identified by the parties for assistance with resolution of the action; (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure.

(e) The order will also contain a comprehensive disclosure schedule, including dates for the service of third-party pleadings, discovery, motion practice, a compliance conference, if needed, a date for filing the note of issue, a date for a pre-trial conference and a trial date.

(f) The preliminary conference order may provide for such limitations of interrogatories and other discovery as may be necessary to the circumstances of the case. Additionally, the court should consider the appropriateness of altering prospectively the presumptive limitations on depositions set forth in Rule 11-d.

(g) The court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion.

Rule 11-a. Interrogatories.

(a) Interrogatories are limited to 25 in number, including subparts, unless another limit is specified in the preliminary conference order. This limit applies to consolidated actions as well.

(b) Unless otherwise ordered by the court, interrogatories are limited to the following topics: name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of material and necessary documents, including pertinent insurance agreements, and other physical evidence.

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(c) During discovery, interrogatories other than those seeking information described in paragraph (b) above may only be served:

(1) if the parties consent; or

(2) if ordered by the court for good cause shown.

(d) At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the Court has ordered otherwise.

Rule 11-b. Privilege Logs.

(a) Meet and Confer: General. Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order. 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.

(b) Categorical Approach or Document-By-Document Review.

(1) The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. The parties are expected to address such considerations in good faith as part of the meet and confer process (see paragraph (a) above) and to agree, where possible, to employ a categorical approach to privilege designations. The parties are encouraged to utilize any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category. For each category of documents that may be established, the producing party shall provide a certification, pursuant to 22 NYCRR section 130-1.1a, 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. The certification shall be signed by the Responsible Attorney, as defined below, or by the party, through an authorized and knowledgeable representative.

(2) In the event the requesting party refuses to permit a categorical approach, and instead insists on a document-by-document listing on the privilege log, then unless the Court deems it appropriate to issue a protective order pursuant to CPLR 3103 based upon the facts and circumstances before it, the requirements set forth in CPLR 3122 shall be followed. In that circumstance, however, 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. Upon good cause shown, the court may allocate the costs to the requesting party.

(3) To the extent that a party insists upon a document-by-document privilege log as contemplated by CPLR 3122, and absent an order to the contrary, each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following:

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(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 the 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 employer, job title, role in the case) to allow for a considered assessment of privilege issues.

(c) Special Master. In complex matters likely to raise significant issues regarding privileged and protected material, parties are encouraged to hire a Special Master to help the parties efficiently generate privilege logs, with costs to be shared.

(d) Responsible Attorney. 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.

(e) Court Order. Agreements and protocols agreed upon by parties should be memorialized in a court order.

Rule 11-c. Discovery of Electronically Stored Information.

(a) Parties and nonparties should consult the Commercial Division's Guidelines for Discovery of Electronically Stored Information (“ESI”) (the “ESI Guidelines”), which can be found in Appendix A to these Rules of the Commercial Division. The ESI Guidelines are advisory and should be applied to the extent appropriate under the circumstances.

(b) Prior to the preliminary conference, counsel shall confer with regard to electronic discovery topics, including those set forth in the ESI Guidelines. Topics on which the parties cannot agree shall be addressed with the court at the preliminary conference.

(c) Requests for the production of ESI may specify the format in which ESI shall be produced, to which the responding party may object. In the absence of such specification, or agreement among the parties or court order, the production of electronic documents shall be in the form in which it is ordinarily maintained, or in a searchable format that is usable by the party receiving the ESI.

(d) The costs and burdens of discovery of ESI shall be proportionate to its benefits, considering the nature of the dispute, the amount in controversy, and the importance of the materials requested to resolving the dispute. A court may deny or modify disproportionate requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment.

(e) The requesting party shall promptly defray the reasonable expenses associated with a non-party's production of ESI, in accordance with CPLR 3111 and 3122(d).

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(f) The parties are encouraged to use efficient means to identify ESI for production, which may include technology-assisted review in appropriate cases. The parties shall confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they propose to use in document review and production.

(g) Inadvertent or unintentional production of ESI or documents containing information that is subject to the attorney-client privilege, work product protection, or other generally recognized privilege shall not be deemed a waiver in whole or in part of such privilege if the producing party (i) took reasonable precautions to prevent disclosure, and (ii) after learning of the inadvertent disclosure, promptly gave notice either in writing, or later confirmed in writing, to the receiving party or parties that such information was inadvertently produced and requests that the receiving party or parties return or destroy the produced ESI. Upon such notice, or as otherwise required, the receiving party or parties shall promptly return or destroy all such material, including copies, except as may be necessary to bring a challenge before the Court. The parties may extend or modify the protections and duties of this provision by written agreement, as provided in Rule 11-g(c), which shall be submitted to the Court to be ordered. Nothing in this rule shall abridge a lawyer's obligations under Rule 4.4(b) of the New York Rules of Professional Conduct concerning a lawyer's receipt of documents that appear to have been inadvertently sent.

(h) Consistent with CPLR 3126, a party should take reasonable steps to preserve ESI that it has a duty to preserve.

Editorial note: As per the December 23, 2014 Administrative Order of the Chief Administrative Judge of the Courts, Rule 11-d is applicable to cases filed in the Commercial Division on and after April 1, 2015.

Rule 11-d. Limitations on Depositions.

(a) Unless otherwise stipulated to by the parties or ordered by the court:

(1) the number of depositions taken by plaintiffs, or by defendants, or by third-party defendants, shall be limited to 10; and

(2) depositions shall be limited to 7 hours per deponent.

(b) Notwithstanding subsection (a)(1) of this Rule, the propriety of and timing for depositions of non-parties shall be subject to any restrictions imposed by applicable law.

(c) For the purposes of subsection (a)(1) of this Rule, the deposition of an entity through one or more representatives shall be treated as a single deposition even though more than one person may be designated to testify on the entity's behalf.

(d) For the purposes of this Rule, each deposition of an officer, director, principal or employee of an entity who is also a fact witness, as opposed to an entity representative, shall constitute a separate deposition.

(e) For the purposes of subsection (a)(2) of this Rule, the deposition of an entity shall be treated as a single deposition even though more than one person may be designated to testify on the entity's behalf. Notwithstanding the foregoing, the cumulative presumptive durational limit may be enlarged by agreement of the parties or upon application for leave of Court, which shall be freely granted.

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(f) For good cause shown, the court may alter the limits on the number of depositions or the duration of an examination.

(g) Nothing in this Rule shall be construed to alter the right of any party to seek any relief that it deems appropriate under the CPLR or other applicable law.

Rule 11-e. Responses and Objections to Document Requests.

(a) For each document request propounded, the responding party shall, in its Response and Objections served pursuant to CPLR 3122(a) (the "Responses"), either:

i. state that the production will be made as requested; or

ii. state with reasonable particularity the grounds for any objection to production.

(b) By a date agreed to by the parties or at such time set by the Court, the responding party shall serve the Responses contemplated by Rule 11-e(a)(ii), which shall set forth specifically: (i) whether the objection(s) interposed pertains to all or part of the request being challenged; (ii) whether any documents or categories of documents are being withheld, and if so, which of the stated objections forms the basis for the responding party's decision to withhold otherwise responsive documents or categories of documents; and (iii) the manner in which the responding party intends to limit the scope of its production.

(c) By agreement of the parties to a date no later than the date set for the commencement of depositions, or at such time set by the Court, a date certain shall be fixed for the completion of document production by the responding party.

(d) By agreement of the parties to a date no later than one month prior to the close of fact discovery, or at such time set by the Court, the responding party shall state, for each individual request: (i) whether the production of documents in its possession, custody or control and that are responsive to the individual request, as propounded or modified, is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to the individual request as propounded or modified.

(e) Nothing contained herein is intended to conflict with a party's obligation to supplement its disclosure obligations pursuant to CPLR 3101(h).

Rule 11-f. Depositions of Entities; Identification of Matters.

(a) A notice or subpoena may name as a deponent a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(b) Notices and subpoenas directed to an entity may enumerate the matters upon which the person is to be examined, and if so enumerated, the matters must be described with reasonable particularity.

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(c) If the notice or subpoena to an entity does not identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then no later than ten days prior to the scheduled deposition:

(1) the named entity must designate one or more officers, directors, members or employees, or other individual(s) who consent to testify on its behalf;

(2) such designation must include the identity, description or title of such individual(s); and

(3) if the named entity designates more than one individual, it must set out the matters on which each individual will testify.

(d) If the notice or subpoena to an entity does identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then:

(1) pursuant to CPLR 3106(d), the named entity shall produce the individual so designated unless it shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced;

(2) pursuant to CPLR 3106(d), a notice or subpoena that names a particular officer, director, member, or employee of the entity shall include in the notice or subpoena served upon such entity the identity, description or title of such individual; and

(3) if the named entity, pursuant to subsection (d)(1) of this Rule, cross-designates more than one individual, it must set out the matters on which each individual will testify.

(e) A subpoena must advise a nonparty entity of its duty to make the designations discussed in this Rule.

(f) The individual(s) designated must testify about information known or reasonably available to the entity.

(g) Deposition testimony given pursuant to this Rule shall be usable against the entity on whose behalf the testimony is given to the same extent provided in CPLR 3117(2) and the applicable rules of evidence.

(h) This Rule does not preclude a deposition by any other procedure allowed by the CPLR.

Rule 11-g. Proposed Form of Confidentiality Order.

The following procedure shall apply in those parts of the Commercial Division where the justice presiding so elects:

(a) For all commercial cases that warrant the entry of a confidentiality order, the parties shall submit to the Court for signature the proposed stipulation and order that appears in Appendix B to these Rules of the Commercial Division.

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(b) In the event the parties wish to deviate from the form set forth in Appendix B, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.

(c) In the event the parties wish to incorporate a privilege claw-back provision into either (i) the confidentiality order to be utilized in their commercial case, or (ii) another form of order utilized by the Justice presiding over the matter, they shall utilize the text set forth in Appendix B, Paragraph 18 to these Rules of the Commercial Division. In the event the parties wish to deviate from the language in Appendix B. Paragraph 18, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.

(d) In the event the parties wish to incorporate Attorney's Eyes-Only protection, the parties shall submit to the Court for signature the proposed stipulation and order that appears in Appendix F to these Rules of the Commercial Division. Appendix F provides both a clean form of order as well as a redline, which illustrates how it differs from the confidentiality order without Attorney's Eyes-Only protection and referenced in Rule 11-g(a) above. In the event the parties wish to deviate from the Attorney's Eyes-Only form set forth in Appendix F, they shall submit to the Court a redline of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.

(e) Nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the Civil Practice Law and Rules.

Rule 12. Non-Appearance at Conference. The failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27, including dismissal, the striking of an answer, an inquest or direction for judgment, or other appropriate sanction.

Rule 13. Adherence to Discovery Schedule, Expert Disclosure.

(a) Parties shall strictly comply with discovery obligations by the dates set forth in all case scheduling orders. Such deadlines, however, may be modified upon the consent of all parties, provided that all discovery shall be completed by the discovery cutoff date set forth in the preliminary conference order. Applications for extension of a discovery deadline shall be made as soon as practicable and prior to the expiration of such deadline. Non-compliance with such an order may result in the imposition of an appropriate sanction against that party pursuant to CPLR 3126.

(b) If a party seeks documents as a condition precedent to a deposition and the documents are not produced by the date fixed, the party seeking disclosure may ask the court to preclude the non-producing party from introducing such demanded documents at trial.

(c) If any party intends to introduce expert testimony at trial, no later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure--including the identification of experts, exchange of reports, and depositions of testifying experts--all of which shall be completed no later than four months after the completion of fact discovery. In the event that a party objects to this procedure or timetable, the parties shall request a conference to discuss the objection with the court.

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Unless otherwise stipulated or ordered by the court, expert disclosure must be accompanied by a written report, prepared and signed by the witness, if either (1) the witness is retained or specially employed to provide expert testimony in the case, or (2) the witness is a party's employee whose duties regularly involve giving expert testimony. The report must contain:

(A) a complete statement of all opinions the witness will express and the basis and the reasons for them;

(B) the data or other information considered by the witness in forming the opinion(s);

(C) any exhibits that will be used to summarize or support the opinion(s);

(D) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(E) a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years; and

(F) a statement of the compensation to be paid to the witness for the study and testimony in the case.

The note of issue and certificate of readiness may not be filed until the completion of expert disclosure. Expert disclosure provided after these dates without good cause will be precluded from use at trial.

Rule 14. Disclosure Disputes. If the court's Part Rules address discovery disputes, those Part Rules will govern discovery disputes in a pending case. If the court's Part Rules are silent with respect to discovery disputes, the following Rule will apply. Discovery disputes are preferred to be resolved through court conference as opposed to motion practice. Counsel must consult with one another in a good faith effort to resolve all disputes about disclosure. See Section 202.7. If counsel are unable to resolve any disclosure dispute in this fashion, counsel for the moving party shall submit a letter to the court not exceeding three single-spaced pages outlining the nature of the dispute and requesting a telephone conference. Such a letter must include a representation that the party has conferred with opposing counsel in a good faith effort to resolve the issues raised in the letter or shall indicate good cause why no such consultation occurred. Not later than four business days after receiving such a letter, any affected opposing party or non-party shall submit a responsive letter not exceeding three single-spaced pages. After the submission of letters, the court will schedule a telephone or in-court conference with counsel. The court or the court's law clerks will attempt to address the matter through a telephone conference where possible. The failure of counsel to comply with this rule may result in a motion being held in abeyance until the court has an opportunity to conference the matter. If the parties need to make a record, they will still have the opportunity to submit a formal motion.

Rule 14-a. Rulings at Disclosure Conferences. The following procedures shall govern all disclosure conferences conducted by non-judicial personnel.

(a) At the request of any party

(1) prior to the conclusion of the conference, the parties shall prepare a writing setting forth the resolutions reached and submit the writing to the court for approval and signature by the presiding justice; or

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(2) prior to the conclusion of the conference, all resolutions shall be dictated into the record, and either the transcript shall be submitted to the court to be "so ordered," or the court shall otherwise enter an order incorporating the resolutions reached.

(b) With respect to telephone conferences, upon request of a party and if the court so directs, the parties shall agree upon and jointly submit to the court within one (1) business day of the telephone conference a stipulated proposed order, memorializing the resolution of their discovery dispute. If the parties are unable to agree upon an appropriate form of proposed order, they shall so advise the court so that the court can direct an alternative course of action.

Rule 15. Adjournments of Conferences. By leave of court as provided by Rule 1(d), attorneys are encouraged to use remote appearance technology in order to avoid adjournments of conferences. Adjournments on consent are permitted with the approval of the court for good cause where notice of the request is given to all parties. Adjournment of a conference will not change any subsequent date in the preliminary conference order, unless otherwise directed by the court.

Rule 16. Motions in General.

(a) Form of Motion Papers. The movant shall specify in the notice of motion, order to show cause, and in a concluding section of a memorandum of law, the exact relief sought. Counsel must attach copies of all pleadings and other documents as required by the CPLR and as necessary for an informed decision on the motion (especially on motions pursuant to CPLR 3211 and 3212). Counsel should clearly separate exhibits from each other by using divider pages with the exhibit number. Counsel shall follow Rule 6 with respect to hyperlinking. Copies must be legible. If a document to be annexed to an affidavit or affirmation is voluminous and only discrete portions are relevant to the motion, counsel shall attach excerpts and submit the full exhibit separately. Documents in a foreign language shall be properly translated. CPLR 2101(b). Whenever reliance is placed upon a decision or other authority not readily available to the court, the court may direct counsel to submit a copy and counsel shall otherwise follow Rule 6 with respect to hyperlinking.

(b) Proposed orders. When appropriate, proposed orders should be submitted with motions, *e.g.*, motions to be relieved, *pro hac vice* admissions, open commissions, etc. No proposed order should be submitted with motion papers on a dispositive motion.

(c) Adjournment of motions. Dispositive motions (made pursuant to CPLR 3211, 3212 or 3213) may be adjourned only with the court's consent. Non-dispositive motions may be adjourned on consent no more than three times for a total of no more than 60 days unless otherwise directed by the court.

Rule 17. Length of Papers. Unless otherwise permitted by the court: (i) briefs or memoranda of law shall be limited to 7,000 words each; (ii) reply memoranda shall be no more than 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief; (iii) affidavits and affirmations shall be limited to 7,000 words each. The word count shall exclude the caption, table of contents, table of authorities, and signature block. Every brief, memorandum, affirmation, and affidavit shall include, on a page attached to the end of the applicable document, a certification by the counsel who has filed the document describing the number of words in the document. That certification by counsel certifies that the document complies with the word count limit. The counsel certifying compliance may rely on the word count of the word-processing system used to prepare the document.

Rule 18. Sur-Reply and Post-Submission Papers. Absent express permission in advance, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted, except that counsel may inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues, but there shall be no additional argument. Materials submitted in violation hereof will not be read or considered. Opposing counsel who receives a copy of materials submitted in violation of this rule shall not respond in kind.

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Rule 19. Orders to Show Cause. Motions shall be brought on by order to show cause only when there is genuine urgency (e.g., applications for provisional relief), a stay is required or a statute mandates so proceeding. Absent advance permission, reply papers shall not be submitted on orders to show cause.

Rule 19-a. Motions for Summary Judgment; Statements of Material Facts.

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

(b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered statement responding to each numbered paragraph in the statement of the moving party, In the response to the material statement of facts, the respondent shall recite the movant's paragraphs and then provide a response to that paragraph so the Court has all the materials in one document. The movant shall, upon request, promptly provide the respondent with a copy of the material statement of facts in the same word processing software application in which the statement was prepared. The respondent may also include additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.

Editorial Note: This rule is amended through Court Notices, effective July 1, 2017.

Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued ex parte. The applicant must give notice, including copies of all supporting papers, to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

Rule 21. Courtesy Copies. Courtesy copies should not be submitted unless requested or as herein provided. However, courtesy copies of all motion papers and proposed orders shall be submitted in cases in the court's Filing by Electronic Means System.

Rule 22. Oral Argument. Any party may request oral argument on the face of its papers or in an accompanying letter. Except in cases before justices who require oral argument on all motions, the court will determine, on a case-by-case basis, whether oral argument will be heard and, if so, when counsel shall appear. Notice of the date selected by the court shall be given, if practicable, at least 14 days before the scheduled oral argument. At that time, counsel shall be prepared to argue the motion, discuss resolution of the issue(s) presented and/or schedule a trial or hearing.

Rule 23. [Reserved][Previous rule repealed in June 2020]

Rule 24. Advance Notice of Motions (a) Nothing in this rule shall be construed to prevent or limit counsel from making any motion deemed appropriate to best represent a party's interests. However, in order to permit the court the opportunity to resolve

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issues before motion practice ensues, and to control its calendar in the context of the discovery and trial schedule, pre-motion conferences in accordance herewith must be held. The failure of counsel to comply with this rule may result in the motion being held in abeyance until the court has an opportunity to conference the matter.

(b) This rule shall not apply to disclosure disputes covered by Rule 14 nor to dispositive motions pursuant to CPLR 3211, 3212 or 3213 made at the time of the filing of the request for judicial intervention or after discovery is complete. Nor shall the rule apply to motions to be relieved as counsel, for *pro hac vice* admission, for reargument or in limine.

(c) Prior to the making or filing of a motion, counsel for the moving party shall advise the court in writing (no more than two pages) on notice to opposing counsel outlining the issue(s) in dispute and requesting a telephone conference. If a cross-motion is contemplated, a similar motion notice letter shall be forwarded to the court and counsel. Such correspondence shall not be considered by the court in reaching its decision on the merits of the motion.

(d) Upon review of the motion notice letter, the court will schedule a telephone or in-court conference with counsel. Counsel fully familiar with the matter and with authority to bind their client must be available to participate in the conference. The unavailability of counsel for the scheduled conference, except for good cause shown, may result in granting of the application without opposition and/or the imposition of sanctions.

(e) If the matter can be resolved during the conference, an order consistent with such resolution may be issued or counsel will be directed to forward a letter confirming the resolution to be "so ordered." At the discretion of the court, the conference may be held on the record.

(f) If the matter cannot be resolved, the parties shall set a briefing schedule for the motion which shall be approved by the court. Except for good cause shown, the failure to comply with the briefing schedule may result in the submission of the motion unopposed or the dismissal of the motion, as may be appropriate.

(g) On the face of all notices of motion and orders to show cause, there shall be a statement that there has been compliance with this rule.

(h) Where a motion must be made within a certain time pursuant to the CPLR, the submission of a motion notice letter, as provided in subdivision (a), within the prescribed time shall be deemed the timely making of the motion. This subdivision shall not be construed to extend any jurisdictional limitations period.

Rule 25. Trial Schedule. Counsel are expected to be ready to proceed either to select a jury or to begin presentation of proof on the scheduled trial date. Once a trial date is set, counsel shall immediately determine the availability of witnesses. If, for any reason, counsel are not prepared to proceed on the scheduled date, the court is to be notified within ten days of the date on which counsel are given the trial date or, in extraordinary circumstances, as soon as reasonably practicable. Failure of counsel to provide such notification will be deemed a waiver of any application to adjourn the trial because of the unavailability of a witness. Witnesses are to be scheduled so that trials proceed without interruption. Trials shall commence each court day promptly at such times as the court directs. Failure of counsel to attend the trial at the time scheduled without good cause shall constitute a waiver of the right of that attorney and his or her client to participate in the trial for the period of counsel's absence. There shall be no adjournment of a trial except for good cause shown. With respect to trials scheduled more than 60 days in advance, section 125.1(g) of the Rules of the Chief Administrator shall apply and the actual engagement of trial counsel in another matter will not be recognized as an acceptable basis for an adjournment of the trial.

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Editorial Note: This rule is amended through Court Notices, effective July 1, 2017.

Rule 26. Length of Trial. At least ten days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial. If requested by the Court, the estimate shall also contain a request by each party for the total number of hours which each party believes will be necessary for its direct examination, cross examination, redirect examination, and argument during the trial. The court may rule on the total number of trial hours which the court will permit for each party. The court in its discretion may extend the total number of trial hours as justice may require.

Rule 27. Motions in Limine. The parties shall make all motions in limine no later than ten days prior to the scheduled pre-trial conference date, and the motions shall be returnable on the date of the pretrial conference, unless otherwise directed by the court. Opposition papers, if any, shall be served and filed no later than two days before the return date of the motion, unless otherwise directed by the court. Objections to the admissibility of specific exhibits or specific deposition testimony based on basic threshold issues such as lack of foundation or hearsay shall be made under Rule 28 and Rule 29, respectively. Motions in limine should be used to address broader issues concerning, for example, (1) the receipt or exclusion of evidence, testimony, or arguments of a particular kind or concerning a particular subject matter, (2) challenges to the competence of a particular witness, or (3) challenges to the qualifications of experts or to the receipt of expert testimony on a particular subject matter. Motions in limine should not be used as vehicles for summary judgment motions.

Rule 28. Pre-Marking of Exhibits. Counsel for the parties shall consult prior to the pre-trial conference and shall in good faith attempt to agree upon the exhibits that will be offered into evidence without objection and shall pre-mark all exhibits as to which no objection has been made for introduction into evidence. Counsel shall also mark all exhibits not consented to for identification only. Counsel asserting objections to the introduction of any proposed exhibit shall be prepared to state the objection with specificity at the pre-trial conference or such other time as the court directs. The pre-marked exhibits as to which there is no dispute shall be marked into evidence, unless the court directs otherwise. If the trial exhibits are voluminous or in a digital or other format that creates practical marking issues, counsel shall consult the clerk of the part for guidance. Exhibits not previously identified which are to be used solely for impeachment, credibility or rebuttal need not be pre-marked.

Rule 29. Identification of Deposition Testimony. Counsel for the parties shall consult prior to trial and shall in good faith attempt to agree upon the portions of deposition testimony to be offered into evidence without objection, and to resolve any objections regarding the use of any corresponding video recording of such deposition testimony. The parties shall delete from the testimony to be read questions and answers that are irrelevant to the point for which the deposition testimony is offered. Each party shall prepare a list of deposition testimony to be offered by it as to which objection has not been made and, identified separately, a list of deposition testimony as to which objection has been made to the introduction of the testimony or corresponding video recording of the deposition testimony. At least 10 days prior to trial, or such other time as the court may set, each party shall submit its list to the court and other counsel, together with a copy of the portions of the deposition testimony as to which no objection has been made and, if applicable, the corresponding video recording of the portions of deposition testimony as to which no objection has been made. This Rule does not apply to portions of deposition testimony and corresponding video recording to be used solely for impeachment or credibility purposes.

Rule 30. Settlement and Pretrial Conferences. (a) Settlement conference. At the time of certification of the matter as ready for trial or at any time after the discovery cut-off date, the court may schedule a settlement conference which shall be attended by counsel and the parties, who are expected to be fully prepared to discuss the settlement of the matter.

(b) Mandatory Settlement Conference. Unless exempted as set forth herein, the parties in every case pending in the Commercial Division must participate in a court-ordered mandatory settlement conference (MSC) following the filing of a Note of Issue.

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(1) Referral to MSC. Following the filing of a Note of Issue, the parties must confer and file a request to proceed to a MSC pursuant to one of the following four tracks. If all parties have agreed upon the settlement conference track that they prefer, they may file a joint request with a statement of preferred procedure for MSC. If the parties do not agree, they must file separate requests with statements as to their preference for a MSC track. The court will select the settlement conference track after considering the parties' preferences, the available judicial and other resources, and any other factors the court deems appropriate. The four possible settlement conference tracks are as follows:

(A) The parties may agree to have a settlement conference before the assigned justice or another judge pursuant to Commercial Division Rule 3(b).

(B) The court may refer the case to the Judicial Hearing Officer/Special Referee office for assignment of a Judicial Hearing Officer or Special Referee to conduct the MSC.

(C) The court may refer the case to the ADR coordinator or other designated court official in the judicial district where the case is pending for assignment, at no charge to the parties, of a neutral selected from the roster of neutrals or mediators under Part 146 of the Rules of the Chief Administrative Judge. If the parties wish to continue talks with the neutral beyond the initial conference, an arrangement will have to be made to retain such neutral at terms agreed to by the neutral and the parties.

(D) The parties may agree to engage a private neutral.

(2) Attendance at MSC. The MSC shall be attended by a person with knowledge of the case and authority to settle the case.

(3) Submissions to the neutral conducting the MSC. The neutral shall determine whether a submission should be provided to the neutral and the service thereof.

(4) Exemptions from MSC. MSC is mandatory for all cases in the Commercial Division unless the assigned justice to the case, for good cause shown, exempts the case from MSC under this Rule.

(5) Confidentiality. All attendees of the MSC, including the assigned neutral, shall treat as confidential information any settlement submission created expressly for use in the MSC, anything that happened or was said during the course of or pursuant to the MSC, and any positions taken or offers made during the MSC. Such material cannot be disclosed to anyone not involved in the litigation or to the court, and may not be used in any fashion in the litigation of the case.

(6) Report. Following the MSC, the parties will advise the assigned justice whether a settlement was reached, and if a settlement was reached, a date by which the parties expect to complete documentation of the settlement. The parties shall not discuss any reasons why a settlement was not reached.

(7) Scheduling and Procedures. Any scheduling and procedural issues shall be determined by the justice assigned to the case. If it is determined that the MSC is to be held before a neutral other than the assigned justice, scheduling and procedural issues with respect to the MSC shall be determined by the neutral.

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(8) Non-exclusive. Nothing in the Rule shall preclude or replace any settlement practices used by the court, by any individual justice, or as agreed to by the parties and the assigned justice shall retain ultimate authority with respect to each aspect of the MSC.

(c) Pre-trial Conference. Prior to the pretrial conference, counsel shall confer in a good faith effort to identify matters not in contention, resolve disputed questions without need for court intervention and further discuss settlement of the case. At the pre-trial conference, counsel shall be prepared to discuss all matters as to which there is disagreement between the parties, including those identified in Rules 27-29, and settlement of the matter. At or before the pre-trial conference, the court may require the parties to prepare a written stipulation of undisputed facts.

(d) Consultation Regarding Expert Testimony. The court may direct that prior to the pre-trial conference, counsel for the parties consult in good faith to identify those aspects of their respective experts' anticipated testimony that are not in dispute. The court may further direct that any agreements reached in this regard shall be reduced to a written stipulation.

Rule 31. Pre-Trial Memoranda, Trial Exhibits and Requests for Jury Instructions

(a) If requested by the Court, counsel shall submit pre-trial memoranda at such time as the court may set. Counsel shall comply with CPLR 2103(e). A single memorandum of no more than 7,000 words shall be submitted by each side. No memoranda in response shall be submitted.

(b) At the pre-trial conference or at such other time as the court may set, counsel shall submit a copy of trial exhibits for each attorney's and the court's use. Unless otherwise directed in the Court's individual part rules, plaintiff's exhibits shall be tabbed numerically, and defendant's exhibits shall be tabbed alphabetically.

(c) Where the trial is by jury, counsel shall, on the pre-trial conference date or such other time as the court may set, provide the court with case-specific requests to charge and proposed jury interrogatories. Where the requested charge is from the New York Pattern Jury Instructions--Civil, a reference to the PJI number will suffice.

(d) In cases brought before paperless commercial parts, counsel shall submit the pre-trial memoranda, copy of trial exhibits and requests to charge on a USB flash drive. In all other commercial parts, counsel shall submit the pre-trial memoranda and requests to charge in a Word document, 12-point type, and submit the copy of trial exhibits in an indexed binder or notebook.

Rule 32. Scheduling of witnesses. At the pre-trial conference or at such time as the court may direct, each party shall identify in writing for the court the witnesses it intends to call, the order in which they shall testify, the estimated length of their testimony and whether the witness will testify in person or through the use of video technology, and shall provide a copy of such witness list to opposing counsel. Counsel shall separately identify for the court only (and not to be exchanged with other counsel) a list of the witnesses who may be called solely for rebuttal or with regard to credibility.

Rule 32-a. Direct Testimony by Affidavit. The court may require that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing shall be submitted in affidavit form, provided, however, that the court may not require the submission of a direct testimony affidavit from a witness who is not under the control of the party offering the testimony. The submission of direct testimony in affidavit form shall not affect any right to conduct cross-examination or re-direct examination of the witness.

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Rule 33. Preclusion. Failure to comply with Rules 28, 29, 31 and 32 may result in preclusion pursuant to CPLR 3126.

Rule 34. Staggered Court Appearances. Staggered court appearances are a mechanism to increase efficiency in the courts and to decrease lawyers' time waiting for a matter to be called by the courts. While this rule is intended to streamline the litigation process in the Commercial Division, it will be ineffectual without the cooperation and participation of litigants. Improving the process of litigating in the Commercial Division by instituting staggered court appearances of matters before the court, for example, requires not only the promulgation of rules such as this one, but also, and more importantly, the proactive and earnest adherence to such rules by parties and their counsel.

(a) Each court appearance before a Commercial Division Justice for oral argument on a motion shall be assigned a time slot. The length of the time slot allotted to each matter is solely in the discretion of the court.

(b) In order for the court to be able to address any and all matters of concern to the court and in order for the court to avoid the appearance of holding ex parte communications with one or more parties in the case, even those parties who believe that they are not directly involved in the matter before the court must appear at the appointed date and time assigned by the court unless specifically excused by the court. However, if an individual is appearing as a self-represented person, that individual must appear at each and every scheduled court appearance regardless of whether he or she anticipates being heard.

(c) Since the court is setting aside a specific time slot for the case to be heard and since there are occasions when the court's electronic or other notification system fails or occasions when a party fails to receive the court-generated notification, each attorney who receives notification of an appearance on a specific date and time is responsible for notifying all other parties by e-mail that the matter is scheduled to be heard on that assigned date and time. All parties are directed to exchange e-mail addresses with each other at the commencement of the case and to keep these e-mail addresses current, in order to facilitate notification by the person(s) receiving the court notification.

(d) Requests for adjournments or to appear telephonically must be e-filed and received in writing by the court by no later than 48 hours before the hearing.

Rule 35. Disclosure Statement.

(A) Who Must File: Contents. A non-governmental corporate party and a non-governmental corporation that seeks to intervene must file a disclosure statement that:

(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(2) states that there is no such corporation.

(B) Time to File: Supplemental Filing. A party or a proposed intervenor must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

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(2) promptly file a supplemental statement if any required information changes.

Rule 36. Virtual Evidentiary Hearing or Non-jury Trial.

(a) If the requirements of paragraph (c) of this Rule are met, the court may, with the consent of the parties, conduct an evidentiary hearing or a non-jury trial utilizing video technology.

(b) If the requirements of paragraph (c) of this Rule are met, the court may, with the consent of the parties, permit a witness or party to participate in an evidentiary hearing or a non-jury trial utilizing video technology.

(c) The video technology used must enable:

i. a party and the party's counsel to communicate confidentially:

ii. documents, photos, and other things that are delivered to the court to be delivered to the remote participants:

iii. interpretation for a person of limited English proficiency:

iv. a verbatim record of the trial: and

v. public access to remote proceedings.

(d) This Rule does not address the issue of when all parties do not consent.

Rule 37. Remote Depositions.

(a) The court may, upon the consent of the parties or upon a motion showing good cause, order oral depositions by remote electronic means, subject to the limitations of this Rule.

(b) Considerations upon such a motion, and in support of a showing of good cause, shall include but not be limited to:

(1) The distance between the parties and the witness, including time and costs of travel by counsel and litigants and the witness to the proposed location for the deposition; and

(2) The safety of the parties and the witness, including whether counsel and litigants and the witness may safely convene in one location for the deposition; and

(3) Whether the witness is a party to the litigation; and

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(4) The likely importance or significance of the testimony of the witness to the claims and defenses at issue in the litigation.

For the avoidance of doubt, the safety of the parties and the witness shall take priority over all other criteria.

(c) Remote depositions shall replicate, insofar as practical, in-person depositions and parties should endeavor to eliminate any potential for prejudice that may arise as a result of the remote format of the deposition. To that end, parties are encouraged to utilize the form protocol for remote deposition, which is reproduced as Appendix G to these rules, as a basis for reaching the parties' agreed protocol.

(d) No party shall challenge the validity of any oath or affirmation administered during a remote deposition on the grounds that

(1) the court reporter or officer is or might not be a notary public in the state where the witness is located; or.

(2) the court reporter or officer might not be physically present with the witness during the examination.

(e) Witnesses and defending attorneys shall have the right to review exhibits at the deposition independently to the same degree as if they were given paper copies.

(f) No waiver shall be inferred as to any testimony if the defending attorney was prohibited by technical problems from interposing a timely objection or instruction not to answer.

(g) Nothing in this rule is intended to: (i) address whether a remote witness is deemed “unavailable.” within the meaning of CPLR 3117 and its interpretive case law, for the purposes of utilizing that witness' deposition at trial: or (ii) alter the Court's authority to compel testimony of non-party witnesses in accordance with New York law.

APPENDIX A

Commercial Division

Guidelines for Discovery of

Electronically Stored Information (“ESI”)

The purpose of these Guidelines for Discovery of ESI (the “Guidelines”) is to:

• Provide efficient discovery of ESI (a.k.a., e-discovery) in civil cases;

• Assist counsel in identifying ESI issues to be considered and addressed with its client;

• Encourage the early assessment and discussion of the costs of preserving, retrieving, reviewing and producing ESI given the nature of the litigation and the amount in controversy;

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• Facilitate an early evaluation of the significance of and/or need for ESI in light of the parties' claims or defenses;

• Assist parties in resolving disputes regarding ESI informally and without Court supervision or intervention whenever possible;

• Encourage meaningful discussions and cooperation between parties; and

• Ensure a productive Preliminary Conference by, among other things, identifying terms and issues that will be addressed at the Preliminary Conference and/or in the Preliminary Conference Stipulation and Order.

The Guidelines are advisory only and intended to facilitate compliance with the CPLR, the Uniform Civil Rules for the Supreme Court, and the Rules of the Commercial Division of the Supreme Court. In the case of any conflict between the Guidelines and these rules, the relevant rules should control.

The Guidelines apply to discovery from parties and nonparties alike, and the term “parties”, as used in these Guidelines, should be read to include nonparties to the extent applicable.

Parties are encouraged to review the Guidelines at or before the commencement of proceedings.

I. CONDUCT OF THE E-DISCOVERY PROCESS

A. Parties are encouraged to share information relating to the e-discovery process, and to attempt in good faith to resolve disputes about ESI through the informal meet and confer process where possible, rather than through formal discovery or motion practice. Such informal discussions are strongly encouraged at the earliest reasonable stage of the discovery process. An attorney's advocacy for a client is not compromised by conducting discovery in a cooperative manner, which tends to reduce litigation costs and delay, and facilitate the cost-effective, predictable and fair adjudication of cases.

B. Parties should tailor requests for ESI to what is reasonable and proportionate, considering the burdens of the requested discovery, the nature of the dispute, the amount in controversy, and the importance of the materials requested to resolving those issues. Parties should not use discovery of ESI for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

C. Consistent with New York Rule of Professional Conduct 1.1, counsel should be familiar with the legal and technical aspects of e-discovery in the matter so that it may appropriately advise its client how to conduct discovery in an efficient and legally defensible manner. This should include legal knowledge and skill with respect to the rules and case law related to e-discovery; its client's storage, organization, and format of ESI; and relevant information retrieval technology. Where appropriate *(e.g.*, in cases where there will likely be significant ESI discovery), and in order to assist with competent representation with respect to ESI issues, the parties should consider each designating an ESI Liaison, a person with particular knowledge and expertise about the parties' electronic systems and the e-discovery process, who can be prepared to participate in informal resolution of ESI disputes between the parties and presentation of issues to the Court should the need arise.

II. PRELIMINARY CONFERENCE

A. Consistent with Rule 11-c(b), the parties should confer with the client with regard to anticipated electronic discovery issues prior to the Rule 7 Preliminary Conference. The Parties should consider a written stipulation for the preservation, collection, review and production of ESI, and consider submitting that agreement to the court to be ordered. A number of such ESI

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stipulations have been entered in the Commercial Division and there are published models available from other courts (*e.g.*, federal courts in the Northern District of California, the District of Maryland, and the Eastern District of Michigan), which may be consulted. Issues that cannot be resolved between the parties should be presented to the Court for resolution prior to or at the Preliminary Conference.

B. Matters related to ESI that should be discussed prior to the Preliminary Conference should generally include:

1. the extent to which e-discovery is likely to be necessary for the just and efficient resolution of the dispute;

2. the appropriate scope of preservation, including any sources of ESI that do not need to be preserved because they are not reasonably accessible;

3. any potential conflicts between a party's discovery obligations and state, federal, and foreign laws governing the use and disclosure of protected personal, health, financial, trade secret and other information;

4. the identification of custodians, time frame, and sources of ESI to be searched, including the identification of ESI sources that are not reasonably accessible;

5. the method for searching and reviewing ESI, including the use of search terms, the exclusion of certain types of documents and other non-discoverable information from discovery, the use of de-duplication and email thread suppression, and the use of technology assisted review ("TAR").

6. the appropriate format for production of ESI;

7. identification, redaction, labeling, and logging of privileged and other ESI protected from discovery or disclosure, including agreement on the clawback of inadvertently produced materials;

8. the anticipated cost and burden of ESI discovery and whether cost-sharing or cost-shifting is appropriate;

9. opportunities to reduce costs and increase efficiency and speed of e-discovery, such as through the phasing of discovery so as to prioritize searches that are most likely to be relevant, the use of sampling to test the likely relevance of searches, alternative methods for logging privilege information, and/or sharing expenses like those related to litigation document repositories.

III. **PRESERVATION AND COLLECTION OF ESI**

A. Counsel should take an active role in assisting its client in the preservation and collection of ESI. This should include becoming knowledgeable about relevant ESI in its client's possession, custody, or control, and how such information is generated, maintained, retained, and disposed. Counsel should assist its client in all stages of the preservation and collection process, including the implementation of an effective legal hold, reasonable monitoring of compliance with that legal hold, identification of sources of relevant ESI, and defensible collection of that ESI.

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B. Counsel should be knowledgeable of the sources where a client's discoverable ESI may exist, including workstations, email systems, instant messaging systems, document management systems (e.g., Google Drive, Sharepoint, Confluence), collaboration tools (e.g., Microsoft Teams, Slack), social media, mobile devices and apps, cloud-based storage, back-up systems, and structured databases, so that it may advise its client as to whether such sources need to be collected and searched. Where counsel is not itself knowledgeable with respect to such sources, it should consult with persons with appropriate subject-matter expertise, knowledge, and competence.

C. A party should take reasonable steps to identify and to preserve relevant data in its possession, custody, or control once litigation is pending or is reasonably anticipated. Factors to consider in formulating such steps should include, but are not limited to:

1. the claims, defenses, and relevant facts in dispute;

2. relevant time frames, geographic locations, and individuals;

3. the types of ESI that may be relevant to the claims and defenses and the current repositories and custodians of that data;

4. whether legacy, archived, or offline ESI sources are reasonably likely to contain relevant, non-duplicative information;

5. whether there are third-party sources that have relevant information that falls within the preservation obligation and, if so, what actions should be taken to preserve that ESI;

6. whether any automatic or routine document retention or destruction policies should be suspended or modified; and

7. the circumstances and information known or reasonably available to counsel and the parties at the time the preservation efforts at issue are or were undertaken.

D. Reasonable preservation steps should include a written litigation hold(s) to be distributed to relevant individuals as soon as litigation is reasonably anticipated and/or has commenced. Reasonable preservation may also require affirmative action in order to ensure relevant ESI is not lost through the operation of processes that may automatically delete ESI. Parties should also consider the preservation risks associated with the use of “ephemeral” messaging systems (*e.g.*, Snapchat, Telegram) that facilitate the disappearance of messages after they have been read by a recipient.

E. The parties should discuss preservation, including the implementation of litigation holds, in order to ensure that the scope of preservation is reasonably tailored and not unduly burdensome. Such a discussion should occur at the onset of the case and periodically throughout the case as issues evolve. Preservation letters are not required to notify an opposing party of its preservation obligation. If a party does send a preservation letter, the letter should not be overbroad but rather should provide reasonable detail to allow informed decisions about the scope of the preservation obligation, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the party knows or believes are likely to contain relevant information, and any other information that might assist the responding party in determining what information

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to preserve. A party has a duty to preserve relevant ESI, consistent with its common law, statutory, regulatory, or other duties, regardless of a preservation letter from an opposing party.

F. For some sources of ESI, the burden of preserving them outweighs the potential benefit of unique, relevant ESI they may contain. The parties should discuss whether such sources need to be preserved beyond what may be preserved pursuant to normal business retention practices.

IV. **ESI NOT REASONABLY ACCESSIBLE**

A. As the term is used herein, ESI should not be deemed "not reasonably accessible" 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. Whether data are not reasonably accessible due to undue burden or cost will depend on the facts of the case.

B. No party should object to the discovery of ESI on the basis that it is not reasonably accessible unless the objection has been stated with particularity, and not in conclusory or boilerplate language. The party asserting that ESI is not reasonably accessible should be prepared to specify facts that support its contention, including submitting an appropriate and detailed analysis in the form of an affidavit.

C. If the requesting party intends to seek discovery of ESI from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, and consider conditions on obtaining this information, such as limits as to the scope, and allocation of costs between the requesting party and the producing party, as set forth in Rule 11-c(d) and in accordance with Section VIII of the Guidelines.

V. **SEARCHING, FILTERING AND REVIEWING ESI**

A. Ordinarily, the producing party is best situated to evaluate the procedures, methodologies, and technologies for producing their own ESI, though a producing party should engage in a good faith exchange of information about its process and attempt to resolve any disputes regarding the process to be employed.

B. Counsel should take an active role in assisting its client in the search and review of ESI. Counsel should assist its client in all stages of the search and review process, including, as appropriate, use of search terms and other methods for filtering ESI, review of ESI to determine what is responsive and/or privileged, and the production of responsive ESI.

C. A search methodology need not be perfect but it should be reasonable under the circumstances. A reasonable methodology may include steps to reduce the volume of data by removing ESI that is duplicative, cumulative, or not reasonably likely to contain information within the scope of discovery.

D. The parties should exchange reasonable information about a party's process for searching and reviewing ESI, including search terms to be used, filtering out of certain file types, date filters, de-duplication, email thread suppression, and the use of technology assisted review (TAR) to aid in the review process.

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E. Consistent with Rule 11-c(f), the parties are encouraged to use efficient means to identify ESI for production. The parties should tailor searches of ESI to (a) apply to custodians whose ESI may reasonably be expected to contain evidence that is material to the dispute and (b) employ search terms and other search methodologies (*e.g.*, TAR) reasonably designed to identify evidence that is material to the dispute. So that use of TAR is not unjustifiably discouraged, its use should not be held to a higher standard than the use of search term keywords or manual review. Counsel employing TAR should ensure that it is sufficiently knowledgeable regarding its use and/or associate with persons with appropriate subject-matter expertise, knowledge, and competence.

VI. **FORM OF PRODUCTION OF ESI**

A. As set forth in Rule 11-c(c), a party requesting ESI may specify the format in which ESI shall be produced. The party responding to that request may object to the requested format to the extent it is burdensome or for any other valid reason, and if it does so, it should specify with particularity the format in which it proposes to produce ESI, about which the parties should meet and confer, consistent with Rule 11-c(c). The parties are encouraged to reach agreement on a format for the production of ESI to avoid unnecessary expense and the risk of costly re-productions.

B. Agreement on the form of production of ESI should address, among other issues, the following:

1. whether documents should be produced as images (e.g., TIFF, JPG) or as native files;

2. how searchable text associated with documents should be provided;

3. what metadata fields should be provided;

4. how documents should be labeled (e.g., by bates number) and how confidentiality designations and privilege redactions should be applied;

5. production formats for non-document forms of ESI, such as multimedia, text messages, instant messages, social media, and structured databases.

C. Ordinarily, absent agreement or court order to the contrary, a party should be permitted to produce ESI in the form in which it is ordinarily maintained, i.e., its native format. Where the native format would be unusable to the requesting party, the parties should meet and confer on a reasonable format.

D. The producing party should not reformat, scrub or alter the ESI to intentionally downgrade the usability of the data.

VII. **PRIVILEGE AND OTHER PROTECTIONS FROM DISCOVERY**

A. Parties should take reasonable steps to safeguard ESI subject to the attorney client privilege or other protections from disclosure. That said, pursuant to Rule 11-c(g), the inadvertent or unintentional production of ESI containing protected

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information should not be deemed a waiver if reasonable precautions were taken to prevent disclosure and prompt notice is given of the inadvertent disclosure. The use of search terms or other technology processes rather than wholesale manual review may be considered reasonable precautions to identify privileged material provided that they were appropriately employed.

B. The parties may extend or modify the protections and duties of Rule 11-c(g) by written agreement.

C. Counsel are reminded of their obligations under Rule 4.4(b) of the New York Rules of Professional Conduct concerning their receipt of documents that appear to have been inadvertently sent to them.

D. Parties should be aware of and give due regard to state, federal, and foreign laws governing the use and disclosure of protected personal, health, financial, trade secret and other information, consistent with their New York discovery obligations.

VIII. **COSTS**

A. As a general matter, the producing party should bear the cost of searching for, retrieving, and producing ESI. However, where the court determines the request constitutes an undue burden or expense on the responding party, the court may exercise its broad discretion to permit the shifting of costs between the parties. When evaluating whether costs should be shifted, courts should consider:

1. the extent to which the request is specifically tailored to discover relevant information;

2. the availability of such information from other sources;

3. the total cost of production, compared to the amount in controversy;

4. the total cost of production, compared to the resources available to each party;

5. the relative ability of each party to control costs and its incentive to do so;

6. the importance of the issues at stake in the litigation; and

7. the relative benefits to the parties of obtaining the information.

B. Where a party seeks production of ESI from a non-party, the party seeking discovery shall promptly defray the reasonable expenses associated with the non-party's production of ESI, in accordance with Rules 3111 and 3122(d) of the CPLR. Such reasonable production expenses may include the following:

1. Reasonable fees charged by outside counsel and e-discovery consultants;

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2. The reasonable costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production;

3. The reasonable cost of disruption to the nonparty's normal business operations to the extent such cost is quantifiable and warranted by the facts and circumstances; and

4. Other costs as may be reasonably identified by the nonparty.

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,	Index No. _____
Plaintiff,	**STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION**
- against -	
_____,	
Defendant.	

This matter having come before the Court by stipulation of plaintiff, _____, and defendant, _____, (individually "Party" and collectively "Parties") for the entry of a protective order pursuant to CPLR 3103(a), limiting the review, copying, dissemination and filing of confidential and/or proprietary documents and information to be produced by either party and their respective counsel or by any non-party in the course of discovery in this matter to the extent set forth below; and the parties, by, between and among their respective counsel, having stipulated and agreed to the terms set forth herein, and good cause having been shown;

IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery of documents and information that the Parties and, as appropriate, non-parties, agree merit confidential treatment (hereinafter the "Documents" or "Testimony").

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2. Any Party or, as appropriate, non-party, may designate Documents produced, or Testimony given, in connection with this action as "confidential," either by notation on each page of the Document so designated, statement on the record of the deposition, or written advice to the respective undersigned counsel for the Parties hereto, or by other appropriate means.

3. As used herein:

(a) "Confidential Information" shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information or other information the disclosure of which would, in the good faith judgment of the Party or, as appropriate, non-party designating the material as confidential, be detrimental to the conduct of that Party's or non-party's business or the business of any of that Party's or non-party's customers or clients.

(b) "Producing Party" shall mean the parties to this action and any non-parties producing "Confidential Information" in connection with depositions, document production or otherwise, or the Party or non-party asserting the confidentiality privilege, as the case may be.

(c) "Receiving Party" shall mean the Parties to this action and/or any non-party receiving "Confidential Information" in connection with depositions, document production, subpoenas or otherwise.

4. The Receiving Party may, at any time, notify the Producing Party that the Receiving Party does not concur in the designation of a document or other material as Confidential Information. If the Producing Party does not agree to declassify such document or material within seven (7) days of the written request, the Receiving Party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall continue to be treated as Confidential Information. If such motion is filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise. Notwithstanding anything herein to the contrary, the Producing Party bears the burden of establishing the propriety of its designation of documents or information as Confidential Information.

5. Except with the prior written consent of the Producing Party or by Order of the Court, Confidential Information shall not be furnished, shown or disclosed to any person or entity except to:

(a) personnel of the Parties actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;

(b) counsel for the Parties to this action and their associated attorneys, paralegals and other professional and non-professional personnel (including support staff and outside copying services) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

(c) expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;

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(d) the Court and court personnel;

(e) an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;

(f) trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 9 and 10, respectively, hereof; and

(g) any other person agreed to by the Producing Party.

6. Confidential Information shall be utilized by the Receiving Party and its counsel only for purposes of this litigation and for no other purposes.

7. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(c) hereof, counsel for the Receiving Party making such disclosure shall provide to the expert witness or consultant a copy of this Stipulation and obtain the expert's or consultant's written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Receiving Party obtaining the certificate shall supply a copy to counsel for the other Parties at the time designated for expert disclosure, except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied.

8. All depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the Parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

9. Should the need arise for any Party or, as appropriate, non-party, to disclose Confidential Information during any hearing or trial before the Court, including through argument or the presentation of evidence, such Party or, as appropriate, non-party may do so only after taking such steps as the Court, upon motion of the Producing Party, shall deem necessary to preserve the confidentiality of such Confidential Information.

10. This Stipulation shall not preclude counsel for any Party from using during any deposition in this action any Documents or Testimony which has been designated as “Confidential Information” under the terms hereof. Any deposition witness who is given access to Confidential Information shall, prior thereto, be provided with a copy of this Stipulation and shall execute a written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Party obtaining the certificate shall supply a copy to counsel for the other Parties and, as appropriate, a non-party that is a Producing Party. In the event that, upon being presented with a copy of the Stipulation, a witness refuses to execute the agreement to be bound by this Stipulation, the Court shall, upon application, enter an order directing the witness's compliance with the Stipulation.

11. A Party may designate as Confidential Information subject to this Stipulation any document, information, or deposition testimony produced or given by any non-party to this case, or any portion thereof. In the case of Documents, produced by a non-party, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated

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as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the Party asserting the confidentiality privilege. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the Party (or, as appropriate, non-party) asserting the confidentiality. Prior to the expiration of such fifteen (15) day period (or until a designation is made by counsel, if such a designation is made in a shorter period of time), all such Documents and Testimony shall be treated as Confidential Information.

In Counties WITH Electronic Filing

12.

(a) A Party or, as appropriate, non-party, who seeks to file with the Court (i) any deposition transcripts, exhibits, answers to interrogatories, or other documents which have previously been designated as comprising or containing Confidential Information, or (ii) any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information shall file the document, pleading, brief, or memorandum on the NYSCEF system in redacted form until the Court renders a decision on any motion to seal (the "Redacted Filing"). If the Producing Party fails to move to seal within seven (7) days of the Redacted Filing, the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(b) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information produced by a Producing Party that is a non-party, the filing Party shall so notify that Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant Producing Party's Confidential Information unredacted.

(c) If the Producing Party makes a timely motion to seal, and the motion is granted, the filing Party (or, as appropriate, non-party) shall ensure that all documents (or, if directed by the court, portions of documents) that are the subject of the order to seal are filed in accordance with the procedures that govern the filing of sealed documents on the NYSCEF system. If the Producing Party's timely motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) Any Party filing a Redacted Filing in accordance with the procedure set forth in this paragraph 12 shall, contemporaneously with or prior to making the Redacted Filing, provide the other Parties and the Court with a complete and unredacted version of the filing.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any materials which have previously been designated by a party as comprising or containing Confidential Information shall identify such documents by the production number ascribed to them at the time of production.

In Counties WITHOUT Electronic Filing

13.(a) A Party or, as appropriate, non-party, who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information, or any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information, shall (i) serve upon the other Parties (and, as appropriate, non-parties) a Redacted Filing and a complete and unredacted version of the

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filing; (ii) file a Redacted Filing with the court; and (iii) transmit the Redacted Filing and a complete unredacted version of the filing to chambers. Within three (3) days thereafter, the Producing Party may file a motion to seal such Confidential Information.

(b) If the Producing Party does not file a motion to seal within the aforementioned three (3) day period, the Party (or, as appropriate. non-party) that seeks to file the Confidential Information shall take steps to file an unredacted version of the material.

(c) In the event the motion to seal is granted, all (or, if directed by the court, portions of) deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated by a Party (or, as appropriate, non-party) as comprising or containing Confidential Information, and any pleading, brief or memorandum which reproduces, paraphrases or discloses such material, shall be filed in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words "CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" as well as an indication of the nature of the contents and a statement in substantially the following form:

"This envelope, containing documents which are filed in this case by (name of Party or as appropriate, non-party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of the parties. Violation hereof may be regarded as contempt of the Court."

In the event the motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information produced by a Producing Party that is non-party, the Party (or, as appropriate, non-party) making the filing shall so notify the Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant non-party's Confidential Information unredacted.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any documents which have previously been designated by a party as comprising or containing Confidential Information shall identify such documents by the production number ascribed to them at the time of production.

14. Any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof and shall use reasonable measures to store and maintain the Confidential Information so as to prevent unauthorized disclosure.

15. Any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its "confidential" nature as provided in paragraphs 2 and/or 11 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving Party identifying the document or information as "confidential" within a reasonable time following the discovery that the document or information has been produced without such designation.

16. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions of this Stipulation.

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17. The production or disclosure of Confidential Information shall in no way constitute a waiver of each Producing Party's right to object to the production or disclosure of other information in this action or in any other action. Nothing in this Stipulation shall operate as an admission by any Party or non-party that any particular document or information is, or is not, confidential. Failure to challenge a Confidential Information designation shall not preclude a subsequent challenge thereto.

18. In connection with their review of electronically stored information and hard copy documents for production (the "Documents Reviewed") the Parties agree as follows:

(a) to implement and adhere to reasonable procedures to ensure Documents Reviewed that are protected from disclosure pursuant to CPLR 3101(c), 3101(d)(2) and 4503 ("Protected Information") are identified and withheld from production.

(b) if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.

(c) upon request by the Producing Party for the return of Protected Information inadvertently produced the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.

19. This Stipulation is entered into without prejudice to the right of any Party or non-party to seek relief from, or modification of, this Stipulation or any provisions thereof by properly noticed motion to the Court or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

20. This Stipulation shall continue to be binding after the conclusion of this litigation except that there shall be no restriction on documents that are used as exhibits in Court unless such exhibits were filed under seal); and (b) that a Receiving Party may seek the written permission of the Producing Party or further order of the Court with respect to dissolution or modification of the Stipulation. The provisions of this Stipulation shall, absent prior written consent of the parties, continue to be binding after the conclusion of this action.

21. Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

22. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof shall be returned to the Producing Party or, at the Receiving Party's option, shall be destroyed. In the event that any Receiving Party chooses to destroy physical objects and documents, such Party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the Parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable rules of professional conduct. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any Receiving Party,

or of experts specially retained for this case, to represent any individual, corporation or other entity adverse to any Party or non-party or their affiliate(s) in connection with any other matter.

23. If a Receiving Party is called upon to produce Confidential Information in order to comply with a court order, subpoena, or other direction by a court, administrative agency, or legislative body, the Receiving Party from which the Confidential Information is sought shall (a) give written notice by overnight mail and either email or facsimile to the counsel for the Producing Party within five (5) business days of receipt of such order, subpoena, or direction, and (b) give the Producing Party five (5) business days to object to the production of such Confidential Information, if the Producing Party so desires. Notwithstanding the foregoing, nothing in this paragraph shall be construed as requiring any party to this Stipulation to subject itself to any penalties for noncompliance with any court order, subpoena, or other direction by a court, administrative agency, or legislative body.

24. This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a Party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

25. This Stipulation may be signed in counterparts, which, when fully executed, shall constitute a single original, and electronic signatures shall be deemed original signatures.

[FIRM]	[FIRM]
By: _____	By: _____
_____	
New York, New York	New York, New York
Tel: _____	Tel: _____
Attorneys for Plaintiff	*Attorneys for Defendant*

Dated: _____

SO ORDERED

_____

J.S.C.

EXHIBIT “A”

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

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_____,	Index No. _____
Plaintiff,	**AGREEMENT WITH RESPECT TO CONFIDENTIAL MATERIAL**
- against -	
_____,	
Defendant.	

I, _____, state that:

1. My address is _____.

2. My present occupation or job description is _____.

3. I have received a copy of the Stipulation for the Production and Exchange of Confidential Information (the "**Stipulation**") entered in the above-entitled action on

_____

4. I have carefully read and understand the provisions of the Stipulation.

5. I will comply with all of the provisions of the Stipulation.

6. I will hold in confidence, will not disclose to anyone not qualified under the Stipulation, and will use only for purposes of this action, any Confidential Information that is disclosed to me.

7. I will return all Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information.

8. I hereby submit to the jurisdiction of this court for the purpose of enforcement of the Stipulation in this action.

Dated: _____ _____

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APPENDIX C. COMMERCIAL DIVISION SAMPLE CHOICE OF FORUM CLAUSES

Purpose

The purpose of these sample forum-selection provisions is to offer contracting parties streamlined, convenient tools in expressing their consent to confer jurisdiction on the Commercial Division or to proceed in the federal courts in New York State.

These sample provisions are not intended to modify governing case law or to replace any parts of the Rules of the Commercial Division of the Supreme Court (the "Commercial Division Rules"), the Uniform Civil Rules for the Supreme Court (the "Uniform Civil Rules"), the New York Civil Practice Law and Rules (the "CPLR"), the Federal Rules of Civil Procedure, or any other applicable rules or regulations pertaining to the New York State Unified Court System or the federal courts in New York. These sample provisions should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, the Federal Rules of Civil Procedure, and any other applicable rules and regulations. Parties which use these sample provisions must satisfy all jurisdictional, procedural, and other requirements of the courts specified in the provisions.

The Sample Forum Selection Provision

To express their consent to the exclusive jurisdiction of the Commercial Division, parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSY ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCEMENT OR TERMINATION THEREOF."

Alternatively, in the event that parties wish to express their consent to the exclusive jurisdiction of either the Commercial Division or the federal courts in New York State, the parties may include specific language in their contract, such as: "THE PARTIES AGREE TO SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE COMMERCIAL DIVISION, NEW YORK STATE SUPREME COURT, OR THE FEDERAL COURTS IN NEW YORK STATE, WHICH SHALL HEAR ANY DISPUTE, CLAIM OR CONTROVERSEY[1] ARISING IN CONNECTION WITH OR RELATING TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO THE VALIDITY, BREACH, ENFORCMENT[1] OR TERMINATION THEREOF."

APPENDIX D. COMMERCIAL DIVISION SAMPLE CHOICE OF LAW PROVISION

Purpose

The purpose of this sample choice of law provision is to offer contracting parties a streamlined, convenient tool in expressing their consent to having New York law apply to their contract, or any dispute under the contract.

This sample provision is not intended to modify governing case law or to replace any parts of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, or any other applicable rules or regulations. This sample provision should be construed in a manner that is consistent with governing case law and applicable sections and rules of the Commercial Division Rules, the Uniform Civil Rules, the CPLR, and any other applicable rules and regulations. Parties which use this sample provision must meet any requirements of applicable law.

The Sample Choice of Law Provision

To express their consent to have New York law apply to the contract between them, or any disputes under such contract, the parties may include specific language in their contract, such as: "THIS AGREEMENT AND ITS ENFORCEMENT, AND ANY

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CONTROVERSY ARISING OUT OF OR RELATING TO THE MAKING OR PERFORMANCE OF THIS AGREEMENT, SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK, WITHOUT REGARD TO NEW YORK'S PRINCIPLES OF CONFLICTS OF LAW."

APPENDIX E.

(reserved)

APPENDIX F. STANDARD FORM OF CONFIDENTIALITY ORDER WITH ATTORNEY'S EYES-ONLY DESIGNATED (Clean and Redlined to Show Changes)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,	Index No. _____
Plaintiff,	
	STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION
-against -	
_____,	
Defendant.	

This matter having come before the Court by stipulation of plaintiff, _____, and defendant, _____, (individually "Party" and collectively "Parties") for the entry of a protective order pursuant to CPLR 3103(a), limiting the review, copying, dissemination and filing of confidential and/or proprietary documents and information to be produced by either party and their respective counsel or by any non-party in the course of discovery in this matter to the extent set forth below; and the parties, by, between and among their respective counsel, having stipulated and agreed to the terms set forth herein, and good cause having been shown;

IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery of documents and information that the Parties and, as appropriate, non-parties, agree merit confidential treatment (hereinafter the "Documents" or "Testimony").

2. Any Party or, as appropriate, non-party, may designate Documents produced, or Testimony given, in connection with this action as "confidential" or "highly confidential - attorney's eyes only" either by notation on each page of the Document so designated, statement on the record of the deposition, or written advice to the respective undersigned counsel for the Parties hereto, or by other appropriate means.

3. As used herein:

(a) “Confidential Information” shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information or other information the disclosure of which would, in the good faith judgment of the Party or, as appropriate, non-party designating the material as confidential, be detrimental to the conduct of that Party's or non-party's business or the business of any of that Party's or non-party's customers or clients.

(b) “Highly Confidential - Attorney's Eyes-Only Information” shall mean any “Confidential Information” that is of such a private, sensitive, competitive or proprietary nature that present disclosure to persons other than those identified in paragraph 5.1 below would reasonably be expected to cause irreparable harm or materially impair the legitimate competitive position or interests of the Producing Party. A designation of Confidential Information as Attorney's Eyes-Only Information constitutes a representation that such Confidential Information has been reviewed by an attorney for the Producing Party and that there is a valid basis for such a designation.

(c) “Producing Party” shall mean the parties to this action and any non-parties producing “Confidential Information” or “Highly Confidential - Attorney's Eyes-Only Information” in connection with depositions, document production or otherwise, or the Party or non-party asserting the confidentiality privilege, as the case may be.

(d) “Receiving Party” shall mean the Parties to this action and/or any non-party receiving “Confidential Information” or “Highly Confidential - Attorney's Eyes-Only Information” in connection with depositions, document production, subpoenas or otherwise.

4. The Receiving Party may, at any time, notify the Producing Party that the Receiving Party does not concur in the designation of a document or other material as Confidential Information or “Highly Confidential - Attorney's Eyes-Only Information.” If the Producing Party does not agree to declassify such document or material within seven (7) days of the written request, the Receiving Party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall continue to be treated as Confidential Information or Highly Confidential - Attorney's Eyes-Only Information. If such motion is filed, the documents or other materials shall be deemed as designated by the Producing Party unless and until the Court rules otherwise. Notwithstanding anything herein to the contrary, the Producing Party bears the burden of establishing the propriety of its designation of documents or information as Confidential Information or Highly Confidential - Attorney's Eyes-Only Information.

5. Except with the prior written consent of the Producing Party or by Order of the Court, Confidential Information shall not be furnished, shown or disclosed to any person or entity except to:

(a) personnel of the Parties actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;

(b) counsel for the Parties to this action and their associated attorneys, paralegals and other professional and non-professional personnel (including support staff and outside copying services) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

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(c) expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;

(d) the Court and court personnel;

(e) an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;

(f) trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 9 and 10, respectively, hereof; and

(g) any other person agreed to by the Producing Party.

5.1 Except with the prior written consent of the Producing Party or by Order of the Court, Highly Confidential - Attorney's Eyes-Only Information shall not be furnished, shown or disclosed to any person or entity except to those identified in paragraph 5(b)-5(g).

6. Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" shall be utilized by the Receiving Party and its counsel only for purposes of this litigation and for no other purposes.

7. Before any disclosure of Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" is made to an expert witness or consultant pursuant to paragraph 5 (c) thereof, counsel for the Receiving Party making such disclosure shall provide to the expert witness or consultant a copy of this Stipulation and obtain the expert's or consultant's written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Receiving Party obtaining the certificate shall supply a copy to counsel for the other Parties at the time designated for expert disclosure, except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied.

8. Unless otherwise designated during the deposition, all depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the Parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

9. Should the need arise for any Party or, as appropriate, non-party, to disclose Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" during any hearing or trial before the Court, including through argument or the presentation of evidence, such Party or, as appropriate, non-party may do so only after taking such steps as the Court, upon motion of the Producing Party, shall deem necessary to preserve the confidentiality of such Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information."

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10. This Stipulation shall not preclude counsel for any Party from using during any deposition in this action any Documents or Testimony which has been designated as "Confidential Information" or "Highly Confidential - Attorney's Eyes-Only Information" under the terms hereof. Any deposition witness who is given access to Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" shall, prior thereto, be provided with a copy of this Stipulation and shall execute a written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Party obtaining the certificate shall supply a copy to counsel for the other Parties and, as appropriate, a non-party that is a Producing Party. In the event that, upon being presented with a copy of the Stipulation, a witness refuses to execute the agreement to be bound by this Stipulation, the Court shall, upon application, enter an order directing the witness's compliance with the Stipulation.

11. A Party may designate as Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" subject to this Stipulation any document, information, or deposition testimony produced or given by any non-party to this case, or any portion thereof. In the case of Documents, produced by a non-party, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the Party asserting the confidentiality privilege. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the Party (or, as appropriate, non-party) asserting the confidentiality. Prior to the expiration of such fifteen (15) day period (or until a designation is made by counsel, if such a designation is made in a shorter period of time), all such Documents and Testimony shall be treated as Confidential Information.

In Counties WITH Electronic Filing

12.

(a) A Party or, as appropriate, non-party, who seeks to file with the Court (i) any deposition transcripts, exhibits, answers to interrogatories, or other documents which have previously been designated as comprising or containing Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information," or (ii) any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" shall file the document, pleading, brief, or memorandum on the NYSCEF system in redacted form until the Court renders a decision on any motion to seal (the "Redacted Filing"). If the Producing Party fails to move to seal within seven (7) days of the Redacted Filing, the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(b) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" produced by a Producing Party that is a non-party, the filing Party shall so notify that Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant Producing Party's Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" unredacted.

(c) If the Producing Party makes a timely motion to seal, and the motion is granted, the filing Party (or, as appropriate, non-party) shall ensure that all documents (or, if directed by the court, portions of documents) that are the subject of the order to seal are filed in accordance with the procedures that govern the filing of sealed documents on the NYSCEF system. If the Producing Party's timely motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

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(d) Any Party filing a Redacted Filing in accordance with the procedure set forth in this paragraph 12 shall, contemporaneously with or prior to making the Redacted Filing, provide the other Parties and the Court with a complete and unredacted version of the filing.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any materials which have previously been designated by a party as comprising or containing Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" shall identify such documents by the production number ascribed to them at the time of production.

In Counties WITHOUT Electronic Filing

13.(a) A Party or, as appropriate, non-party, who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information," or any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information," shall (i) serve upon the other Parties (and, as appropriate, non-parties) a Redacted Filing and a complete and unredacted version of the filing; (ii) file a Redacted Filing with the court; and (iii) transmit the Redacted Filing and a complete unredacted version of the filing to chambers. Within seven (7) days thereafter, the Producing Party may file a motion to seal such Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information."

(b) If the Producing Party does not file a motion to seal within the aforementioned seven (7) day period, the Party (or, as appropriate. non-party) that seeks to file the Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" shall take steps to file an unredacted version of the material.

(c) In the event the motion to seal is granted, all (or, if directed by the court, portions of) deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated by a Party (or, as appropriate, non-party) as comprising or containing Confidential Information or "Highly Confidential - Attorney's Eyes Only Information," and any pleading, brief or memorandum which reproduces, paraphrases or discloses such material, shall be filed in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words "CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" or "HIGHLY CONFIDENTIAL MATERIAL - ATTORNEY'S EYES-ONLY - SUBJECT TO STIPUALTION[1] AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION," as well as an indication of the nature of the contents and a statement in substantially the following form:

"This envelope, containing documents which are filed in this case by (name of Party or as appropriate, non-party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of the parties. Violation hereof may be regarded as contempt of the Court."

In the event the motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" produced by a Producing Party that is non-party, the Party (or, as appropriate, non-party) making the filing shall so notify the Producing Party within twenty four (24) hours after the

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Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant non-party's Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" unredacted.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any documents which have previously been designated by a party as comprising or containing Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" shall identify such documents by the production number ascribed to them at the time of production.

14. Any person receiving Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof and shall use reasonable measures to store and maintain the Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" so as to prevent unauthorized disclosure.

15. Any document or information that may contain Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" that has been inadvertently produced without identification as to its "confidential" nature as provided in paragraphs 2 and/or 11 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving Party identifying the document or information as "confidential" within a reasonable time following the discovery that the document or information has been produced without such designation.

16. Extracts and summaries of Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" shall also be treated with the same level of confidentiality as the designated information from which it was derived.

17. The production or disclosure of Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" shall in no way constitute a waiver of each Producing Party's right to object to the production or disclosure of other information in this action or in any other action. Nothing in this Stipulation shall operate as an admission by any Party or non-party that any particular document or information is, or is not, confidential or "highly confidential attorney's-eyes only." Failure to challenge a Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" designation shall not preclude a subsequent challenge thereto.

18. This Stipulation is entered into without prejudice to the right of any Party or non-party to seek relief from, or modification of, this Stipulation or any provisions thereof by properly noticed motion to the Court or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

19. This Stipulation shall continue to be binding after the conclusion of this litigation except that there shall be no restriction on documents that are used as exhibits in Court (unless such exhibits were filed under seal); and (b) that a Receiving Party may seek the written permission of the Producing Party or further order of the Court with respect to dissolution or modification of the Stipulation. The provisions of this Stipulation shall, absent prior written consent of the parties, continue to be binding after the conclusion of this action.

20. Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

21. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" produced or designated and all reproductions thereof

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shall be returned to the Producing Party or, at the Receiving Party's option, shall be destroyed. In the event that any Receiving Party chooses to destroy physical objects and documents, such Party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the Parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable rules of professional conduct. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any Receiving Party, or of experts specially retained for this case, to represent any individual, corporation or other entity adverse to any Party or non-party or their affiliate(s) in connection with any other matter.

22. If a Receiving Party is called upon to produce Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" in order to comply with a court order, subpoena, or other direction by a court, administrative agency, or legislative body, the Receiving Party from which the Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" is sought shall (a) give written notice by overnight mail and either email or facsimile to the counsel for the Producing Party within five (5) business days of receipt of such order, subpoena, or direction, and (b) give the Producing Party five (5) business days to object to the production of such Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information," if the Producing Party so desires. Notwithstanding the foregoing, nothing in this paragraph shall be construed as requiring any party to this Stipulation to subject itself to any penalties for noncompliance with any court order, subpoena, or other direction by a court, administrative agency, or legislative body.

23. This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a Party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

24. This Stipulation may be signed in counterparts, which, when fully executed, shall constitute a single original, and electronic signatures shall be deemed original signatures.

[FIRM]	[FIRM]
By: _____	By: _____
_____	_____
New York, New York	New York, New York
Tel: _____	Tel: _____
Attorneys for Plaintiff	*Attorneys for Defendant*

Dated: _____

SO ORDERED

_____

J.S.C.

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EXHIBIT "A"

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,	Index No. _____
Plaintiff,	**AGREEMENT WITH RESPECT TO CONFIDENTIAL MATERIAL**
-against -	
_____,	
Defendant.	

I, _____, state that:

1. My address is _____.

2. My present occupation or job description is _____.

3. I have received a copy of the Stipulation for the Production and Exchange of Confidential Information (the "**Stipulation**") entered in the above-entitled action on _____.

4. I have carefully read and understand the provisions of the Stipulation.

5. I will comply with all of the provisions of the Stipulation.

6. I will hold in confidence, will not disclose to anyone not qualified under the Stipulation, and will use only for purposes of this action, any Confidential Information or "Highly Confidential - Attorney's Eyes-Only Information" that is disclosed to me.

7. I will return all Confidential Information or "Highly Confidential - Attorney's Eyes Only Information" that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information or "Highly Confidential - Attorney's Eyes Only Information."

8. I hereby submit to the jurisdiction of this court for the purpose of enforcement of the Stipulation in this action.

Dated: _____

_____

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APPENDIX G. FORM REMOTE DEPOSITION PROTOCOL

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

XXXX,	Index No. _____/___
Plaintiff(s),	
- against -	
XXXX,	
Defendant(s).	

STIPULATION AND ORDER CONCERNING PROTOCOL FOR CONDUCTING REMOTE DEPOSITIONS

The Plaintiff(s) and Defendant(s) (collectively, the "Parties") jointly stipulate to the following protocol for conducting depositions via remote means in the above-captioned manner:

1. All depositions shall be conducted remotely using videoconference technology, and each deposition shall be recorded, either by stenographic or video means.

2. Insofar as practicable, the remote deposition shall be similar to an in-person deposition.

3. The Party that notices the deposition shall contract with a court reporting service for court reporting, videoconference, and remote depositions services. An employee or employees of the service provider shall attend or be available at each remote deposition to record the deposition, troubleshoot any technological issues that may arise, and administer the virtual breakout rooms.

4. The Parties agree that these recorded remote depositions may be used at a trial or hearing to the same extent that an in-person deposition may be used at trial or hearing, and the Parties agree not to object to the use of these recordings on the basis that the deposition was taken remotely. The Parties reserve all other objections to the use of any deposition testimony at trial.

5. The deponent, court reporter, and counsel for the Parties may each participate in the videoconference deposition remotely and separately. Each person attending a deposition shall be clearly visible to all other participants, their statements shall be audible to all participants, and they should each use best efforts to ensure their environment is free from noise and distractions.

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6. No counsel shall privately communicate with any deponent during questioning on the record, except for the purpose of determining whether a privilege should be asserted, and only after the witness has stated on the record that he or she needs to consult counsel regarding a question of privilege. Deponents shall shut off electronic devices, other than the devices that the deponent is using for the videoconferencing software and to display and access the exhibits, and shall refrain from all private communication during questioning on the record.

7. During breaks in the deposition, the Parties may use a breakout-room feature, which simulates a live breakout room through videoconference. Conversations in the breakout rooms shall not be recorded. The breakout rooms shall be established by the court reporting service prior to the deposition and controlled by the remote deposition or relevant service provider.

8. Remote depositions shall be recorded by stenographic means, and may also be video-recorded; but, the court reporter might not be physically present with the witness whose deposition is being taken. The Parties agree not to challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.

9. The court reporter will stenographically record the testimony, and the court reporter's transcript shall constitute the official record. If the deposition is to be video recorded, the videographer will record the audio and video of the deposition and preserve the recording. The court reporter may be given a copy of the video recording and may review the recording to improve the accuracy of any written transcript. The court reporter shall mark and preserve exhibits used at the deposition.

10. The Parties agree that the court reporter is an “Officer” as defined by CPLR 3113(b) and shall be permitted to administer the oath to the witness via the videoconference. The deponent will be required to provide government-issued identification satisfactory to the court reporter and this identification must be legible on the video record, if the deposition is to be video recorded.

11. The Party that noticed the deposition shall be responsible for procuring a written transcript and any video record of the remote deposition. The Parties shall bear their own costs in obtaining a transcript and/or video record of the deposition or any real-time transcript functionality.

12. The Party that noticed the deposition shall provide the remote deposition or relevant service provider with a copy of this Stipulation and Order at least twenty-four hours in advance of the deposition.

13. At the beginning of each deposition, consistent with CPLR 3113(b), the videographer or stenographer shall “put the witness on oath” (CPLR 3113(b)) and begin the deposition with a statement on the record, consistent with 22 NYCRR 202.15(d), that shall include: (i) the officer's name and address; (ii) the name and address of the officer's employer; (iii) the date, time, and place (or method) of the deposition; (iv) the party on whose behalf the deposition is being taken; and (v) the identity of all persons present.

14. At the beginning of each segment of the deposition, consistent with 22 NYCRR 202.15(d), the videographer or stenographer shall begin that segment of the remote deposition by announcing the beginning and end of each segment of the remote deposition.

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15. If the deposition is being video recorded, the videographer shall monitor the audio and video transmission and shall stop the record if he or she determines that any participant has been dropped from the remote deposition or is otherwise incapable of participating by reason of technical problems. If a videographer is not present, the monitor and/or court reporter shall stop the record as soon as he or she becomes aware that a participant has been dropped from the remote deposition or cannot participate by reason of technical problems.

16. The defending attorney shall make objections and interpose instructions not to answer in substantially the same manner as he or she would at an in-person deposition. If the defending attorney is unable to make objections and interpose instructions not to answer by reason of technical difficulties, such a failure to object or to instruct shall not be construed as waiver and the defending attorney shall have an opportunity to object or to instruct as soon as the technical problem has been remedied. Objections and instructions not to answer shall be regarded as timely if made as soon as practicable.

17. The Parties agree to work collaboratively and in good faith with the court reporting agency to assess each deponent's technological abilities and to troubleshoot any issues at least 48 hours in advance of the deposition so any adjustments can be made. Counsel and deponents may test remote deposition software before any remote deposition. The Parties also agree to work collaboratively to address and troubleshoot technological issues that arise during a deposition and make such provisions as are reasonable under the circumstances to address such issues. This provision shall not be interpreted to compel any Party to proceed with a deposition where the deponent cannot hear or understand the other participants or where the participants cannot hear or understand the deponent. Any period on the record during which a deponent or questioner could not hear or understand the questions or answers due to technical difficulties shall not count toward time limitation under CPLR 3113(b).

18. Counsel shall use best efforts to ensure that they have sufficient technology to participate in a videoconference deposition (e.g., a webcam and computer or telephone audio and sufficient internet bandwidth to sustain the remote deposition). Counsel for the deponent shall likewise use best efforts to ensure that the deponent has such sufficient technology. In the case of non-party witnesses, counsel noticing the deposition shall supply any necessary technology that the deponent does not have.

19. The Parties agree that this Stipulation and Order applies to remote depositions of non-parties under CPLR 3101 and shall work in a collaborative manner in attempting to schedule remote depositions of non-parties. The Party noticing any non-party deposition shall provide this Stipulation and Order to counsel for any non-party under CPLR 3101 a reasonable time before the date of the deposition.

20. The Parties agree that any of the following methods for administering exhibits may be employed during a remote deposition, or a combination of one or more methods:

(i) Counsel noticing the deposition may choose to mail printed copies of documents that may be used during the deposition to the deponent, the deponent's counsel, counsel for other parties that will appear on the record, and the court reporter. In that event, noticing counsel shall so inform the recipients prior to mailing the documents and shall provide tracking information for the package. Such documents shall be delivered by noon (local-time) the day before the deposition. Recipients shall confirm receipt of the package by electronic mail to Counsel noticing the deposition. If printed copies are mailed, every recipient of a mailed package shall keep the package sealed until the deposition begins and shall only unseal the package on the record, on video, and during the deposition when directed to do so by the counsel taking the deposition. Recipients shall proceed to open the documents and review the documents only upon the instruction of the noticing attorney. This same procedure shall apply to any physical copies of documents any other counsel intends to use for examining the witness.

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(ii) Counsel noticing the deposition may share exhibits digitally, such as by e-mailing a compressed zip folder or sharing a link. The exhibits shall be shared to the deponent, the deponent's counsel, the other Party's counsel, and the court reporter, and any other attorneys who have appeared on the record at the deposition. Every recipient of a digital exhibit shall not open the digital exhibit until directed to do so by the counsel taking the deposition. If sending documents digitally, counsel will be mindful of file size limitations, which presumptively should be less than ___ MB. Such file transfers shall be password-protected.

(iii) If the software for the videoconference supports uploading and sharing digital files in real time (e.g., such as the Chat feature on Zoom), then such function may be equivalently used to distribute exhibits to the deponent and participants in real time. Counsel appearing on the record at the deposition and the court reporter shall confirm receipt of the documents to Counsel noticing the deposition. The method of transferring the documents shall be password-protected, and counsel taking the deposition shall supply the password immediately prior to the commencement of the deposition.

(iii)[1] Regardless which method of document-sharing is used, the witness and the defending counsel shall have the right to private copies of the exhibits that allow the witness and defending counsel to independently and fully navigate the exhibit while the deposition is on the record.

Dated:

SO ORDERED:

_____

[_____, J.]

Justice of the Supreme Court of the State of New York

Stipulated to:

[ATTORNEY SIGNATURE BLOCKS]

Credits

Sec. filed Jan. 9, 2006; amds. filed: April 3, 2007; Aug. 13, 2007; Dec. 3, 2007; Jan. 9, 2009 eff. Jan. 5, 2009. Amended (a). Amended (a) through Court Notices in NY Register, Volume XXXI, Issue 27, dated July 8, 2009; amds. through Court Notices in the Aug. 4, 2010 Register, eff. Aug. 4, 2010; amds. through Court Notices in the Aug. 18, 2010 Register, eff. Aug. 18, 2010; amd. through Court Notices in the June 15, 2011 Register, eff. June 15, 2011; amd. through Court Notices in the Oct. 30, 2013 Register; amd. through Court Notices in the Feb. 26, 2014 Register; amd. through Court Notices in the May 7, 2014 Register; amd. through Court Notices in the July 9, 2014 Register; amd. through Court Notices in the July 30, 2014 Register; amd. through Court Notices in the Aug. 6, 2014 Register; amd. through Court Notices in the Sept. 3, 2014 Register; amd. through Court Notices in the Jan. 28, 2015 Register; amd. through Court Notices in the April 29, 2015 Register; amd. through Court Notices in the Dec. 23, 2015 Register; amd. through Court Notices in the Feb. 24, 2016 Register; amd. through Court Notices in the June 22, 2016 Register; amd. through Court Notices in the July 20, 2016 Register; amd. through Court Notices in the Nov. 23, 2016 Register; amd. through Court Notices eff. May 1, 2017; amd. through Court Notices in the April 26, 2017 Register; amd. through Court Notices in the July 26, 2017 Register, eff. July 1, 2017; amd. through Court Notices in the Jan. 17, 2018 Register eff. Jan. 1, 2018; amd. through Court Notices in the Aug. 8, 2018 Register eff. July 1, 2018; amd. through Court Notices in the Aug. 22, 2018 Register eff. Oct. 1, 2018; amd. through Court Notices in the Dec. 12, 2018 Register eff. Jan. 1, 2019; amd.

through Court Notices in the Jan. 9, 2019 Register eff. Jan. 1, 2019; amd. through Court Notices in the May 8, 2019 Register eff. July 1, 2019; amd through Court Notices in the July 15, 2020 Register; amd. through Court Notices in the July 29, 2020 Register eff. July 15, 2020; amd. through Court Notices in the Oct. 14, 2020 Register eff. Oct. 13, 2020; amd. through Court Notices in the Oct. 28, 2020 Register eff. Nov. 16, 2020; amd. through Court Notices in the March 24, 2021 Register eff. March 1, 2021; amd. through Court Notices in the April 14, 2021 Register; amd. through Court Notices in the Oct. 27, 2021 Register eff. Dec. 1, 2021; amd. through Court Notices in the Nov. 17, 2021 Register eff. Dec. 13, 2021; amd. through Court Notices in the Dec. 29, 2021 Register eff. Dec. 15, 2021 (Register dated Dec. 29, 2021); amd. through Court Notices in the Nov. 17, 2021 Register eff. Dec. 20, 2021; amd. through Court Notices in the Feb. 2, 2022 Register eff. Feb. 1, 2022; amd. through Court Notices in the April 13, 2022 Register eff. April 11, 2022; amd. through Court Notices eff. April 18, 2022; amd. through Court Notices in the May 18, 2022 Register eff. May 2, 2022; amd. through Court Notices in the June 8, 2022 Register eff. May 31, 2022; amd. through Court Notices in the Aug. 3, 2022 Register eff. June 24, 2022; amd. through Court Notices in the Aug. 3, 2022 Register eff. July 12, 2022; amd. through Court Notices in the Sept. 28, 2022 Register eff. Sept. 12, 2022; amd. through Court Notices in the Jan. 11, 2023 Register eff. Jan. 3, 2023 (Register dated Jan. 11, 2023); amd. through Court Notices in the Jan. 25, 2023 Register eff. Jan. 3, 2023 (Register dated Jan. 25, 2023); amd. through Court Notices in the May 17, 2023 Register eff. April 20, 2023 (Register dated May 17, 2023); amd. through Court Notices in the June 7, 2023 Register eff. June 5, 2023 (Register dated June 7, 2023); amd. through Court Notices in the Aug. 2, 2023 Register eff. July 5, 2023 (Register dated Aug. 2, 2023); amd. through Court Notices in the Aug. 23, 2023 Register eff. Aug. 31, 2023 (Register dated Aug. 23, 2023); amd. through Court Notices in the Aug. 30, 2023 Register eff. Aug. 31, 2023 (Register dated Aug. 30, 2023); amd. through Court Notices in the March 13, 2024 Register eff. Feb. 14, 2024 (Register dated March 13, 2024).

Current with amendments included in the New York State Register, Volume XLVI, Issue 16, dated April 17, 2024. Some sections may be more current, see credits for details.

Footnotes

1 So in original.

N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70, 22 NY ADC 202.70

End of Document

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 32. Accelerated Judgment (Refs & Annos)

McKinney's CPLR Rule 3211

Rule 3211. Motion to dismiss

Effective: May 7, 2022
Currentness

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or

2. the court has not jurisdiction of the subject matter of the cause of action; or

3. the party asserting the cause of action has not legal capacity to sue; or

4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or

5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

6. with respect to a counterclaim, it may not properly be interposed in the action; or

7. the pleading fails to state a cause of action; or

8. the court has not jurisdiction of the person of the defendant; or

9. the court has not jurisdiction in an action where service was made under section 314 or 315; or

10. the court should not proceed in the absence of a person who should be a party.

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11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law. Presumptive evidence of the status of the corporation, association, organization or trust under section 501(c)(3) of the internal revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust. On a motion by a defendant based upon this paragraph the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law or subdivision six of section 20.09 of the arts and cultural affairs law and, if it so finds, whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. If the court finds that the defendant is entitled to the benefits of that section and does not find reasonable probability of gross negligence or intentional harm, it shall dismiss the cause of action as to such defendant.

(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) of this rule, and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) of this rule is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) of this rule may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding to collect a debt arising out of a consumer credit transaction where a consumer is a defendant or under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight or nine of subdivision (a) of this rule is waived if a party moves on any of the grounds set forth in subdivision (a) of this rule without raising such objection or if, having made no objection under subdivision (a) of this rule, he or she does not raise such objection in the responsive pleading which, in any action to collect a debt arising out of a consumer credit transaction where a consumer is a defendant, includes any amended responsive pleading.

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(f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

(g) Stay of proceedings and standards for motions to dismiss in certain cases involving public petition and participation. 1. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

2. In making its determination on a motion to dismiss made pursuant to paragraph one of this subdivision, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based. No determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

3. All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.

4. For purposes of this section, “complaint” includes “cross-complaint” and “petition”, “plaintiff” includes “cross-complainant” and “petitioner”, and “defendant” includes “cross-defendant” and “respondent.”

(h) Standards for motions to dismiss in certain cases involving licensed architects, engineers, land surveyors or landscape architects. A motion to dismiss based on paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion.

Credits

(L.1962, c. 308. Amended Jud.Conf.1964 Proposal No. 6; Jud.Conf.1965 Proposal Nos. 5, 6; L.1965, c. 773, § 9; Jud.Conf.1973 Proposal No. 4; L.1986, c. 220, § 12; L.1990, c. 904, § 26; L.1991, c. 656, § 4; L.1992, c. 767, § 4; L.1996, c. 501, § 1; L.1996, c. 682, § 2; L.1997, c. 518, § 2, eff. Sept. 3, 1997; L.2005, c. 616, § 1, eff. Jan. 1, 2006; L.2020, c. 250, § 3, eff. Nov. 10, 2020; L.2021, c. 593, § 8, eff. May 7, 2022.)

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Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Hon. Mark C. Dillon

2023
C3211:1 The Motion to Dismiss, Generally

Practitioners, beware of using Artificial Intelligence (AI) such as ChatGPT when preparing motion affidavits and memoranda of law. ChatGPT is a form of AI which became available to the public on November 30, 2022. “Chat” refers to its chat box functionality. The “GPT” stands for Generative Pre-Trained Transformer. The program has many functions, one of which is to compose letters and essays on topics selected by the user. Essays produced by ChatGPT are not based on dedicated search engines such as Westlaw, but are instead based on generally-available information which leaves room for error in the sophisticated and detail-orientated field of law.

This is just the opinion of your humble Practice Commentator, take it for whatever it is worth: Do not use ChatGPT for writing legal papers that will be served upon parties and filed with a court. Two attorneys learned that lesson the hard way in the case of *Roberto Mata v Avianca, Inc*. The plaintiff, Mata, commenced an action in the Supreme Court, New York County, seeking damages for personal injuries allegedly sustained as a result of having been struck by a metal serving cart during a 2019 airline flight bound for New York's JFK Airport. The action was removed to the federal District Court for the Southern District of New York, under Docket No. 22 CV 1461 (Castel, J.). The defendant, Avianca, Inc., later moved to dismiss the action under F.R.C.P 12(b)(6) (https://storage.courtlistener.com/recap/gov.uscourts.nysd.575368/gov.uscourts.nysd.575368.16.0.pdf), which was opposed by counsel representing the plaintiff. The opposition papers were composed by plaintiff's counsel using ChatGPT. Because of shortcomings with the ChatGPT program, the papers submitted in opposition to dismissal cited to several judicial decisions which did not, in fact, exist (https://www.documentcloud.org/documents/23826751-mata-v-avianca-airlines-affidavit-in-opposition-to-motion). The non-existent cases were accompanied by non-existent quotes from them and contained internal citations which also did not exist. Quick on the uptake, District Judge P. Kevin Castel directed that the plaintiff's attorneys show cause on June 8, 2023 as to why they should not be sanctioned for the submission (Order to Show Cause dated May 4, 2023, *available at* https://ecf.nysd.uscourts.gov/doc1/127133304220. *See also* Weiser, Benjamin, Here's What Happens When Your Lawyer Used ChatGPT, *New York Times*, May 27, 2023, *available at* https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html).

Lawyering is never one-size-fits all. No computer program such as ChatGPT can incorporate the years of experience that an attorney brings to a matter such as in the drafting of legal papers for filing. No computer program can substitute for human judgment, strategy, nuance, emphasis, and persuasiveness. No computer program can know, like a lawyer, what type of argument may best resonate with the particular judge assigned to the matter. And if composition programs such as ChatGPT do not directly focus upon proven legal research platforms like Westlaw, legal research and analysis is rightly suspect.

Some might argue that the problem which came to light in *Mata* was not one of burgeoning technology, but the failure by counsel to double-check ChatGPT's draft to assure that the final product submitted to the court was accurate and complete (Wilkins, Stephanie, “The Problem With the ‘Bogus' ChatGPT Legal Brief? It's Not the Tech,” *NYLJ*, June 2, 2023, *available at* https://www.law.com/legaltechnews/2023/06/02/the-problem-with-the-bogus-chatgpt-legal-brief-its-not-the-tech/). But that begs the question. If the technology produces flawed material,

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should any attorney use it in the first place rather than drafting the papers from scratch using our traditional schooled methods? Do not clients deserve the traditional effort?

On June 22, 2023, Judge Castel financially sanctioned the two attorneys and their law firm who had submitted the misleading opposition papers the sum of $5,000 (Opinion and Order dated June 22, 2023, p. 34, *available at* https://ecf.nysd.uscourts.gov/doc1/127133572604). The court noted that the attorneys failed in their gatekeeping function to assure the accuracy of their filings. Further, in a separate order, the District Court dismissed plaintiff Mata's personal injury action as untimely commenced (Opinion and Order dated June 22, 2023, *available at* https://ecf.nysd.uscourts.gov/doc1/127133572662).

Aside from the shortfalls of ChatGPT, ethics rules may be implicated as well. How is counsel to bill a client for the research and drafting of legal papers actually researched and drafted by an Artificial Intelligence, which a non-lawyer could obtain by using the same computer program? How can counsel sign an attorney certification that filed papers are not frivolous, as required by 22 NYCRR 130-1.1a(b) and Federal Rule 11(b), if counsel relies upon ChatGPT research and fails to carefully review the papers to assure that there are not inaccuracies and non-existent citations? May there be disciplinary concerns under the Rules 1.1(a) or 5.1(d) of the Rules of Professional Conduct (22 NYCRR 1200.1.1(a), 1200.5.1[d]), and under other potentially-applicable Rules? The answer to all of these questions may be problematic for any attorney caught in a ChatGPT snare. As General Colin Powell once said of the Pottery Barn rule in a different context, "You break it, you own it."

We do not have a crystal ball as whether and to what extent AI might become more accurate and reliable in the future. A law office is not a drive-thru business. For now, nothing beats legal writing the old fashioned way--knowing the facts, accumulating evidence, performing legal research, drafting papers discussing the facts and law, attaching relevant exhibits, being persuasive in submissions, and filing the papers in an appropriate manner that permits you to sleep well at night.

C3211:8 *Sua Sponte* Dismissals

These Supplemental Practice Commentaries take the annual pulse of the number of plaintiffs' complaints that are erroneously dismissed by trial courts *sua sponte*. Such dismissals are to occur sparingly and only when extraordinary circumstances exist to warrant such drastic relief. The bar is set high because *sua sponte* dismissals deprive aggrieved parties of due process notice and any opportunity to be heard on the question of whether the dismissal is appropriate.

This year's crop of appellate court reversals of *sua sponte* dismissals, from the absence of extraordinary circumstances for doing so, include *Newrez, LLC v City of Middletown*, 216 A.D.3d 657, 188 N.Y.S.3d 606 (2nd Dep't. 2023); *U.S. Bank National Association v Bhagwandeen*, 216 A.D.3d 700, 187 N.Y.S.3d 115 (Mem.) (2nd Dep't. 2023); *U.S. Bank National Association v Turner,* 215 A.D.3d 889, 188 N.Y.S.3d 536 (2nd Dep't. 2023); *Deutsche Bank Trust Company Americas v Martinez*, 214 A.D.3d 704, 185 N.Y.S.3d 232 (2nd Dep't. 2023); *CRC Insurance Services, Inc. v Kullman*, 211 A.D.3d 903, 180 N.Y.S.3d 589 (2nd Dep't. 2022); *Melikov v 66 Overlook Terrace Corp*., 211 A.D.3d 537, 181 N.Y.S.3d 35 (1st Dep't. 2022); *Citimortgage, Inc. v Dedalto*, 210 A.D.3d 628, 178 N.Y.S.3d 102 (2nd Dep't. 2022); *U.S. Bank National Association v Stuart*, 208 A.D.3d 824, 172 N.Y.S.3d 625 (2nd Dep't. 2022); *Wells Fargo Bank, N.A. v Cascarano*, 208 A.D.3d 729, 174 N.Y.S.3d 394 (2nd Dep't. 2022).

Conversely, there is another side of the coin on this pesky topic. If a court dismisses an action *sua sponte*, it may, upon motion, likewise vacate its dismissal to cure its previous error of doing so (*Bank of New York Mellon v Stewart*, 216 A.D.3d 720, 190 N.Y.S.3d 80 [2nd Dep't. May 14, 2023]). In appropriate circumstances, a trial court will be reversed for failing to vacate an earlier *sua sponte* dismissal (*Wohnberger v Lucani*, 214 A.D.3d 615, 186 N.Y.S.3d

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618 [1st Dep't. 2023]; *Cooper v Broems*, 214 A.D.3d 497, 186 N.Y.S.3d 159 [1st Dep't. 2023]; *Bankunited v Kaur*, 208 A.D.3d 622, 173 N.Y.S.3d 55 (2nd Dep't. 2022]).

C3211:10 Defense Based on "Documentary Evidence"

Decisional authority continues to develop on the extent to which letters, e-mails, and affidavits may qualify as documentary evidence for purposes of a CPLR 3211(a)(1) motion. Affidavits prepared for the motion never qualify (*J.D. v Archdiocese of New York*, 214 A.D.3d 561, 183 N.Y.S.3d 851 [1st Dep't. 2023]; *Davis v Henry*, 212 A.D.3d 597, 181 N.Y.S.3d 606 [2nd Dep't. 2023]). For letters and electronically-generated information such as e-mails, the general rule is that such material does not qualify as documentary evidence for purposes of CPLR 3211(a)(1) (*Xu v Van Zwienen*, 212 A.D.3d 872, 183 N.Y.S.3d 475 [2nd Dep't. 2023] [letter inadmissible]; *Bath & Twenty, LLC v Federal Savings Bank*, 198 A.D.3d 855, 156 N.Y.S.3d 316 [2nd Dep't. 2021]). The reason for the general rule is that these forms of material are too easily manipulatable by a party to be allowed to affect a dismissal motion's outcome. Case law tends to view CPLR 3211(a)(1) documentary evidence as material that is more unassailable such as judicial records, as well as documents reflecting out-of-court transactions including mortgages, deeds, contracts, and other papers the contents of which are essentially undeniable (*Xu v Van Zwienen*, 212 A.D.3d at 874). For e-mails to have any chance of being admissible for a CPLR 3211(a)(1) motion, they must fall into the category of material that is essentially undeniable. E-mails, for admissibility, must at least meet the high test of being unambiguous, authentic, and undeniable. How particular e-mails fare under that test will vary depending on the unique facts of each action. The parties' agreement in their papers that e-mails are authentic goes a long way toward meeting that test. Recently, in *Matter of Estate of Eckert v Connelly*, 217 A.D.3d 1151, 191 N.Y.S.3d 510 (3rd Dep't. June 15, 2023), the court addressed the question of whether the language of parties' e-mails constituted a binding stipulation of settlement. In *Eckert*, there was no issue between the parties as to the authenticity of their e e-mail exchanges, and as a result, the court determined the merits of the enforceability of the purported stipulation (finding in the end by a 3-2 majority that essential terms for the settlement and assent were lacking). Thus, even when authenticity is not an issue, the e-mail, once admitted, must be conclusive to the subject matter of the motion to be determinative of an outcome (*e.g. Cohen v Getzel*, 205 A.D.3d 532, 166 N.Y.S.3d 527 [1st Dep't. 2022]).

Nothing beats the decision of a Canadian court about whether a thumbs-up emoji qualifies as a binding signature for an electronic contract, finding that under section 18(1)(b) of its controlling Electronic Information and Documents Act, an emoji *is* the equivalent of a signature because it is an "icon" permissible under the language of the Act (*South West Terminal v Achter Land & Cattle*, 2023 SKKB 116 [Swift Current, Canada 2023]). Thanks goes to David Paul Horowitz and Katryna L. Kristoferson for bringing that interesting Canadian case to the attention of the bar in a published article (Horowitz, David Paul and Kristoferson, Katryna L. " 'It Is Hereby ...' Can Emails Create a Binding Stipulation?" *NYLJ* July 17, 2023, *available at* https://www.law.com/newyorklawjournal/2023/07/17/it-is-hereby-can-emails-create-a-binding-stipulation/). New York practitioners should of course not rely on that Canadian case as legal authority, as we are subject to the terms and expectations of the General Obligations Law, and specifically GOL 5-701, for determining whether a document qualifies as an enforceable signed writing. A New York court held that a "thumbs-up" emoji was insufficient to convey a party's intent to be bound, where only minutes beforehand the same party had categorically asserted that he would never sign any document (*Lightstone Re LLC v Zinntex LLC*, 2022 WL 3757585 (Sup. Ct. N.Y. Co. 2022). In a general sense, might a "thumbs-up" reflect a party's happiness with an offer without going so far as to reflect an intent to be bound by it? Attorneys should advise clients against using the thumbs-up emoji when executing legal contracts and stipulations, and while at it, advise clients against using the happy face, the hand clap, the fireworks, the celebratory balloons, the check mark, the A-OK sign, and the red heart! Parties agreeing to the terms of a contract are better off simply placing an electronic signature at the designated signature location of the e-document. Doing so avoids ambiguities, problems, misunderstandings, and perhaps litigation. For deeper analysis, an entire law review article has been written about whether emojis should may qualify as signed writings under New York's statute of frauds, GOL 5-701 (Berliner,

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Moshe. "When a Picture s Not Worth a Thousand Words: Why Emojis Should Not Satisfy the Statute of Frauds' Writing Requirement," 41 *Cardozo L. Rev*. 2161 (June 2020).

E-mails may sometimes be used to establish claims or defenses in actions involving the statute of frauds (CPLR 3211[a][5]). There is further discussion of this topic specific to the statute of frauds within this year's Supplemental Practice Commentary C3211:18.

C3211:11 Lack of Subject Matter Jurisdiction

The state constitution was amended by public referendum on November 2, 2021, raising the jurisdiction of the Civil Court within the City of New York from $25,000 to $50,000. The previous amendment, which raised the Civil Court's monetary jurisdiction from $10,000 to $25,000, occurred in 1983. The primary purpose of the constitutional amendment was to adjust the Civil Court's jurisdiction for almost four decades of price inflation. The new $50,000 limit applies not only to actions for money damages, but to actions for replevin, the foreclosure of mechanics' liens, partitions, contract rescissions, and real property foreclosures, so long as the value of the subject matter fits within the new $50,000 cap. The subject matter jurisdiction of the Supreme Court is not affected by the constitutional amendment in any way, and Supreme Court therefore remains the go-to court for disputes which exceed $50,000 in value.

The increase in the Civil Court's jurisdiction presents pros and cons. The benefit of the increase is its stated purpose, of adjusting the court's subject matter jurisdiction to account for inflation. A burden of the increase is that it may add to the size of the Civil Court dockets in counties within the City of New York which are already overworked and backlogged. For disputes that are less than $50,000 in value, nothing prevents plaintiffs from commencing their actions in the Supreme Court, but doing so risks the court's discretionary removal of those actions to Civil Court under CPLR 325(d) and 22 NYCRR 202.13(a), even *sua sponte* (*Leighton v Lowenberg*, 215 A.D.3d 474, 185 N.Y.S.3d 683 [1st Dep't. 2023] [post-amendment removal from Supreme Court to Civil Court]). If an action is removed to a court of more limited jurisdiction without the parties' consent, which "higher" courts have the authority to order, the verdict or judgment is not limited to the monetary jurisdiction of the lower court and may instead be of an amount within the jurisdiction of the court where the action was originally filed (CPLR 325[d]; *Delaine v Finger Lakes Fire & Cas. Co*., 23 A.D.3d 1143, 806 N.Y.S.2d 320 [4th Dep't. 2005]). It is only when an action's removal to a court of more limited jurisdiction is on the parties' consent that the parties become bound to the monetary jurisdictional limit of the lower court (CPLR 325[c] [subject to a counterclaim-related exception]; *Hoboken Wood Flooring Corp. v Fischoff*, 10 Misc.3d 1065[A], 814 N.Y.S.2d 561 [Sup. Ct. Nassau Co. 2005]).

Pivoting to another topic, there must be a valid marriage for the Supreme Court to have the subject matter jurisdiction for granting a divorce. While that concept seems straight-forward, an interesting twist occurred in *Bernstein v Benchemoun*, 216 A.D.3d 893, 188 N.Y.S.3d 669 (2nd Dep't. May 23, 2023). The parties in *Bernstein* were New York residents. The plaintiff "wife" sought a divorce based upon a Florida marriage. The defendant "husband" moved for *inter alia* the dismissal of the action for lack of subject matter jurisdiction, claiming that the marriage in Florida was not valid absent there being a valid marriage license issued from there permitting it to be solemnized. Indeed, Florida law does not recognize the validity marriages without a license, whereas in New York marriages are valid without a license so long as they are solemnized. The defendant's dismissal motion was referred to a court attorney referee (Szochet, Ct. Att. Ref.) to determine the matter. After a fact-finding hearing, the referee determined that the Florida marriage was not valid under Florida law as it was performed without a license from that state. The plaintiff's alternative argument, that the parties' marriage was validly solemnized by a rabbi in New York under a procedure in the Jewish faith known as a ketubah, was likewise found by the referee to be invalid as the rabbi who purportedly executed the ketubah denied actually solemnizing the marriage. Absent a valid marriage for the court's subject matter jurisdiction, the plaintiff's divorce action was dismissed, and the dismissal was affirmed on appeal.

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Matrimonial actions are not the only subject area where there has been recent activity in the case law on subject matter jurisdiction. In 2019, New York changed its statute of limitations for cases that may be brought by victims of various forms of sexual abuse. CPLR 208 was amended to provide, in new subparagraph (b), that for minors victimized by certain sex offenses defined by the Penal Law, actions may be commenced for damages from physical, psychological, or other injuries or conditions during a defined two and one half revival period, for victim plaintiffs that have not reached the age of 55 (CPLR 214-g). Naturally, actions have been commenced against various defendants for damages arising from alleged sexual abuse incidents dating back many years, even many decades. In actions brought against state agencies in the Court of Claims, where Court of Claims Act 11(b) requires the claimant to allege particular details as a condition to the waiver of sovereign immunity including, *inter alia,* "the time when" the claim arose (*Kolnacki v State*, 8 N.Y.3d 277, 832 N.Y.S.2d 481, 864 N.E.2d 611 [2007]), claimants are not necessarily in a position so many years after the fact to accurately specify exact dates when the alleged sexual abuse occurred. The Crime Victims Act (CVA), of which CPLR 208 is a part, creates a tension between the inability of some claimants to specify abuse dates *versus* the subject matter jurisdictional requirement that specificity be provided. As a general matter, a claimant's failure in the Court of Claims to particularize a claim, as to prevent the state from investigating it and ascertaining the existence and extent of liability, may result in the dismissal of the action (*D.G. v State of New York*, 214 A.D.3d 713, 185 N.Y.S.3d 245 [2nd Dep't. 2023]). However, courts have recognized under the new CVA some flexibility reflecting the reality that certain claimants may be unable to specify dates of abuse, and whose actions should not necessarily be dismissed as a result. Courts have held that as to the dates of alleged abuse under the CVA, absolute exactitude is not required so long as the particulars of the claim are sufficiently detailed to enable the state to conduct an investigation of the claim (*e.g. Wagner v State of New York*, 214 A.D.3d 930, 187 N.Y.S.3d 61 [2nd Dep't. 2023]; *Meyer v State of New York*, 213 A.D.3d 753, 183 N.Y.S.3d 521 [2nd Dep't. 2023]). The theory of these cases, which is sound, is that if the claimant provides a general time frame, a place, perhaps name of a perpetrator, the overall quantum of detail is sufficient to permit the investigation contemplated by Court of Claims Act 11(b), and such actions should not be dismissed for the absence of subject matter jurisdiction.

C3211:14 "Other Action Pending"

CPLR 3211(a)(4), which permits the dismissal of an action because there is a prior action pending between the same parties for the same dispute, received some exercise in *Quinones v Z & B Trucking Inc*., __ A.D.3d __, 196 N.Y.S.3d 162 (Mem.) (2nd Dep't. 2023). The two related actions at issue were for personal injuries sustained by the plaintiff as a result of a two-vehicle automobile accident. Action #1 was commenced by the filing of initiatory papers in 2019 but process was never served upon the defendants who owned and operated one of the vehicles. Action #2 was e-filed by the same plaintiff against the same defendants in 2021 for the same underlying occurrence, but on this occasion process was effected upon the defendants. The two actions were assigned to different justices in Queens County. The defendants moved to dismiss the second action under CPLR 3211(a)(4) arguing that there was a prior action from 2019 that was pending. At the same general time, the defendants served a motion to dismiss the first of the two actions on the ground that service of process had not been accomplished within the 120-day timeframe required by CPLR 306-b. The practicing bar might view these facts as potentially inequitable if both actions were to be dismissed and the plaintiff left without any pending case. Yet, because the two actions were assigned to two different judges, the dismissal of both actions is what happened--the first action was dismissed on September 14, 2021 for the failure to serve process, and the second action was dismissed three days later on the ground of prior action pending. Of course, RJI forms are supposed to identify the relatedness of actions so these types of inconsistencies can be avoided. One day before the dismissal of the second action, the plaintiff provided the court with a copy of the order dismissing the first action, which the court acknowledged receiving, but which was not later listed in the order of dismissal as among the papers considered. The plaintiff's motion to renew and reargue the dismissal of the second action was denied, and the denial of reargument is of course not appealable (though the denial of renewal is subject to appeal). Appeals were taken *inter alia* from both the order dismissing

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the second action for prior action pending, and the order denying its renewal on the ground that the earlier dismissal of the first action negated the existence of any prior action *pending.* The Second Department held that it was error for the court in the second action to find that there was a prior action pending, as the absence of any service of process in that matter meant that no prior action was actually "pending." That determination rendered academic any error that arguably existed by the court's denial of renewal. Had renewal been reached on appeal, it is likely and predictable that the Appellate Division would have reversed, as the first action had clearly been dismissed by court order prior to the dismissal of the second action for prior action pending, so that on that additional basis, there was no longer any pending prior action.

C3211:18 Affirmative Defenses Available on Subdivision (a)(5) Motion

Statute of Limitations

Governor Andrew Cuomo issued a series of Executive Orders that affected court deadlines as a means of dealing with the covid-19 virus and the disruptions and shutdowns related to it. The governor's authority to do so derived from Executive Law 29-a(1) and (2) in dealing with disaster emergencies. Executive Law 29-a(1) permits a governor by executive order to temporarily suspend specific provisions of statutes, local laws, or ordinances, or the rules or regulations of state agencies, during disaster emergencies. Executive Law 29-a(2)(d) permits the governor in such instances to alter or modify the requirements of statutes, local laws, ordinances, rules or regulations. Under that authority, the governor issued on March 20, 2020 Executive Order ("EO") 202.8 (9 NYCRR 8.202.8) directing that any time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, be tolled until April 19, 2020. Nine additional Executive Orders were issued extending the deadline extensions ultimately to November 3, 2020, a total of 228 days (EO Nos. 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72, found at 9 NYCRR 8.202.14, 9 NYCRR 8.202.28, 9 NYCRR 8.202.38, 9 NYCRR 8.202.48, 9 NYCRR 8.202.55, 9 NYCRR 8.202.55.1, 9 NYCRR 8.202.60, 9 NYCRR 8.202.67, and 9 NYCRR 8.202.72). Without doubt, the Executive Orders extended, among other things, statutes of limitations.

A question naturally arose as to whether these covid-related time extensions represented a "suspension" or a "toll" of the statute of limitations. There is a difference in the nomenclature that could have a practical effect upon the timeliness of actions. A "suspension" of a statute of limitations merely extends the limitations period to the end-date of the suspension, so that limitations periods expiring in the interim do not expire during that defined time. With a suspension, a statute of limitations expiring on a date after the suspension is lifted is unaffected, meaning that the plaintiff must commence an anticipated action or proceeding within the standard limitations period. By contrast, a "toll" stops the statute of limitations clock from ticking for so long as the toll is in effect. When the toll period ceases, the amount of the tolled time is added to the end of the standard limitations period, thereby expanding the time for timely commencing an action or proceeding to a date beyond the original end-date of the statute of limitations. Tolls may therefore more helpful and generous to plaintiffs than suspensions. Executive Law 29-a(1) clearly provides the governor with authority to temporarily "suspend" statutory provisions. Yet, the Executive Orders issued by Governor Cuomo expressly used the language of a "toll."

The Appellate Division in the Second Department squarely addressed the question of whether the covid-related Executive Orders at issue operated as suspensions or tolls to the statutes of limitations. It held in *Brash v Richards*, 195 A.D.3d 582, 149 N.Y.S.3d 560 (2nd Dep't. 2021) that the Executive Orders were tolls. The court acknowledged that the governor only has authority to toll statutory deadlines where the underlying authority of the Executive Law permits it. It found the tolling authority to exist by virtue of the language of Executive Law 29-a(2)(d), which confers upon the governor the authority to "provide for the *alteration or modification* of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions (emphasis added)." The operative words for the Appellate Division were "alteration" and "modification," broad enough to envision the tolling of limitations periods (*Brash v Richards*, 195 A.D.3d at 585). The same reasoning has since

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been adopted by other judicial departments (*Murphy v Harris*, 210 A.D.3d 410, 411, 177 N.Y.S.3d 559 [1st Dep't. 2022]; *Roach v Cornell University*, 207 A.D.3d 931, 933, 172 N.Y.S.3d 215 [3rd Dep't. 2022]).

The covid tolls will be mathematically applied just like any lawful toll such as those for a defendant's absence from the state (CPLR 207), infancy (CPLR 208), insanity (CPLR 208), war (CPLR 209), the death of a party (CPLR 210), military service (Military Law 308), and bankruptcy (11 U.S.C. 362[a]). By logical extension, arguably, all causes of action that accrued in New York prior to Governor Cuomo's initial Executive Order on March 20, 2020 may be filed months or years into the future, enjoying a 228-day toll to their limitations deadlines depending on the applicable math.

The courts are beginning to see the effects of the covid tolls in litigations where the toll has enabled facially untimely actions to be timely, and thereby enable plaintiffs to survive CPLR 3211(a)(5) dismissal motions. But the arithmetic must actually work for the plaintiff to avoid such dismissals. *In Lastella v St. Joseph's Hospital*, 219 A.D.3d 1421, 196 N.Y.S.3d 162 [2nd Dep't. 2023], an administrator's action for medical malpractice and wrongful death was dismissed based on the last date the decedent was a patient at the defendant hospital as to the medical malpractice, and the date that the decedent died as to the wrongful death. The respective statutes of limitations had expired as to both causes of action by the time of the action's commencement-two and a half years for the alleged medical malpractice (CPLR 214-a) and two years for the alleged wrongful death (EPTL 5-4.1). The plaintiff argued that Governor Cuomo's 228-day covid tolls were excludable from the computations. However, even excluding those days, both causes of action were still untimely in the relation to the date the action was commenced, requiring that the entire action be dismissed for untimeliness (*Lastella v St. Joseph's Hospital*, 219 A.D.3d at 1421).

The Statute of Limitations and Standing

The plaintiff's lack of standing is a basis for the dismissal of a complaint under CPLR 3211(a)(5). The Foreclosure Abuse Prevention Act (L.2022 ch. 821) known in shorthand as FAPA, which was signed into law by Governor Hochul on December 30, 2022, affects limitations-related and standing-related dismissal motions under CPLR 3211(a)(5).

The FAPA legislation contains a number of inter-related homeowner-friendly provisions. Prior to the enactment of FAPA, if a residential mortgage foreclosure action was commenced with an acceleration of the balance due on the unpaid note, the action could be discontinued under CPLR 3217 and, according to the Court of Appeals, the discontinuance had the automatic effect of rescinding the debt acceleration. The lender could then commence a second action at a later date within the six-year statute of limitations measured from the discontinuance of the earlier action (CPLR 213[4]), and with a new acceleration of the outstanding debt on the note (*Freedom Mortgage Corporation v Engel*, 37 N.Y.3d 1, 146 N.Y.S.3d 542, 169 N.E.2d 912 [2021]; *Bank of New York Mellon v Shurko*, 209 A.D.3d 951, 177 N.Y.S.3d 593 [2nd Dep't. 2022]). Further, a later action could be commenced *after* six years from the discontinuance of the earlier one, along with a debt acceleration, so long as the plaintiff in that earlier action lacked standing to commence it and accelerate the debt (*Hawthorne v New Century Mortgage Corp.*, 207 A.D.3d 528, 169 N.Y.S.3d 814 [2nd Dep't. 2022] [action under RPAPL 1504(1)]; *Wells Fargo Bank, N.A. v Rutty*, 206 A.D.3d 862, 171 N.Y.S.3d 117 [2nd Dep't. 2022]). In those second actions, the lender argued the seemingly-counterintuitive position that the plaintiff-lender in the earlier action lacked standing which, if proven, rendered the debt acceleration in that earlier action null and void. The only limitation upon the lender in the later action was that missed payments toward the note could only be sought for the six-year limitations period preceding the commencement of the later action, plus the accelerated note balance. The accelerated note balance is usually the prayer for relief that represents the big money of these actions, and is typically more important than the value of missed monthly payments. But FAPA changed the dynamic.

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FAPA amended CPLR 213 to add two new subdivisions denominated in the statute as subdivisions (4)(a) and (4)(b), which changes much of the foregoing. Under CPLR 213(4)(a), as amended, the lender in a second action is estopped from claiming that the plaintiff-lender in an earlier action against the mortgagor lacked standing to commence the action and accelerate the loan (*MTGLQ Investors, L.P. v Singh*, 216 A.D.3d 1087, 190 N.Y.S.3d 415 [2nd Dep't. 2023]). As a result, even if the plaintiff in the first action can be shown to have lacked standing, it does not matter as the plaintiff-lender in the second action, with standing, is statutorily barred from claiming that there had been an unenforceable earlier acceleration. CPLR 213(4)(a) contains one important exception: If the earlier mortgage foreclosure action was *dismissed by the court* for the lack of standing, then the plaintiff-lender in the second action may argue the invalidity of the initial acceleration, as to allow the acceleration in the later action. The court's dismissal of an earlier action for the lack of standing could be by an order granting dismissal under CPLR 3211(a)(5) or by summary judgment under CPLR 3212. But absent a judicial dismissal for lack of standing in the earlier action, the estoppel imposed against the lender by CPLR 213(4)(a) controls (*SYCP, LLC v Evans*, 217 A.D.3d 707, 191 N.Y.S.3d 433 [2nd Dep't. 2023]; *Bank of N.Y. Mellon v Stewart,* 216 A.D.3d 720, 190 N.Y.S.3d 80 [2nd Dep't. 2023]; *GMAT Legal Title Trust 2014-1 v Kator*, 213 A.D.3d 915, 184 N.Y.S.3d 805 [2nd Dep't. 2023]).

Under CPLR 213(4)(b), as amended, the same concept, described above, is applied to actions under RPAPL 1504(1) seeking to cancel and discharge mortgages.

What we are left with, insofar as standing is concerned, is the greater ability for homeowner defendants in the later of multiple actions to move to dismiss those actions for untimeliness under CPLR 3211(a)(5).

The provision of FAPA that restricts parties' rights to challenge standing in a prior related action, in order to seek recovery on a re-accelerated debt in a later action, is limited to residential mortgage foreclosure actions subject to CPLR 213(4). Other actions to collect upon defaulted notes are unaffected by the FAPA legislation, and as to those, the Court of Appeals decision in *Freedom Mortgage Corporation v Engel*, discussed above, remains good law.

The reader is referred to this year's Supplemental Practice Commentary C3217:5, which discusses the FAPA amendment to CPLR 3217 and its effect on discontinuances and the statute of limitations in residential mortgage foreclosure actions.

Statute of Limitations and CPLR 214-a

The state legislature enacted “Lavern's Law,” which amended CPLR 214-a effective on January 18, 2018 (L.2018 ch. 1 sec. 6). The amendment added a discovery toll to the statute of limitations for medical malpractice claims arising out of a defendant's failure to diagnose cancer or a malignant tumor. The statute of limitations remained the same--two and a half years-but it did not begin to run until when the plaintiff knew or should have known that the defendant's alleged act or omission caused injury, subject to a seven-year cap measured from the alleged negligent act or omission. However, the revival period of the statutory amendment also was limited by its terms to medical malpractice claims that arose within two and a half years prior to its January 18, 2018 effective date, and not before. In *Ford v Lee,* 203 A.D.3d 456, 164 N.Y.S.3d 592 (1st Dep't. 2022), the defendant moved to dismiss the plaintiff's complaint for an alleged failure to diagnose cancer as the cause of action had accrued on May 16, 2014, earlier in time than the revival period defined by the statute. The First Department agreed, and the plaintiff's dismissal motion, which had been denied by the Supreme Court, was granted on appeal.

Statute of Limitations and the Crime Victims Act

The Crime Victims Act (CVA) embodied by CPLR 214-g, originally effective February 14, 2019, revived otherwise time-barred claims by plaintiffs who were victimized as minors by certain defined acts of sexual offenses committed by defendants. It must be read in conjunction with the CVA-related tolling provisions for infancy as set forth in

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CPLR 208(b), as also amended in 2019. The CVA is primarily a civil remedy, not a criminal one. It allows for the filing of formerly time-barred actions by individuals who were under the age of 18 at the time of certain sex offenses, for a two and a half revival period measured from the effective date of the statute, so long as the plaintiff is not 55 years old or older at the time of commencement. CPLR 208(b) otherwise extends the civil statute of limitations for actions arising from underage sex offenses to victims' 55th birthdays. CPLR 214-g was further amended effective August 30, 2020. The CVA was challenged on due process grounds. The statute was found to not violate due process, and on that basis, the denial of the defendant's motion to dismiss for a violation of the statute of limitations was affirmed on appeal (*Schearer v Fitzgerald*, 217 A.D.3d 980, 192 N.Y.S.3d 207 [2nd Dep't. June 28, 2023]). Case not dismissed.

The CVA has also been challenged on constitutional grounds, both on its face and as applied to particular defendants. The Third Department rejected the dismissal of an action on those constitutional challenges in *Matarazzo v Charlee Family Care, Inc*., 218 A.D.3d 941, 192 N.Y.S.3d 755 (3rd Dep't. 2023).

Statute of Limitations and Bankruptcy

A bankruptcy proceeding stays the running of the statute of limitations on an accrued claim that may potentially be asserted against the bankrupt party. In *Deutsche Bank National Trust Company v Lubonty*, 208 A.D.3d 142, 171 N.Y.S.3d 556 (2nd Dep't. 2022), the defendant moved for a CPLR 3211 dismissal of the second of two residential mortgage foreclosure actions on the ground of untimeliness. The defendant argued that the second action was commenced more than six years from the discontinuance by the plaintiff of the first action and was therefore untimely under CPLR 213(4). While the defendant was correct on that math, he was not correct on the law. The defendant had been under the protection of a bankruptcy court for part of the time between the two cases, which operated as a toll of the statute of limitations under 11 U.S.C. 362(a) and CPLR 204(a). The toll stayed and extended the time for commencing the plaintiff's second action long enough that the action, though commenced more than six calendar years from the discontinuance of the first action, was nevertheless timely (*Deutsche Bank National Trust Company v Lubonty*, 208 A.D.3d at 150). Case not dismissed.

Infancy

Plaintiffs in a two-vehicle automobile accident commenced an action for damages. One plaintiff was an infant who sued in her own name rather than through a parent or guardian, and the second plaintiff was the infant's mother. The defendants moved to dismiss the action of the daughter based on the infancy defense of CPLR 3211(a)(5). The plaintiffs cross-moved under CPLR 3025(b) for leave to amend their complaint to name the infant's mother as the plaintiff on behalf of her daughter. The Supreme Court, Bronx County, granted the dismissal motion and denied the cross-motion. The First Department reversed, finding that the court should have exercised its discretion to deny dismissal in favor of granting the plaintiff-mother's cross-motion to correct the problem (*Veloz v Jiddou*, 212 A.D.3d 549, 182 N.Y.S.3d 85 [1st Dep't. 2023]). The case could have alternatively been viewed as one involving the infant's lack of capacity to act as the plaintiff in the action under CPLR 3211(a)(3), though that was apparently not a defense raised by the parties or discussed in the reported decision. In any event, the failure of the initial complaint to name a proper party plaintiff was rectified. Case not dismissed.

Release

Sjogren v Board of Trustees of Dutchess Community Coll., 216 A.D.3d 836, 189 N.Y.S.3d 237 (2nd Dep't. 2023) involved a student at a college that mandated certain gym activities. The plaintiff had some physical limitations, but she signed a release discharging the defendant college "from all liability for any claim of injury" to the student's person, whether harm was "caused by the negligence of the releasees or otherwise." The release further provided that it was "intended to be broad and inclusive in keeping with state laws." The plaintiff claimed that she was injured

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during one of her mandated gym activities and commenced an action against the defendant college for damages. The defendant of course moved to dismiss the action under CPLR 3211(a)(5) based on the language of the release. The Second Department noted that a release constitutes a complete bar to an action on a claim which is the subject of the release. Releases are interpreted under the principles of contract law. The Second Department held that the sweeping language of the release at issue here evinced an intention of the parties that it be all-encompassing. The release included language that the plaintiff was aware of and agreed to any risks associated with her gym activities (*Sjogren v Board of Trustees of Dutchess Community Coll.*, 216 A.D.3d at 239). Case dismissed.

A similar result was reached in the Fourth Department involving the operator of a snowmobile who was involved in an accident. The plaintiff had signed a broad general release, clearly and unambiguously releasing the defendant from any claims for bodily injury of any kind. The Fourth Department found it enforceable, and on that basis, dismissed the plaintiff's complaint on appeal (*Putnam v Kibler*, 210 A.D.3d 1458, 178 N.Y.S.3d 851 [4th Dep't. 2022]).

Statute of Frauds

These Practice Commentaries have monitored developing case law addressing when and whether e-mail and other material obtained from social media may qualify as "documentary evidence" for the dismissal of an action under CPLR 3211(a)(1) (CPLR Practice Commentaries and Supplemental Practice Commentaries C3211:10). Distilled to its essence, e-mails may qualify as documentary evidence under CPLR 3211 when they are essentially unambiguous, undeniable and authentic, and for a dismissal motion to be granted upon them, conclusive.

Similar issues have arisen in the context of dismissal motions arguing non-compliance with the statute of frauds under CPLR 3211(a)(5). E-mails were found to be insufficient to establish a party's compliance with the statute of frauds where they were not subscribed in an electronic signature block by the party to be charged as to form a binding contract (*Preston v Nichols*, 216 A.D.3d 1398, 189 N.Y.S.3d 837 [4th Dep't. May 5, 2023] [texts and e-mails]).

Practitioners are referred to an analytical decision and order of Supreme Court Justice Aaron D. Maslow, which surveys appellate cases that address when e-mail has been, and has not been, admissible in determining motions under CPLR 3211(a)(1) (*590 Myrtle LLC v Silverman-Shaw Inc.*, 78 Misc.3d 1218[A], 185 N.Y.S.3d 655 [Sup. Ct. Kings Co. 2023] [portions of the motions were converted to summary judgment per CPLR 3211[c]). In *590 Myrtle Avenue*, e-mail exchanges between counsel during negotiation of a $9.5 million real estate transaction were found to be admissible on the ground that they were unambiguous, authentic, and undeniable (*590 Myrtle LLC v Silverman-Shaw Inc.*, 78 Misc.3d at 1218[A] *8). Indeed, the authenticity of the e-mails were not in question by the parties to the CPLR 3211(a)(1) motion which, it seems, makes it much easier for a court to find that prong of admissibility to be met. In the end, the court determined that the merits of the proffered e-mails established *inter alia* a lack of a meeting of the minds for there to be an enforceable contract between the parties.

C3211:21 Failure to State a Cause a Cause of Action, Generally

CPLR 3211(a)(7) allows for the dismissal of complaints that fail to state a cause of action on which the relief sought can be granted. The term "cause of action" has no discrete definition in the general definitional section of CPLR 105. It is readily understood as relating to allegations of fact and the invocation of law providing grounds for some form of monetary or equitable relief from another party. Causes of action do not lie for procedural devices that are merely collateral to them such as joinder, consolidation, and severance, and should not be styled as such. Relief collateral to causes of action may instead be pursued by means of a separate application to the court, brought under its own enabling statute.

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The same concept is true of claims for punitive damages. Punitive damages are not a cognizable free-standing cause of action in New York and should not be pleaded as such (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 N.Y.603, 616, 612 N.Y.S.2d 339, 634 N.E.2d 940 [1997]). Punitive damages are instead a prayer for relief to be set forth in an *ad damnum* clause, which relate back to the stated causes of action from which damage awards are derived (*Trigo v Miller*, 60 Misc.3d 456, 75 N.Y.S.3d 847 [Sup. Ct. Nassau Co. 2018]).

C3211:28 Lack of Personal Jurisdiction

Service of Process

CPLR 308(2) and (4) require the filing of affidavits of service. Affidavits of service are likewise important in helping establish the proper service of process when other forms of service are used as well. Attorneys should be diligent in overseeing the work of process servers not just in connection with the timing and methods of service, but also, the accuracy of the affidavits of service prepared after the fact. The failure of a party to produce accurate affidavits of service can be fatal to the service itself, particularly when the timing or method is challenged by the defendant. An example is seen in *HSBC Bank, National Association v Rini*, 202 A.D.3d 945, 162 N.Y.S.3d 471 (2nd Dep't. 2023). In *Rini*, the defendant moved to dismiss the plaintiff's complaint for the alleged improper "suitable age and discretion" process under CPLR 308(2). The defendant produced in support of the motion the process server's affidavit which reflected an execution of the affidavit one day *prior* to the necessary mailing of a copy of the summons and complaint. In response to the motion, the plaintiff filed two amended affidavits of service, the first confirming the mailing date of the summons and complaint, and the second changing that date to three days earlier. The Supreme Court deemed the second amended affidavit as correcting the confusion on dates and denied the defendant's motion to dismiss. The Second Department reversed on the ground that the process server's inconsistent and competing affidavits raised credibility issues which required a *Traverse* hearing to determine the validity of the service of process. The court noted that while affidavits of service may be corrected under CPLR 305(c) in the exercise of judicial discretion where a substantial right of a party is not prejudiced, the alleged erroneous mailing date reflected by the first and second affidavits of service affected a substantial right of the defendant to proper CPLR notice of the action. Of course, the problem faced by the plaintiff could have been avoided if counsel had more carefully checked the content of the original affidavit of service against the calendar incongruity apparent on its face.

General Jurisdiction

Courts continue to address issues of general jurisdiction in light of the U.S. Supreme Court's groundbreaking opinion in *Daimler AG v Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014) Opinion by Ginsburg, J.). As readers of these Practice Commentaries know, the U.S. Supreme Court clarified in *Daimler* that for general jurisdiction to attach against a corporate party, the entity must be "at home" in the state, meaning that it 1) be incorporated within the state, or 2) maintain its principle office within the state, or 3) qualify as a "truly exceptional case" where the entity's operations are so substantial and of such nature as to render the corporation at home within the state. In New York, general jurisdiction is recognized by CPLR 301.

The first two prongs for general jurisdiction defined by *Daimler* are objective and straight-forward, easily determined by reference to public documentation. Every corporation will have a publicly-filed document identifying its state of incorporation and principal office address. The third potential prong for general jurisdiction is more amorphous as it depends upon arguable factors that will vary from case to case, such as operations being "so substantial" within a state or being of "such nature." A number of recent reported cases have found the circumstances to *not* qualify as "truly exceptional" under *Daimler*. These include, as examples, *Machado v Hershey Entertainment and Resorts Company*, 2023 WL 1967531 (E.D.N.Y. 2023) (not exceptional where defendant engages in *inter alia* extensive television and internet advertising in New York and solicitation of business) and

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Starostenko v UBS AG (A Swiss Bank), 2023 WL 34947 (S.D.N.Y. 2023) (not exceptional where defendant is one of the largest broker-dealers in the world with subsidiaries in New York).

The *Machado* and *Starostenko* cases, and other reported jurisdiction-related cases that may be found on Westlaw across the country, discuss one case from 1952 which is held out an example of where exceptional circumstances may exist for the assertion of general jurisdiction--*Perkins v Benquet Consol. Min. Co*., 342 U.S. 437, 72, S.Ct. 413, 96 L.Ed. 485 (1952). *Perkins* involved a defendant corporation that shut down the entirety of its mining operations in the Philippines because of World War II and relocated its operations to Ohio. The U.S. Supreme Court held in *Perkins* that the defendant was amenable to the general jurisdiction of Ohio because Ohio had become its principal, albeit perhaps temporary, place of business. The definition of a "truly exceptional case" for general jurisdiction is nosebleed high.

Of note from our state court where truly exceptional circumstances were analyzed for the possible assertion of general jurisdiction is *Jiang v Z & D Tour, Inc*., 75 Misc.3d 583, 169 N.Y.S.3d 460 (Sup. Ct. Richmond Co. 2022). The plaintiff was injured on a passenger bus operated by the defendant during a roll-over accident while the bus was travelling in Pennsylvania. The defendant, J & D Tour, Inc. (Z & D), was a New Jersey corporation whose buses traveled to many locations throughout the country. Although Z & D was not incorporated in New York and did not maintain its principal office here, it maintained a brick-and-mortar office in New York for the sale of tickets, its buses stopped in front of its office to take on and discharge passengers, the defendant's name appeared on a bus stop sign posted in New York, and the defendant had applied to the New York City Department of Transportation and lobbied the local community board for permission to post its signage. The Court held that those circumstances failed to qualify as truly exceptional under *Daimler.* The Supreme Court's analysis in *Jiang* appears to be correct, as the factors that the plaintiff relied upon for arguing in favor of general jurisdiction were simply run-of-the-mill endeavors by an out-of-state entity to transact business in New York, and were limited in and of themselves. The Supreme Court held in *Jiang* that the defendant was amendable to the specific longarm jurisdiction of New York under CPLR 302(a)(1), from its transaction of business in New York and the relatedness of its transaction to the plaintiff's claim (*Jiang v Z & D Tours, Inc*., 75 Misc.3d at 590). *Jiang* underscores that even where general jurisdiction is lacking against a defendant under CPLR 301, that same defendant may be amenable to longarm jurisdiction under at least one of the statutory bases set forth in CPLR 302(a).

On June 27, 2023, the U.S. Supreme Court released its 5-4 decision in the case of *Mallory v Norfolk Southern Railway Co*., 600 U.S. 122, 143 S.Ct. 2028, 216 L.Ed.2d 815 (2023). The majority opinion was written by Justice Gorsuch and the dissent by Justice Barrett. It is yet another significant development in the evolving law on the assertion of general jurisdiction. It is the latest of four major developments on the subject of general jurisdiction.

The first of four major developments was the U.S. Supreme Court's 2014 decision in *Daimler AG v Bauman*, *supra*. As already noted, in *Daimler*, the Supreme Court clarified that states may assert general jurisdiction (as distinguished from specific jurisdiction) over an out-of-state corporation only when the entity is "at home" in the forum state. The court identified three circumstances when a corporation is "at home" in a state--the first being the corporation's state of incorporation, the second being the state where the corporation maintains its principal office, and the third being the "truly exceptional case" where the entity's operations are so substantial and of such nature as to render the corporation at home in the state. *Daimler* was a restrictive interpretation of federal due process in this area.

The second major development on general jurisdiction, at least in New York State, was the question of whether a corporation's registration to do business within the state confers general jurisdiction over the entity. The issue worked its way through the state courts and came to a head in a 5-2 opinion of the Court of Appeals in *Aybar v Aybar*, 37 N.Y.3d 274, 156 N.Y.S.3d 104, 177 N.E.3d 1257 (2021). *Aybar* held that a corporation's registration to do business in New York did *not* confer the state's general jurisdiction over the out-of-state entity, as it instead merely

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provided for the corporation's consent to service of process within the state. Service of process upon the corporation, by whatever means, still requires an underlying basis for New York's jurisdiction, and corporate registration in New York did not, in and of itself, establish general jurisdiction. Notably, *Aybar* was decided based upon New York's due process precedents and was not reliant upon *Daimler*. Plaintiffs seeking to commence actions against foreign corporations, without the availability of general jurisdiction, need under *Aybar* to look to a specific jurisdictional basis under New York's longarm statute (CPLR 302), which in some instances is trickier.

A third recent development has been the New York legislature's response to *Aybar*. The legislature did not like the holding, not one bit. Both houses of the state legislature passed a bill to legislatively nullify *Aybar* (A7769, S7253) by creating proposed CPLR 301-a and amending BCL 1301(e). The amendments provide that a foreign corporation's registration to do business in New York will constitute the corporation's consent the general jurisdiction of New York's courts, absent a withdrawal by the corporation of its registration. That legislation, however, was vetoed by Governor Hochul on December 31, 2021 on the ground that in her view, the proposed legislation would deter foreign corporations from coming to New York to do business. The state legislature was not deterred by the veto. In 2023, both houses of the legislature passed a bill once again to enact a new statute denominated as CPLR 301-a and by amending BCL 1301(e) (A7351, S7476), to provide that a foreign corporation's registration to do business in New York confers New York's general jurisdiction over the entity. Like its proposed legislative predecessor, the corporation could avoid general jurisdiction by withdrawing its New York registration. As of this writing in the summer of 2023, the amendatory bill has not yet been submitted to Governor Hochul for signature. The fate of the bill should be known by the time this Supplemental Practice Commentary is distributed in hard copy at approximately the New Year.

The fourth major development on general jurisdiction is the U.S. Supreme Court's decision in *Mallory v Norfolk Southern Railway Co., supra*. The plaintiff in *Mallory* brought a cancer-related personal injury action against the defendant, Norfolk Southern Railway Co. (Norfolk Southern) in the commonwealth of Pennsylvania under the Federal Employers' Liability Act. The plaintiff resided in Virginia at the time the action was commenced. His exposure to carcinogens while in the former employ of Norfolk Southern was in both Virginia and Ohio. Norfolk Southern's state of incorporation and principal office were in Virginia. The corporation's only jural connection to Pennsylvania was its registration there to do business. And business it did--maintaining within the commonwealth 5,000 Pennsylvanian employees, 2,400 miles of Pennsylvania rail, eleven rail yards there, the largest locomotive shop in North America, and other Pennsylvanian activities (*Mallory v Norfolk Southern Railway Co.*, at *10). Pennsylvania is a “compulsory consent” state, meaning that any entity wishing to do business in the state is *required* to register there and *required* by that registration to consent to the general jurisdiction of the state (15 Pa. Cons. Stat. Ann. 411[a], 5301[a][2][i]). Naturally, considerations of due process are implicated.

In *Mallory*, the five-justice majority at the U.S. Supreme Court (Gorsuch, J.) upheld the assertion of general jurisdiction on the basis of the railway's consent to it, whether compulsory or otherwise. In doing so, the majority relied primarily on precedent which the court found to be squarely on point both factually and legally, the case of *Pennsylvania Fire Ins. Co. of Philadelphia v Gold Issue Min. & Mill. Co.*, 243 U.S. 93, 37 S.Ct. 344, 61 L.Ed. 610 (1917) (Holmes, J.). The Gorsuch majority was unwilling to ignore the court's own century-old precedent. The four-justice dissent (Barrett, J.) disagreed, concluding that the *Pennsylvania Fire Ins. Co.* case from 1917 was implicitly overruled by the Supreme Court's due process analysis in *International Shoe Co. v State of Wash., Office of Unemployment Compensation and Placement,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and by *Daimler's* more recent pronouncement in 2014 that general jurisdiction may only be asserted when a corporation is “at home” in the state by its incorporation there, its principal office there, or in the “truly exceptional case” (*Mallory v Norfolk Southern Railway Co.*, at *26). The dissent concluded that since Norfolk Southern did not meet the *Daimler* tests for the assertion of general jurisdiction by Pennsylvania, general jurisdiction was lacking. Both the majority and the dissent made creditable points.

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In his concurrence with the majority in *Mallory*, Justice Alito made an observation that is potentially significant. He questioned whether the assertion of general jurisdiction through a compulsory consent statute is constitutional under the commerce clause. He stated there was a "good prospect" that Pennsylvania's compulsory consent statute places an undue burden on interstate commerce by requiring corporations to defend themselves in the commonwealth in potentially all of its transactions, whether those transactions are related to Pennsylvania or not. He expressed a concern that businesses might elect to avoid entering new markets as a means of insulating themselves from remote litigations. Justice Alito also noted that the commerce clause, though raised in the parties' papers in the state court proceedings, was not addressed by the Pennsylvania Supreme Court and was therefore not before the U.S. Supreme Court to consider on the merits. But he invited Norfolk Southern to raise the issue upon *Mallory's* remand to the Pennsylvania court (*Mallory v Norfolk Southern Railway Co.*, at *14).

Some observations flow from *Mallory* that impacts us in New York:

Justice Gorsuch was not on the U.S. Supreme Court in 2014 when the *Daimler* case was decided, so he had a free hand to write the majority opinion in *Mallory* without particular constraint. *Mallory's* finding of general jurisdiction based on compulsory consent provides an end-run around *Daimler* for any state that has, or enacts, a sufficient compulsory consent statute. The *Daimler*r Bastille has been partially stormed. However, of equal importance is *what* the compulsory consent statute must actually say to qualify under *Mallory* for general jurisdiction.

Justice Alito's concurrence in *Mallory* that compulsory consent statutes may violate the commerce clause of the constitution is a red flare fired into the sky that will affect the focus of our still-evolving re-definition of general jurisdiction. The legal battlefield will now shift to the commerce clause. The true constitutional limitations to general jurisdiction shall continue to be litigation fodder for a handful of additional years.

The Pennsylvania statute at issue in *Mallory* requires certain paperwork guarantees, and the corporate entity must continuously maintain a registration office as a condition of its certificate to do business and for accepting the benefits and burdens of its presence in that commonwealth. The recent proposed amendments to enact in New York CPLR 301-a and amend BCL 1301(e) (A7351, S7476) which have been passed by the state legislature but as of this writing not yet sent to Governor Hochul, do not mimic the level of compulsory conditions as seen in the Pennsylvania statute. Therefore, arguably, an open question will still fester as to whether the amendatory language, if signed into law, is "enough" under *Mallory* to assert general jurisdiction absent additional language to bring it more in line with Pennsylvania's statute. That may of course be an argument of the out-of-state corporations going forward, commerce clause aside. If, *arguendo*, the proposed legislative amendments to CPLR 301-a and BCL 1301(e) are signed into law by the governor, they will be subject to the same commerce clause challenge identified by Justice Alito in his *Mallory* concurrence. We in New York may still be debating and watching developments on general jurisdiction in year 2028 as *Mallory* does not quite settle the full array of issues, which is unsatisfying. Justice Barrett may be correct in her assessment that the states may now enact broad compulsory consent statutes full of language and conditions, which will have the effect over time of gutting the restrictiveness of *Daimler*. But if she is correct on that, so be it. Chips fall where they may. But it will all be subject to future courts' interpretations of whether it passes muster under the commerce clause.

Where does *Mallory* leave *Aybar*? *Aybar* was decided as a matter of state due process law and analysis, and it should therefore be unaffected by *Mallory.* The prediction here is that if *Aybar* ever goes away, if at all, it will be by means of New York State legislative nullification.

Mallory deserves one final observation. As already noted, *Daimler* recognized three separate bases for general jurisdiction for an entity to be "at home"--the state of incorporation, the state of the principal office, and the "truly exceptional case" where an entity's operations within a state are so substantial and of such nature as to render the corporation at home there. That third prong is deserving of further federal appellate definition and refinement, going

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forward. If Norfolk Southern's contacts with Pennsylvania in *Mallory* were so very extensive as described by Justice Gorsuch in his majority opinion (5,000 Pennsylvanian employees, 2,400 miles of Pennsylvanian rail, eleven rail yards, and the largest locomotive shop there in North America), then *Mallory* might have been a case for considering the third prong of *Daimler* had it been argued and addressed. But instead *Mallory*'s sole focus was the different question of whether a compulsory consent statute permits the assertion of general jurisdiction. The majority and dissent seemed to talk past one another--Justice Barrett's dissent (along with three colleagues) hinged on *Daimler, Daimler, Daimler*, whereas Justice Gorsuch's reasoning focused almost exclusively on the *Pennsylvania Fire* case and only mentioned *Daimler* incidentally a couple of times during a discussion of *International Shoe*. The division behind their closed doors was probably palpable. The third prong of *Daimler* might have potentially brought the members of the court together for one side of the case or the other had that issue been part of the briefing, but the true and separate issue was compulsory consent where the divide occurred.

There is a bottom line that we can draw from *Mallory*: Beyond the three prongs of *Daimler* for general jurisdiction, there now appears to be a fourth, under *Mallory*, based on compulsory consent. *Daimler* + *Mallory* = All current available general jurisdiction grounds. General jurisdiction should be determined, under federal analyses, under what might now be called the *Daimler-Mallory* tests. If more states enact compulsory consent statutes for general jurisdiction, *Mallory* may overpower *Daimler* in the bigger future scheme. But again, word to the wise, it will all be subject to potential future developments involving the commerce clause.

C3211:42 Converting CPLR 3211 Motion Into One for Summary Judgment

A court may not properly advise the parties that it will treat a CPLR 3211 motion as one for summary judgment, and then do so, if summary judgment would itself be premature (*Russo v Crisona*, 219 A.D.3d 920, 195 N.Y.S.3d 729 [2nd Dep't. 2023] [summary judgment premature where discovery was required]).

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

The SLAPP statute has generated some new activity in the courts, particularly as a consequence of the state legislature's amendment of CPLR 3211(g) which became effective on November 10, 2020. The CPLR amendment was made in conjunction with related amendments to Civil Rights Law 70-a and 76-a. CRL 70-a(1)(a), as amended, provides, *inter alia*, that costs and attorneys' fees "shall" be awarded to defendants who successfully obtain CPLR 3211(g) dismissals of SLAPP actions. CRL 70-a(1)(b) and (c) further provide for the discretionary award of compensatory and punitive damages upon plaintiffs who are shown to have commenced SLAPP actions for the purpose of harassing, intimidating, punishing, or maliciously inhibiting the free exercise of free speech, petition, or association rights. The amendments to CPLR 3211(g) directed that the court's determination of a defendant's dismissal motion under CPLR 3211 does not affect the burden of proof in the continuing action or in a subsequent action; that the making of a CPLR 3211 dismissal motion automatically stays discovery, hearings, or other motions absent the court specifically permitting limited discovery on targeted issues; and that the SLAPP provisions of CPLR 3211(g) apply to all forms of parties and pleadings (CPLR 3211[g][2], [3], [4]).

What of the 2020 amendments' retroactivity? Case law on the subject was split and evolving, ultimately leading to a decision by the state Court of Appeals that should put the issue to rest.

The Appellate Divisions in the First and Fourth Departments addressed the issue in both *Gottwald v Sebert*, 203 A.D.3d 488, 165 N.Y.S.3d 38 (1st Dep't. 2022) and *Trinh v Nguyen*, 211 A.D.3d 1623, 180 N.Y.S.3d 735 [4th Dep't. 2022]). In *Gottwald*, the First Department noted that the original SLAPP statute had been enacted almost thirty years before the amendments, and that the amendments were enacted to address shortfalls perceived in the statute's original language. The court noted the absence of any actual retroactivity language in the SLAPP amendments and therefore applied the well-worn presumption that the amendments were prospective only as measured from their

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effective date (*Gottwald v Sebert*, 203 A.D.3d at 488). *Gottwald* was followed by the First Department, though without much discussion, in *Cisneros v Cook*, 209 A.D.3d 519, 175 N.Y.S.3d 214 (Mem.) [1st Dep't. 2022) and *Robbins v 315 West 103 Enterprises LLC*, 204 A.D.3d 551, 164 N.Y.S.3d 823 [1st Dep't. 2022]).

Trinh, from the Fourth Department, was a case of alleged defamation and defamation *per se* that fell within the provisions of the SLAPP statute, and which was commenced prior to the 2020 amendments of the law. The interesting twist to *Trinh* was that the 2020 amendment to the cost and attorney fee provisions of CRL 70-a(1)(a) had become effective by the time the defendant's CPLR 3211(g) dismissal motion was made. The Supreme Court, Erie County, applied the cost and attorney fee provisions retroactively in favor of the successful moving defendant. But the Fourth Department held otherwise, noting that the 2020 statutory amendments contained no provision that its language was to be applied retroactively; that statutes are presumed to be prospective; and that as directly relevant here, a retroactive application of the amendments would impair the rights of the plaintiff in the form that existed when the action was initially filed, increase his liability for past conduct, and impose new duties with respect to transactions already completed (*Trinh v Nguyen*, 211 A.D.3d at 1624-25).

Readers of these Supplemental Practice Commentaries are warned that contrary decisions have been rendered from two federal district courts. Those courts determined that the 2020 SLAPP enactments were "remedial" based on certain material contained in the Bill Jacket for the amendments to CRL 70-a, and became effective immediately. Hence, said those courts, retroactive application best implemented the intent of the state legislature (*Coleman v Grand*, 523 F.Supp.3d 244, 258-59 [E.D.N.Y. 2021]; *Palin v New York Times Company*, 510 F.Supp.3d 21 [S.D.N.Y. 2020]). As of this writing, an appeal of *Coleman* is pending at the Second Circuit under Case Number 21-800, so the fate of Coleman's reasoning, at least in the federal context, is uncertain, though it should be affected by further analysis discussed below involving the state Court of Appeals. Respectfully, the Fourth Department was correct to note, contrary to the analyses of the judges in the Eastern and Southern Districts of New York, that the "remedial" nature of a statutory amendment, which is generally at play with many amendments, is not a basis, in and of itself, for ignoring the long-standing legal presumption that new enactments be prospective particularly where there is no expressed provision that a new law be given retroactive effect. All statutory amendments are, at some level, remedial. Had the state legislature intended for its amendments to CRL 70-a and related law to be retroactive to the pre-commencement date of an action's commencement, it could have said so without any need for the federal courts to read its mind.

Of course, guidance from the New York State Court of Appeals would be most welcome on the issue, particularly given the split of reasoning between the federal district courts on the one hand and the state appellate divisions on the other. But like manna from Heaven, the *Gottwald* case of the First Department, discussed above, was granted leave to the state Court of Appeals, and the Court of Appeals determined the issue of retroactivity in a decision rendered June 13, 2023 (*Gottwald v Sebert*, __ N.Y.3d __, 186 N.Y.S.3d 611, 207 N.E.3d 577 [2023]).

Much of the Court of Appeals' analysis in *Gottwald* involves whether the plaintiff was a public figure and whether the defendant enjoyed a privilege defense under the defamation law, which is not particularly relevant here. As to retroactivity, the majority opinion written by Judge Garcia concluded that the SLAPP amendments were prospective only. The specific amendment regarding costs and attorney's fees was made applicable to actions "*commenced or continued* without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law," citing to CRL 70-a(1)(a), which is prospective language (*Gottwald v Sebert*, 2023 WL 3959051 *6 [emphasis added]). Therefore, there is no retroactivity to the cost and attorney's fees language for the period of time between an action's commencement and the effective date of the SLAPP amendments. *But*, said the court, the statutory amendment regarding costs and attorney's fees was also expressly made applicable to actions commenced "*or continued"* without a substantial basis fact or law. As a consequence, costs and attorney's fees shall be assessed in favor of successful counterclaiming defendants in SLAPP actions as computed from the effective date of the SLAPP amendments, forward. The bottom line, therefore, is that

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the issue of costs and attorney's fees straddle the November 10, 2020 effective date of the SLAPP amendments, as not being awardable in actions existing prior to that date but awardable for specific costs and attorney's fees incurred in any actions "continuing" *from* that effective date. Thus, according to the Court of Appeals, the First Department's view of retroactivity under *Gottwald* (and by extension the Fourth Department's view under *Trinh*) was partially correct and partially incorrect, based on the need to straddle the effective date of the SLAPP amendments.

Practitioners should draw two lessons from *Gottwald v Sebert.* The first is that plaintiffs seeking to "continue" actions beyond November 10, 2020 should soberly assess the merits of their claims and the strength, if at all, of the defendants' SLAPP counterclaims. An award of costs and attorney's fees on the counterclaim may be a consequence of any erroneous assessment of those merits, covering the post-amendment timeframe. The same is of course true for plaintiffs who may "commence" an action after SLAPP's 2020 amendments, where all costs and attorney's fees are fair game. Second, there should now be a turnaround in the federal courts on how they view the issue of retroactivity. The Court of Appeals decision in *Gottwald v Sebert* is a matter of substantive law which federal courts must apply. The expectation here is that the Eastern and Southern District holdings in *Coleman v Grand* and *Palin v New York Times Company*, respectively, which retroactively computed SLAPP costs and attorney's fees from their date of pre-amendment commencements, will not be followed by the federal district or circuit courts in the future.

Of further recent interest for readers on the subject of SLAPP is the case of *Trump v Trump*, 79 Misc.3d 866, 189 N.Y.S.3d 430 (Sup. Ct. N.Y. Co. 2023). The action involved a claim by former President Donald J. Trump against his niece, Mary Trump, the *New York Times*, and certain named reporters of the *New York Times*, arising from the newspaper's publication in 2018 of information obtained from Mary Trump about her uncle's taxes. The information at issue was subject to a 2001 settlement and confidentiality agreement between*, inter alia*, Donald J. Trump and Mary Trump, as reached in connection with an earlier family Surrogate's Court proceeding. Mary Trump allegedly provided tax information to a reporter at the *New York Times* in violation of her confidentiality agreement which the *Times* then published to its readers. Plaintiff Trump alleged causes of action against the *New York Times* for tortious interference with contract by inducing Mary Trump to violate the terms of the confidentiality agreement, aiding and abetting the tortious interference with contract, unjust enrichment, and negligent supervision. Notably, plaintiff Trump did not take issue with the contents of the *Times*' 2018 article, nor was there a cause of action asserted for defamation. The *New York Times* defendants moved to dismiss the action under CPLR 3211(g), arguing that the action against those defendants was in the nature of a "public petition and participation" SLAPP action under the expanded, amended version of the law. In opposition, plaintiff Trump argued that SLAPP actions were limited to claims of defamation and that no such cause of action was part of the case. The Supreme Court disagreed with plaintiff Trump, applied SLAPP to the various alleged causes of action, dismissed the case under CPLR 3211(g), and invoked the provisions of CRL 76-a(1)(a) in awarding costs and attorney's fees to the *New York Times* defendants. Noteworthy here is that *Trump v Trump* was commenced on September 21, 2021, *after* the 2020 amendments to both CPLR 3211(g) and CRL 70-a. Therefore, the retroactivity of cost and attorney fee provisions was not a relevant issue for the court to analyze and address, as costs and attorney's fees were required to be given.

A final case of note is the uniquely-named matter of *Balliet v with prejudice of the other Kottamasu*, 76 Misc.3d 906, 175 N.Y.S.3d 678 (Civ. Ct. Kings Co. 2022). The plaintiff and defendant were roommates. The plaintiff commenced an action for defamation against the defendant, for statements allegedly made by the defendant that the plaintiff had been sexually flirtatious with the defendant's significant other. The plaintiff moved to discontinue the action, and the defendant sought in response an award of attorney's fees and costs as required under the SLAPP statute (CRL 70-a[1][a]). The issue before the Civil Court was whether an action of this type fell within the scope of SLAPP. The court held that it did not. The court, while noting that the amendatory language of CRL 70-a, CRL 76-a, and CPLR 3211(g) and (h) broadened the matters that are to be of public interest or concern, the communication in *Balliet* was nevertheless of a private nature outside the intendment of SLAPP. Attorney's fees and costs, otherwise awardable under SLAPP, were therefore denied to the defendant, and appropriately so.

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C3211:6 Specifying the Ground of the Motion

While the language of CPLR 3211(a) is silent about the need for a moving party to specify the ground for a dismissal motion, CPLR 2214(a) fills the gap by requiring that the ground be specified. The specific ground for a CPLR 3211 motion should be set forth in the notice of motion in a way that is plain for the trial court, the opposing parties, and perhaps the appellate court, to see. If a party makes a motion to dismiss on one or more of the eleven specified grounds available under CPLR 3211(a), the moving party should just plainly say so.

The foregoing brings us to the case of *Grocery Leasing Corp. v P & C Merrick Realty Co*., 197 A.D.3d 628, 153 N.Y.S.3d 82 (2nd Dep't. 2021). In that matter, the defendant made a motion that was unclear about whether it was styled as one for CPLR 3211 dismissal or for CPLR 3212 summary judgment. The notice of motion appeared to be for a CPLR 3211 dismissal, but the supporting papers spoke in terms of CPLR 3212 summary judgment. The deficiency was raised by the plaintiff in opposition. In reply papers, the defendant clarified that the motion was in the nature of a CPLR 3211(a)(7) motion to dismiss for the plaintiff's failure to state a cause of action on which the relief sought could be granted. The Supreme Court granted the motion to dismiss but the dismissal was reversed by the Second Department. The reason for the appellate reversal was that since the nature and evidentiary standard for the defendant's motion was not truly revealed until the defendant's reply papers, and there was no sur-reply, the plaintiff was deprived of an opportunity to oppose the actual grounds on which the defendant's motion was made and granted. All of the foregoing confusion could have been avoided had the defendant's initial motion papers been properly drafted to make clear in both the notice of motion and in the supporting papers that the basis for the motion was an alleged failure to state a cause of action. If the complaint actually failed to state a viable cause of action, its dismissal would have been indicated, and the ultimate result would have been a different and happier one for the defendant. Lawyering matters.

C3211:8 *Sua Sponte* Dismissals

As part of an annual observational exercise, trial courts continue to sometimes dismiss residential mortgage foreclosure complaints *sua sponte,* when the defendant is in default, only to see the orders reversed or modified on appeal (*U.S. Bank National Association v Green*, 205 A.D.3d 755, 165 N.Y.S.3d 712 [2nd Dep't. 2022]; *Deutsche Bank National Trust Company v Dicerbo*, 204 A.D.3d 884, 164 N.Y.S.3d 829 [2nd Dep't. 2022]; *Bayview Loan Servicing, LLC v Taddeo*, 199 A.D.3d 749, 157 N.Y.S.3d 82 [2nd Dep't. 2021]; *U.S. Bank National Association v Salgado*, 192 A.D.3d 1181, 141 N.Y.S.3d 337 [2nd Dep't. 2021]. *See also Binder v Tolou Realty Associates, Inc*., 205 A.D.3d 870, 166 N.Y.S.3d 551 [2nd Dep't. 2022] [alleged breach of lease]). The issue continues to be one that plagues only the Second Department. A court's authority to dismiss a plaintiff's complaint *sua sponte* must be exercised sparingly and only under extraordinary circumstances. Errors in the exercise of that limited authority continue to be made by trial courts.

C3211:10 Defense Based on "Documentary Evidence"

Case law continues to develop the circumstances under which electronically-generated information may or may not qualify as "documentary evidence" within the purview of CPLR 3211(a)(1).

Evidence, including e-mails, must be essentially undeniable and authentic to qualify as "documentary evidence" under CPLR 3211(a)(1) (*Shah v Mitra*, 171 A.D.3d 971, 98 N.Y.S.3d 197 [2nd Dep't. 2019]). Letters, e-mails, and affidavits are not "documentary evidence" (*Bath & Twenty, LLC v Federal Savings Bank*, 198 A.D.3d 855, 156 N.Y.S.3d 316 [2nd Dep't. 2021]), at least as a general rule. If letters or e-mails are found to be essentially undeniable and authentic, then their contents may be examined to determine whether they utterly refute a plaintiff's claim.

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E-mails continue to be reflected in cases on an ever-increasing basis, as more and more business is conducted using that form of communication. In *Cohen v Getzel*, 205 A.D.3d 532, 166 N.Y.S.3d 527 (1st Dep't. 2022), the plaintiff taxpayer sought damages against the defendant accountant for certain IRS tax penalties and interest, imposed as a result of errors on a 2016 tax return. Apparently, the net amount of the plaintiff's recoverable damages were credited to the plaintiff against fees that were otherwise owed to the defendant, as evidenced by an uncontested e-mail from the defendant to the plaintiff. The court accepted the e-mail as evidence in support of the defendant's motion to dismiss, on the ground that the plaintiff incurred no recoverable damages, finding it a "proper case" for evidentially allowing the uncontested e-mail. Presumably, the e-mail at issue was deemed to be authentic and disposed of the plaintiff's claim. Similarly, in *Ostojic v Life Medical Technologies, Inc*., 201 A.D.3d 522, 162 N.Y.S.3d 27 [1st Dep't. 2022]), where the issue was whether the parties had reached a meeting of the minds on a federal case settlement and whether there was a breach of that contract, the state court relied upon e-mails and letters sent by the parties to the federal court in concluding that the material terms of a settlement had been reached there. Observationally, the authenticity of the e-mails and letters was aided by the fact that they were generated in real-time and addressed to a court, were directly related to the subject matter, and were uncontested.

An e-mail, while authentic, was found to be inconclusive in *Vergara v Mission Capital Advisors, LLC*, 200 A.D.3d 484, 155 N.Y.S.3d 68 (1st Dep't. 2021). In *Vergara*, the parties disputed the amount of commissions that were owed by the defendant to the plaintiff. The defendant moved to dismiss the plaintiff's complaint, arguing in part that a prior e-mailed spreadsheet by the plaintiff conclusively established that no additional commissions were owed. The court was unpersuaded, as there was no evidence that the plaintiff's calculations in the particular e-mail and spreadsheet were accurate, or more accurate than the plaintiff's later calculations showing that higher commissions were owed. The same was true in *Whitestone Construction Corp. v F.J. Sciame Construction Co. Inc*., 194 A.D.3d 532, 149 N.Y.S.3d 21 (1st Dep't. 2021), where the contents of certain chain logs and e-mails did not reflect facts that were undeniable. In other words, while the e-mail was authentic, its content did not utterly refute the plaintiff's claim for damages.

C3211:11 Lack of Subject Matter Jurisdiction

Two of the various conditions for the state's waiver of sovereign immunity is that actions be commenced against the state only in the Court of Claims, and that a notice of claim be filed and served upon the attorney general's office within 90 days of certain claims' accrual (CCA 10). Under CCA 10(2), if a claim is sought to be made by a decedent's executor or administrator, the 90-day notice period runs from the date of the executor's or administrator's appointment. If no timely notice is filed as directed by the statute, the Court of Claims has no subject matter jurisdiction to entertain the action in the first instance (*Kolnacki v State of New York*, 8 N.Y.3d 277, 832 N.Y.S.3d 481, 864 N.E.2d 611 [2007]). The statutory requirements conditioning claims are strictly construed and applied (*Lichtenstein v State*, 93 N.Y.2d 911, 690 N.Y.S.2d 851, 712 N.E.2d 1218 [1999]; *Dreger v New York State Thruway Authority*, 81 N.Y.2d 721, 593 N.Y.S.2d 758, 609 N.E.2d 111 [1992]).

Philip v State of New York, 75 Misc.3d 1205(A), 166 N.Y.S.3d 838 (Ct. Cl. 2022) is among the many recent cases that addressed the effect of covid upon time-sensitive deadlines. The claimant, as an administrator, missed the 90-day notice deadline of CCA 10(2) measured from his appointment, but relied upon governor Andrew Cuomo's pandemic-related executive orders which collectively tolled time limitations by 228 days (Executive Order Nos. 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72, 202.79). The Court of Claims applied the toll in concluding that the notice required by CCA 10(2) was filed and served upon the state timely. The strict construction and application of CCA 10, and its importance to subject matter jurisdiction, yields to law that recognizes tolling.

C3211:14 "Other Action Pending"

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When an action is subject to dismissal on the ground that there is a prior action pending between the parties (CPLR 3211[a][4]), the result of the dismissal motion in the second of the two actions is not necessarily just a binary choice between granting it or denying it.

Illustrating the foregoing point is the recent decision in *Zanani v Sutton Apartments Corporation*, 193 A.D.3d 536, 146 N.Y.S.3d 257 [1st Dep't. 2021]). The plaintiff owned shares and occupied space at a cooperative apartment. The defendant cooperative commenced a holdover proceeding in Housing Court, which was the first of the two actions involving the parties. The defendant obtained a judgment of possession in the Housing Court, which the plaintiff appealed to the Appellate Term. While the appeal was pending, the plaintiff commenced the second of the parties' two actions, this one in Supreme Court, New York County, for a declaratory judgment resolving how much money was owed to the defendant. On motion, the Supreme Court dismissed the declaratory judgment action on the ground that there was a prior action pending. However, after the pre-answer dismissal of the second action, the Appellate Term reversed the judgment of possession that had been awarded to the defendant by the Housing Court. On the separate appeal of the dismissal of the second action, the First Department held that since an appeal was pending at the Appellate Term when the CPLR 3211(a)(4) dismissal motion was made, the Supreme Court might have been better advised to stay the second action pending a determination of the appeal before the Appellate Term, and then depending on the appellate result, decide the prior action pending motion accordingly. In the appeal of the second matter, the First Department exercised its discretion in noting that that the Housing Court action was no longer pending at any level, and in the exercise of its discretion, reversed the Supreme Court's order of dismissal and denied the motion to dismiss the declaratory judgment action.

Actions are still “pending” even when on appeal. How the court handling the second of two actions, when the first is on appeal, allows for some flexibility in terms of how to best handle the procedural posture of the cases. Indeed, the *Zanani* case illustrates the importance of the language in CPLR 3211(a)(4) that “the court need not dismiss on this ground but may make such order as justice requires,” which provides for results other than merely granting or denying the motions.

C3211:18 Affirmative Defenses Available on Subdivision (a) Motion

One of the frequently-seen defenses underlying CPLR 3211 dismissal motions in litigation is that of collateral estoppel and *res judicata*. Collateral estoppel has a preclusive effect on the re-litigation of a singular, identical issue, decided in a prior proceeding. *Res judicata* precludes the re-litigation of the entirety of an identical claim, which is broader. The party asserting the collateral estoppel or *res judicata* defense has the burden of establishing the duplicative identity of the already-decided issue/claim. When that burden is met, the opposing party may avoid collateral estoppel or *res judicata* by meeting its own burden, that the party lacked a full and fair opportunity to be heard at the prior proceeding (*Matter of Dunn*, 24 N.Y.3d 699, 3 N.Y.S.3d 751, 27 N.E.3d 465 [2015]).

The related doctrines of collateral estoppel and *res judicata* are usually seen in connection with matters that may have been determined at prior state or federal court proceedings. But what of administrative determinations? Do these doctrines apply to administrative law determinations rendered after evidentiary proceedings, such as those seen from the worker's compensation board, state or county agencies, and administrative review panels, but without the imprimatur of courts of law? The answer, as is heard often enough in the legal profession, is that it depends.

Instructive is the recent case of *Lennon v 56th and Park (NY) Owner Corp., LLC*, 199 A.D.3d 64, 153 N.Y.S.3d 535 [2nd Dep't. 2021] [signed opinion by Dillon, J.]). The plaintiff in *Lennon* claimed that he sustained personal injuries at a worksite during the course of employment, when a hoist elevator on which he was riding with other workers allegedly made multiple sudden rises and drops. The plaintiff filed a worker's compensation claim for knee injuries, which resulted in the conduct of an evidentiary hearing before an administrative law judge (“ALJ”). At the hearing, the plaintiff could not recall the names of any other workers on the elevator at the time of the occurrence.

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The general superintendent of the scaffold contractor at the site testified that safety devices which were in place would have prevented the incident from occurring in the mechanical manner described by the plaintiff, and that any such incident would have prompted a shutdown and evaluation of the equipment which did not occur. A medical administrator investigated the date in question and concluded that nothing out of the ordinary had occurred. The plaintiff was represented at the worker's compensation hearing by counsel who cross-examined witnesses and made closing arguments. The ALJ concluded that the hoist elevator did not malfunction in the manner described by the plaintiff, and described the plaintiff's "claim to be, at best, an afterthought." The worker's compensation board reviewed and affirmed the ALJ's findings and conclusions, and the payment of worker's compensation benefits were denied.

The plaintiff in *Lennon* nevertheless commenced a personal injury action against various entities alleging common law negligence and violations of Labor Law sections 200, 240(1), and 241(6). One of the issues addressed by the Second Department was whether the findings and conclusions of the ALJ, as affirmed by the worker's compensation board, operated as collateral estoppel against the plaintiff's personal injury and Labor Law claims, and particularly, whether the underlying accident had happened at all. The court examined a range of collateral estoppel cases and determined that factors unique to each action determine whether the result of a prior administrative proceeding qualifies for *collateral estoppel*. In some instances, a mere overlap of the subject matter of two proceedings does not mean that one collaterally estops the other, if the nature of the litigated conduct or their chronology differ between them (*e.g. Auqui v Seven Thirty One Ltd. Partnership*, 22 N.Y.3d 246, 980 N.Y.S.3d 345, 3 N.E.3d 682 [2013]; *Melendez v McCrowell*, 139 A.D.3d 1018, 32 N.Y.S.3d 604 [2nd Dep't. 2016]). After all, negligence actions may sometimes involve subject matter that is broader than that addressed at an administrative proceeding, and collateral estoppel should not apply in such instances. Yet, there are other actions where a prior factual finding or legal conclusion is so central, elemental, or pivotal to the core viability of the later action in court, that collateral estoppel should be applied (*Roserie v Alexander's Kings Plaza, LLC,* 171 A.D.3d 822, 97 N.Y.S.3d 174 [2nd Dep't. 2019]; *Emanuel v MMI Mech., Inc*., 131 A.D.3d 1002, 16 N.Y.S.3d 285 [2nd Dep't. 2015]). In *Lennon*, the finding of the ALJ that the plaintiff's accident did not occur, or did not occur as described, was fatal to the plaintiff's ability to establish the common law negligence and Labor Law claims which were asserted. In other words, without an injury-producing occurrence, the court need not reach the remaining issues of the case, warranting its dismissal.

Collateral estoppel and *res judicata* are affirmative defenses set forth in CPLR 3211(a)(5). Defenses in that subdivision are waived unless raised in a pre-answer motion to dismiss or as an affirmative defense in the defendant's answer (CPLR 3211[e]). Here, *Lennon* is further instructive regarding its discussion of leave to amend pleadings under CPLR 3025(b), which was successfully accomplished by the defendants, and which allowed the collateral estoppel defense to then be presented via summary judgment.

C3211:28 Lack of Personal Jurisdiction

Developments continue to unfold in New York and elsewhere as fallout from the U.S. Supreme Court's decision in *Daimler AG v Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). In *Daimler,* the Supreme Court re-examined the topic of general jurisdiction in relation to corporate entities, as distinguished from specific jurisdiction seen in state longarm statutes, and narrowed the concept of general jurisdiction to only where the entity is "at home" within the state. The U.S. Supreme Court identified three circumstances where a corporation may be at home within a state. The first is the corporation's state of incorporation. The second is the state where the corporation maintains its principal office. The third, which is more amorphous than the first two, is the "truly exceptional case," where the entity's operations are so substantial and of such nature as to render the corporation at home in the state. The absence of personal jurisdiction over a corporate party, either by general jurisdiction or longarm jurisdiction, provides a basis for the dismissal of such actions under CPLR 3211(a)(8).

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New York's general jurisdiction is set forth in CPLR 301. Longarm jurisdiction is as defined in CPLR 302 and its various subdivisions. CPLR 301 reads very simply, that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." The *Daimler* case affects CPLR 301 only, as it leaves untouched the various bases for longarm jurisdiction under CPLR 302(a). As predicted in prior Practice Commentaries and elsewhere, the significant effect of *Daimler* would generate a new wave of case law in state and federal courts around the nation, applying, interpreting, and developing its broader impact and meaning.

Among the questions created by *Daimler's* wake is whether a corporation's registration with a state Department of State for authority to do business, and the related designation of an agent for the receipt of service of process within the state, is a sufficient predicate for the assertion of general jurisdiction. The issue, in other words, is whether the registration and designation operates as a consent to the general jurisdiction of the state.

The hot case to watch in New York on this particular issue was *Aybar v Aybar*, 37 N.Y.3d 274, 156 N.Y.S.3d 504, 177 N.E.2d 1257 (2021), which was discussed at length in 2021 Supplemental Practice Commentary C3211:28. The Court of Appeals held by a 5-2 margin that a corporation's registration to do business in New York does not confer the state's general jurisdiction over the entity, and instead is a consent for the service of process only. The result of *Aybar* is that in New York, plaintiff attorneys have a more difficult time obtaining jurisdiction over out-of-state entities. The easy path of satisfying CPLR 301, by an entity's mere registration and designation of an agent for receiving service of process, is no longer available. Instead, plaintiffs must have another independent basis for the assertion of general jurisdiction under CPLR 301, or jump through the more complicated, costly, and uncertain hoops of longarm jurisdiction under CPLR 302(a).

Of course, law is not a two-dimensional concept consisting of courts only. Law is a three-dimensional concept that involves the whole of state government, meaning the legislature, the executive, and the courts. Attorneys disappointed by *Aybar* spoke with state legislators and found sympathetic ears in Albany. Both the New York State Assembly and Senate passed bills in 2021 to enact a new CPLR 301-a and BCL 1301(e), with concomitant amendments to related statutes (A7769, S7253). The proposed enactments provided that a foreign corporation's registration to do business within New York operated as a consent to the general jurisdiction of New York courts. The proposed legislation extended the consent-to-jurisdiction to foreign associations, foreign limited partnerships, and foreign limited liability partnerships as well. The proposed statute included a proviso that if the foreign entity were to withdraw its registration to do business in New York, the entity's consent to New York jurisdiction would likewise cease upon that event. Under the proposed enactments, foreign corporations registered to do business in New York would automatically be subject to the general jurisdiction of New York courts, thereby nullifying the contrary holding of the Court of Appeals in *Aybar.* The bill went to governor Kathy Hochul for signature. On December 31, 2021, governor Hochul vetoed the enactment of the proposed legislation, explaining in her veto message that in her opinion, the proposed legislation would discourage out-of-state corporations from coming to New York to do business here, because they would be more easily amenable to suits. *Aybar* therefore remains good law and the issue *might* now be quieted, at least for the time being.

In any event, these Practice Commentaries have been annually monitoring decisional developments on general jurisdiction in light of *Daimler*, and now also, *Aybar*. The law is developing on whether and under what circumstances general jurisdiction may be obtained when there is (or might be) an "alter ego" relationship between a corporate parent and a subsidiary, so as to reach a non-New York target defendant. In New York State procedure, CPLR 3102(c) permits a party to engage is pre-action discovery, by court order, if necessary to frame a complaint or, as relevant here, determine a jurisdictional basis for commencing an action against a defendant. There is no corresponding provision in the federal Rules of Civil Procedure. In *Lensky v Yollari*, 2021 WL 4311319 (S.D.N.Y. 2021), *app. pend. Lensky v Turkish Airlines* (2nd Cir. Case No. 21-2567), the plaintiffs commenced an action against defendants Turk Hava Yallari AO (THY) and Turkish Airlines (TA). THY is a state-sponsored Turkish airline and TA is its subsidiary with offices in New York City. THY filed a motion to dismiss the plaintiffs' amended

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complaint pursuant to Federal Rule 12(b)(2) on the ground that it was not subject to New York's general or specific jurisdiction. The plaintiffs sought to defeat the motion by alleging that TA, which was subject to jurisdiction, was merely an alter ego of THY, and sought to engage in jurisdictional discovery on that issue. However, the plaintiffs, who noted the fact-intensive nature of an alter ego inquiry, failed to define what evidence they would seek in order to establish jurisdiction, and on that basis, the amended complaint was dismissed as to THY. The lesson for practitioners, whether in pre-action discovery under CPLR 3102(c), or in framed-issue discovery in state litigations, or in jurisdictional discovery in federal courts, is to be as specific as possible in defining the nature and scope of discovery materials relevant to jurisdictional considerations during the earliest stage of litigation.

While much of the focus from *Daimler* has been on whether entities are subject to the general jurisdiction of a state, *Daimler* has impacted the discussion of general jurisdiction as to individuals as well. Prior to *Daimler*, individuals were subject to New York's general jurisdiction by being a domiciliary or mere resident of the state upon being served with process here. The First Department went so far as to apply CPLR 301 general jurisdiction to out-of-state individuals doing business in New York and extending that jurisdiction to other causes arising outside of New York (*ABKCO Industries, Inc. v Lennon*, 52 A.D.2d 435, 384 N.Y.S.2d 781 [1st Dep't. 1976]). Daimler has changed that. Whereas *Daimler* defined corporations "at home" in a state by being incorporated or maintaining a principal office within the state, the concept for individuals most akin to that is the individual's domicile, rather than mere residency or other non-domicile contacts (*IMAX Corp. v The Essel Group*, 154 A.D.3d 464, 62 N.Y.S.3d 107 [1st Dep't. 2017]; *Magdalena v Lins*, 123 A.D.3d 600, 999 N.Y.S.2d 44 [1st Dep't. 2014]). An individual may only have one domicile. Absent being domiciled in New York, an individual's mere ownership of residential property in New York is insufficient for the establishment of general jurisdiction under CPLR 301 (*Chen v Guo Lu*, 144 A.D.3d 735, 41 N.Y.S.3d 517 [2nd Dep't. 2016]). In other words, for individuals, the test for being "at home" in New York is domicile rather than some other form of "presence." Moreover, for general jurisdiction over an individual in the course of business, it must be shown that the person's activities within New York were undertaken on an individualized basis rather than on behalf of a corporate entity (*IMAC Corp. v The Essel Group, supra*).

If a non-domiciliary is passing through New York and personally served with process under CPLR 308, as if "tagged" in the state, may CPLR 301 general jurisdiction be recognized? No, says the Supreme Court, Kings County, in *Ford v Bhatoe*, 58 Misc.3d 1201(A), 92 N.Y.S.3d 703 [Sup. Ct. Kings County 2017]).

Switching gears to a different jurisdictional issue, there is an appellate decision that reflects the interplay between CPLR 3211(a)(8) and General Business Law (GBL) 13. The latter statute provides that service of process may not be effected upon any individual on a Saturday, where the process server knows that the defendant observes that day of the week as a holy time. Our Jewish brothers and sisters are the primary beneficiaries of GBL 13, when postured as defendants in actions. In *Wells Fargo Bank, N.A. v Gross*, 202 A.D.3d 882, 162 N.Y.S.3d 444 (2nd Dep't. 2022), nail and mail service (CPLR 308[4]) was effected at the Orthodox Jewish defendants' residence on a Saturday, and the impropriety of service was raised as a defense in their answer. However, the motion to dismiss the action for improper service was not made until after the 60-day timeframe for contesting service measured from the answer and affirmative defense, as dictated by CPLR 3211(e). The defendants did not assert any undue hardship that prevented them from making a timely dismissal motion. The Second Department held that the failure of a timely motion, without an excusable hardship, required the denial of dismissal, on the ground of a waiver occasioned by the untimeliness of the motion. The defendants may have had a viable ground for dismissing the complaint on the ground of improper service, but failed to make their motion within the required timeframe. The CPLR can lead a horse to water, but can't make it drink. Practitioners must take the 60-day deadline for contesting service of process under CPLR 3211(a)(8) and CPLR 3211(e) seriously, absent the ability to argue and demonstrate an undue hardship in doing so.

C3211:37 Motion to Dismiss Defense May Lead to "Searching the Record"

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CPLR 3211 dismissal motions are unlike motions for summary judgment under CPLR 3212. There are several differences between the two statutes, one of which is that on summary judgment a court may search the record, assess the sufficiency of the parties' evidence, and on that basis grant judgment in favor of one party or another. In contrast, the CPLR 3211 motion to dismiss merely examines the adequacy of the pleadings which are assumed true (CPLR 3212[b]; *Spearance v Snyder*, 73 Misc.3d 769, 156 N.Y.S.3d 809 [Sup. Ct. Onondaga County 2021], *citing Davis v Boeheim,* 24 N.Y.3d 262, 998 N.Y.S.2d 131, 22 N.E.3d 999 [2014]).

There is only one means by which a court may appropriately search the record upon a CPLR 3211 motion to dismiss. That is if a dismissal motion is converted into one for a summary judgment under the procedures set forth in CPLR 3211(c) (*Sitt v Sitt*, 200 A.D.3d 440, 154 N.Y.S.3d 768 [1st Dep't. 2021]). Once converted, searching the record in an appropriate instance becomes fair game. The circumstances and procedures for converting dismissal motions into summary judgment motions are discussed in Practice Commentary C3211:42 and its corresponding Supplemental Practice Commentaries.

C3211:42 Converting CPLR 3211 Motion Into One for Summary Judgment

CPLR 3212(a) spells out a general rule that a party may move for summary judgment in any action, but not until after issue has been joined. The provision of CPLR 3211(c) that courts may, upon adequate notice to the parties, treat a pre-answer dismissal motion as one for summary judgment, is therefore an exception to the general rule. Summary judgment determinations are not front-loaded in litigation except 1) when sought in lieu of a complaint under CPLR 3213, or 2) when a CPLR 3211 dismissal motion is treated upon notice as a motion for summary judgment.

There are three ways that a CPLR 3211 dismissal motion can properly be treated and decided as a motion for summary judgment. The first is when the parties jointly request that the motion be treated as one for summary judgment. The second is when the parties, through their conduct in prosecuting or defending the motion, lay bare their respective proofs as to deliberately chart a summary judgment course. The third is when the court gives adequate notice to the parties of its intention to treat the dismissal motion as a summary judgment motion, as authorized by CPLR 3211(c) (*Hendrickson v Philbor Motors, Inc*., 102 A.D.3d 251, 955 N.Y.S.2d 384 [2nd Dep't. 2012] [signed opinion by Dillon, J.]). In all such instances, the court has the final say as to whether the motion warrants summary judgment treatment. Absent one of those three described circumstances, the rule against premature summary judgment motions is adhered to strictly (*City of Rochester v Chiarella*, 65 N.Y.2d 92, 490 N.Y.S.2d 174, 479 N.E.2d 810 [1985]).

When a court chooses at its own initiative to treat a dismissal motion as one for summary judgment, the notice that courts are required to give to the parties presupposes that the motion papers have been read prior to or after the return date, with the parties offered an opportunity to thereafter make submissions or supplemental submissions addressing summary judgment standards and evidence. The transition of a motion from dismissal to summary judgment should not be handled by the court in a way that catches any party flat-footed. Due process and an opportunity for parties to be heard matters.

Whether a CPLR 3211 dismissal motion should be treated as a summary judgment motion is a determination that cannot be unilaterally forced upon a court and an adversary party by means of a premature summary judgment motion prior to the joinder of issue (*SHG Resources, LLC v SYTR Real Estate Holdings LLC*, 201 A.D.3d 610, 162 N.Y.S.3d 325 [1st Dep't. 2022]). If a summary judgment motion is made prior to the joinder of issue, without the parties stipulating to its treatment as summary judgment, and without the dismissal motion otherwise qualifying for summary judgment under CPLR 3211(c), it will be denied (*Id*.). The same is true if a defendant makes a pre-answer CPLR 3211 motion to dismiss and the defendant responds with a cross-motion for summary judgment. The cross-motion will be denied absent one of the exceptions qualifying it for summary judgment treatment (*New York*

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Bus Operators Compensation Trust v American Home Assurance Co., 71 Misc.3d 630, 144 N.Y.S.3d 820 (Sup. Ct. Suffolk County 2021).

C3211:43 Notice of the Conversion

While CPLR 3211(c) statutorily requires that courts provide the parties with notice if it intends to treat a dismissal motion as one for summary judgment, formal notice is excused by decisional authority if the dispositive issue is strictly a matter of law that is argued by the parties (*Mihlovan v Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288 [1985]). Due process concerns are satisfied if the issue of law has already been addressed by the parties. That said, if there is no notice to the parties of the motion's conversion to summary judgment, and if the action does not involve purely legal issues that have been briefed, a conversion by the trial court is improper (*Balay v Manhattan 140 LLC*, 204 A.D.3d 491, 167 N.Y.S.3d 62 [1st Dep't. 2022]; *Davis v Augoustopoulos*, 198 A.D.3d 528, 156 N.Y.S.3d 168 [1st Dep't. 2021]).

C3211:51 Single-Motion Rule

If a defendant moves to dismiss a plaintiff's complaint, and the plaintiff thereafter amends the complaint to assert new factual allegations, is a motion to dismiss barred as to the amended complaint under the single motion rule? No. So says the Supreme Court, New York County, in *People v National Rifle Association*, 74 Misc.3d 998, 165 N.Y.S.3d 234 [Sup. Ct. New York County 2022]). There, the People of the State of New York, by its Attorney General, brought a suit against the NRA and various individual defendants, and certain of the named defendants including the NRA made motions to dismiss the causes of action on various grounds. The action was stayed by a bankruptcy filing of the NRA, which was ultimately dismissed by the federal bankruptcy court. Thereafter, the People amended the complaint to add 90 additional factual allegations detailing the defendants' wrongdoing that allegedly occurred during the 12 months since the commencement of the action, and certain defendants including the NRA then moved to dismiss causes of action reflected by the amended complaint. The Supreme Court mentioned, though in a footnote, that the single motion rule did not prohibit the defendants from filing a CPLR 3211 motion to dismiss as against the amended complaint, citing as authority *Barbarito v Zahavi*, 107 A.D.3d 416, 968 N.Y.S.2d 422 (1st Dep't. 2013). The result makes sense. If the single motion rule were to be interpreted as prohibiting defendants from seeking the dismissal of amended complaints, the defendants would be unable to ever challenge under CPLR 3211 new non-corresponding allegations of an amended complaint compared with the original complaint.

C3211:67 Motion Automatically Extends Responding Time

In the event a motion to dismiss is denied, the defendant's time to answer the plaintiff's surviving complaint is extended by 10 days after service of the court's order with notice of entry (CPLR 3211[f]). Therefore, no answer is due from the defendant while the motion is pending, plus the 10 days from the order's entry. The same is of course true in reverse, if a plaintiff makes a CPLR 3211 motion to dismiss the defendant's counterclaim and the motion is denied. Under that circumstance, the time for a Reply to the counterclaim is extended for 10 days, as set forth by CPLR 3211(f).

The Second Department addressed an unusual but significant issue in *DLJ Mtge. Capital, Inc. v Christie*, 202 A.D.3d 913, 162 N.Y.S.3d 464 [2nd Dep't. 2022]), involving the interplay between CPLR 3211(f) and CPLR 306-b. In *Christie*, the plaintiff sought summary judgment and an order of reference in a mortgage foreclosure action, on default. The defendants cross-moved under CPLR 3211(a)(8) for *inter alia* the dismissal of the plaintiff's complaint based on the failure of proper service of process. The court directed a *Traverse* hearing and, at its conclusion, granted the cross-motion by finding that process was not properly served, and therefore denied the plaintiff's motion for an order of reference. Within approximately a month, the plaintiff “re-served” process upon the defendants,

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and thereafter moved for leave to deem the re-service effective *nunc pro tunc*. The defendants not only opposed the motion, but cross-moved to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(8) for untimeliness under the statute of limitations and lack of proper service of process. The court granted the CPLR 306-b motion and denied the defendants' cross-motion. Several months elapsed before the defendants served an answer, which the plaintiff treated as untimely. The court's order recognizing the re-service *nunc pro tunc* did not address the time within which the defendants were to serve an answer. However, CPLR 3211(f) says that upon denial of a CPLR 3211 dismissal motion, the defendants have 10 days within which to answer the complaint. Thus, the *nunc pro tunc* treatment of re-service did not place the defendants into an "automatic default," as CPLR 3211(f) provides such defendants with 10 days to serve an answer measured from the order's notice of entry. Observationally, because the defendants made a cross-motion to dismiss under CPLR 3211, they subjected themselves to the provision of CPLR 3211(f) that if their motion was denied, they would have 10 days in which to answer the plaintiff's complaint. The appeal was ultimately decided on other procedural issues unrelated to CPLR 3211(f), but the other issues do not detract from the court's analysis of the 10-day rule of CPLR 3211(f).

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

Law regarding the Strategic Lawsuit Against Public Participation ("SLAPP") was fairly quiet from 1992 when it was enacted into CPLR 3211(g) (L.1992, ch. 767, sec. 4) until 2020, when it was amended (L.2020, ch. 250, sec. 3). SLAPP suits, as the reader knows, involve litigation commenced by property owners, real estate developers, and others seeking public approvals for projects. The suits are brought against members of the public who, through public participation, oppose the project. Causes of action are asserted under various theories such as defamation, prima facie tort, and tortious interference with contractual relations. The concern behind the law is that the suits are motivated to intimate the public from speaking out against proposed projects. CPLR 3211(g), and parallel provisions of CPLR 3212(h), were enacted to provide protections to members of the public from such suits. The 1992 law enabled defendants to move for the dismissal of the plaintiff's complaint, as well as cross-claims and counterclaims, by merely establishing that the claim qualifies as a SLAPP suit. The 1992 law provided that the dismissal "shall be granted" unless the party opposing the motion establishes that the cause(s) of action has (or have) a substantial basis in law, or is/are supported by a substantial argument for an extension, modification, or reversal of existing law. A primary significance of CPLR 3211(g) is that the statute, in effect, flips the burden of proof from the moving party to demonstrate a dispositive legal defense to an action, to the opposing party to demonstrate that the action has merit. The law accomplished it purpose of making it more difficult for plaintiffs to prosecute SLAPP suits beyond the pleading stage.

As noted in the Supplemental Practice Commentaries for 2021, the recent amendment to CPLR 3211(g), which became effective on November 10, 2020, divided SLAPP analysis into four subdivisions. The first subdivision retained the language from the earlier statute about the working and burdens of motions to dismiss, as described above (CPLR 3211[g][1]). The second requires that the pleadings be attached to the moving papers for examination by the court, along with supporting and opposing affidavits. What is "new" about this requirement is its direction that any factual determination by the court is not admissible later in the action or in a subsequent action, and has no effect upon the burden of proof required in the continuing or subsequent action. The third change of the 2020 amendment is the direction in CPLR 3211(g)(3) that while the dismissal motion is pending, all discovery, hearings, or other motions are stayed, pending a determination of the dismissal motion. If the court, upon reviewing the papers, determines that limited discovery is needed for properly deciding the dismissal motion, it may order specified discovery. The mechanism is akin to that which exists in CPLR 3212(d), where the court may order a continuance of a summary judgment motion pending targeted discovery for facts essential to justify opposition to the motion. Finally, the 2020 amendment added CPLR 3211(g)(4), which explains that the overall provisions of the statute apply to all forms of pleadings and all potential posturing of parties.

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The 2020 amendments were accompanied by a parallel amendment to Civil Rights Law (CRL) 76-a, which defines SLAPP actions and the meaning of "public petition and participation." The amendment to CRL 76-a (L.2020, ch. 250, sec. 1) added language to include claims based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" (CRL 76-a[1][a][1]). That amendment has been described as "broaden[ing] the scope of the law and afford[ing] greater protections to citizens facing litigation arising from their public petition and participation" (*Marble Assets, LLC v Rachmanov*, 192 A.D.3d 998, 146 N.Y.S.3d 147 [2nd Dep't. 2021]). The amendatory language applying SLAPP to "any communication ... in a public forum" extends the statute beyond just property owners and developers, to a far wider range of law suits intended to intimidate or punish public comments.

These amendments have had an additional year to bake into the CPLR and for cases to address the amendatory language. A continuing issue is what conduct by the public constitutes matters of "public petition and participation" (CPLR 3211[g]; Civil Rights law 76-a). Clearly, the statute has been easily applied to suits commenced against members of the public by property owners and developers seeking municipal approvals for projects. But what about public commentary about more private matters? Some late breaking guidance on that question is provided by *Aristocrat Plastic Surgery, P.C. v Silva*, 206 A.D.3d 26, 169 N.Y.S.3d 272 (1st Dep't. 2022). There, the defendant underwent a procedure from a plastic surgeon who practiced medicine through the plaintiff, a professional corporation. The defendant was dissatisfied with her results, and posted a negative review on two websites which provide public commentaries about various businesses. The plaintiff, believing it had been defamed, commenced an action against the defendant for defamation, intentional interference with prospective contractual relations, intentional infliction of emotional distress, and prima facie tort. The defendant moved to dismiss the action as a SLAPP suit, and also sought an award of damages under CRL 76-a and attorney's fees. The First Department was called upon to interpret the recent amendment to CRL 76-a, whereby SLAPP protections were extended to claims based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" (Civil Rights law 76-a[1][a][1]). The court held that the defendant's posts concerning the plastic surgery performed upon her qualified as an exercise of her constitutional right of free speech and a comment on a matter of legitimate public concern and public interest--that is, medical treatment rendered by a physician's professional corporation and the physician performing surgery under its auspices. In other words, even though the plastic surgery was performed as a private matter, the defendant's right to express her opinion about the plastic surgeon's quality was of sufficient public interest as to fall within the expanded language of SLAPP.

It remains to be seen how wide the barn door has been thrown open to law suits that may not arguably qualify for SLAPP protections. Predictably, this issue will receive attention in future supplemental practice commentaries.

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C3211:5 Grounds for Dismissal

A party moving for a CPLR 3211 dismissal may argue more than one ground in the papers, directed at the same cause or causes of action. Perhaps best illustrating the point is *Monaco v Van Meerendonk*, 190 A.D.3d 968, 136 N.Y.S.3d 790 (2nd Dep't. 2021). In *Monaco*, the plaintiff's cause of action for fraud was dismissed by the court because it was not adequately pleaded, *and* was time-barred under the applicable statute of limitations, *and* was precluded by the *res judicata* doctrine, *and* was barred by a prior settlement and release. In other words, the meat was turned over on the grill multiple times to assure that the result was well done. Different grounds also may be argued as to different causes of action.

C3211:8 *Sua Sponte* Dismissals

Our decisional law continues to be plagued with reported appellate cases where trial judges are reversed for dismissing complaints *sua sponte*, on grounds not raised by the defendant in the underlying CPLR 3211 moving

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papers. It is an ongoing, annual problem as the trial judges doing so are either refusing to get the precedential message, or are not listening to it. The problem continues to be centered in the Second Department and almost exclusively in the field of residential mortgage foreclosure actions. The Appellate Division has consistently and repeatedly held that the court's power to dismiss a complaint *sua sponte* is to be used sparingly, and only when extraordinary circumstances exist to warrant dismissal (*e.g. Deutsche Bank Natl. Trust Co. v Winslow*, 180 A.D.3d 1000, 120 N.Y.S.3d 81 [2nd Dep't. 2020]; *JP Morgan Chase Bank, N.A. v Laszlo*, 169 A.D.3d 885, 94 N.Y.S.3d 343 [2nd Dep't. 2019]; *OneWest Bank, FSB v Fernandez*, 112 A.D.3d 681, 976 N.Y.S.2d 405 [2nd Dep't. 2013]; *HSBC Bank USA, N.A. v Taher*, 104 A.D.3d 815, 962 N.Y.S.2d 301 [2nd Dep't. 2013]; *U.S. Bank, N.A. v Emmanuel*, 83 A.D.3d 1047, 921 N.Y.S.3d 320 [2nd Dep't. 2011]). There has been no equivocation of that rule on the part of the Appellate Division. Nor does the rule engender ambiguity. The reason that *sua sponte* dismissals should occur sparingly, and only where there are extraordinary circumstances for doing so, is that a *sua sponte* dismissal of a complaint deprives the plaintiff of basic due process to which that party is entitled-notice, and an opportunity to be heard. Courts should be the last forum where due process rights are violated, yet, for reasons unique to residential mortgage foreclosure actions, the violations repeat, then repeat some more, and repeat again. The discussion of the subject in this section of the Practice Commentaries has become an annual event.

Examples of this practice during the year prior to this writing include as follows:

U.S. Bank N.A. v Salgado, 192 A.D.3d 1181, 141 N.Y.S.3d 337 (2nd Dep't. 2021) (*sua sponte* dismissal of compliant by Supreme Court, Queens County [Latin, J.] for plaintiff's violation of a status conference order, reversed on appeal).

Bank of N.Y. v Ramirez, 186 A.D.3d 1472, 131 N.Y.S.3d 104 (2nd Dep't. 2020) (*sua sponte* dismissal of a complaint by Supreme Court, Queens County [Grays, J.], and an order of the same court denying its vacatur [Velasquez, J.] relative to an order of reference, reversed in the absence of any extraordinary circumstances).

Lehman Bros. Bank v Hickson, 186 A.D.3d 1348, 129 N.Y.S.3d 2 (2nd Dep't. 2020) (order of the Supreme Court, Kings County [Baynes, J.] modified on appeal to delete therefrom the branch that *sua sponte* dismissed the plaintiff's complaint on a personal jurisdiction ground not raised by any party).

The established track record suggests that these *sua sponte* dismissals almost never survive appeal.

C3211:10 Defense Based on "Documentary Evidence"

Motions to dismiss on the basis of documentary evidence raise, by definition, two primary considerations for attorneys and courts. One consideration is what type of documents qualify under the statute. The second consideration is the legal standard that must be applied for determining whether qualifying documentary evidence warrants, or fails to warrant, the dismissal of all or part of a plaintiff's complaint. The same discussion applies to motions that may be interposed to dismiss counterclaims, third party complaints, cross-claims (CPLR 3211[a]), and affirmative defenses set forth in parties' answers (CPLR 3211[b]). For ease of reference, this discussion presumes that dismissal is sought of a plaintiff's complaint on the basis of documentary evidence.

The legal standard that courts must apply in determining motions under CPLR 3211(a)(1) is the easier of the two considerations, because the standard is straight-forward. For dismissal, the proffered documents must "utterly refute" the allegations in the plaintiff's complaint, "conclusively establishing a defense as a matter of law" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 34 N.Y.3d 908, 115 N.Y.S.3d 782, 139 N.E.3d 406 [2021]; *Shephard v Friedlander*, 195 A.D.3d 1191, 151 N.Y.S.3d 184 [3rd Dep't. 2021]; *Hart 230, Inc. v PennyMac Corp.*, 194 A.D.3d 789, 149 N.Y.S.3d 134 [2nd Dep't. 2021]). Note the extremism of the burden of proof-that the documentary evidence not only refute the allegations of the plaintiff's

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complaint, but "utterly" do so, and that defense not only be established as a matter of law, but that it "conclusively" do so. There is no room for daylight. Wiggle room is not countenanced. Close calls are not enough. Gray areas have no place within the ambit of CPLR 3211(a)(1). The document that is proffered must clearly say what it says and mean what it means. Courts will not grant motions brought under CPLR 3211(a)(1) on account of documentary evidence, and dismiss a plaintiff's complaint in lieu of an answer, unless the basis for doing so is clear, unambiguous, and absolute.

Which brings the discussion to the *type* of documents that may qualify under the statute. Many documents do not qualify for CPLR 3211(a)(1) consideration. Others, of course, do.

E-mails continue to be an evolving area of law where some qualify as CPLR 3211(a)(1) documentary evidence, and some do not. As a general rule, letters, e-mails, and affidavits prepared for the CPLR 3211 motion are not documentary evidence contemplated by the statute (*Shah v Mitra*, 171 A.D.3d 971, 98 N.Y.S.3d 197 [2nd Dep't. 2019]). Those forms of material are too easily manipulated for the purpose that the moving party seeks to achieve. The standard that appears to be evolving is that for e-mails to be treated as documentary evidence under CPLR 3211(a)(1), their content must be "essentially undeniable" and quintessentially authentic at the time of their creation. (*Id.*) If the content does not undeniably refute the plaintiff's contentions, it will not suffice for the dismissal of the plaintiff's complaint (*Whitestone Constr. Corp. v F.J. Sciame Constr. Co., Inc.*, 194 A.D.3d 532, 149 N.Y.S.3d 21 [1st Dep't. 2021]).

Facebook postings are even more problematic for defendants moving for CPLR 3211(a)(1) dismissals. Unlike e-mails, which are business-like, Facebook postings are almost-exclusively social. In *W & G Wines LLC v Golden Chariot Holdings LLC*, 46 Misc.3d 1202(A), 7 N.Y.S.3d 245 (Sup. Ct. Kings County 2014), the court held that printouts of the plaintiff's Facebook postings were subject to interpretations, and their reliability had not been established.

C3211:11 Lack of Subject Matter Jurisdiction

Motions to dismiss for a court's lack of subject matter jurisdiction is recognized in CPLR 3211(a)(2).

Subject matter jurisdiction has been described as the power of the court to adjudge a general question involved in a matter, and is not dependent on the facts that may appear in a particular case arising, or claimed to have arisen, under the general question (*Thrasher v United States Liab. Ins. Co.*, 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503 [1967]; *21st Century Pharmacy v American Intl. Group*, 195 A.D.3d 776, 145 N.Y.S. 3d 810 [2nd Dep't. 2021]). Even for courts of general jurisdiction, such as the state Supreme Court, there are forms of disputes that cannot be heard where subject matter jurisdiction is lacking. An example of matters that the Supreme Court cannot hear are those where the State of New York is sued and which may only be heard in the Court of Claims. Another example are matters that are within the exclusive province of the federal courts, such as bankruptcy, suits against the United States, and federal tax matters. Also, state courts lack subject matter jurisdiction over issues that have been legislatively preempted by federal law (*Klingsberg v Council of School Supervisors and Administrators--Local 1*, 181 A.D.3d 949, 122 N.Y.S.3d 335 [2nd Dep't. 2020] [preemption of the parties' dispute by the Federal Labor Management Relations Act]). The "lower courts" in New York State at the village, town, city, county, and district level have no subject matter jurisdiction to hear matters that exceed the authorized monetary limits of those respective courts. Specialized courts, such as Family Courts and Surrogate Courts, also lack subject jurisdiction to hear matters outside of their defined ambits.

Subject matter jurisdiction must inherently exist with a court for it to hear and resolve a matter on the merits. Parties may not confer subject matter jurisdiction upon a court that otherwise lacks it, not by consent or otherwise (*Matter of Metropolitan Transp. Auth.*, 32 A.D.3d 943, 823 N.Y.S.3d 88 [2nd Dep't. 2006]). Relatedly, the absence of a

court's subject matter jurisdiction is a defense that is not waived by a party's failure to raise it at any particular time in a litigation, as it may instead be raised at any time (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 N.Y.3d 12, 853 N.Y.S.2d 267, 882 N.E.2d 879 [2008]). Indeed, the issue is one area that may be raised by the court at its own initiative, *sua sponte* (*Id.*), since it is so fundamental. The lack of subject matter jurisdiction is understandably not listed as among the various defenses of CPLR 3211(e) that are waived if not raised as an affirmative defense or in a pre-answer motion to dismiss. If a court determines that it does not have the jurisdiction to hear the subject matter of an action, the action must be dismissed. Period, end of story. If a court renders a judgment in a matter where subject matter jurisdiction was lacking, the judgment is void as a matter of law (*Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 N.Y.3d 200, 969 N.Y.S.2d 424, 991 N.E.2d 198 [2013]; *Caffrey v North Arrow Abstract & Settlement Servs., Inc.*, 160 A.D.3d 121, 73 N.Y.S.3d 70 [2nd Dep't. 2018]).

In actions against the State of New York, a claimant must file a claim within 90 days from the accrual of a cause of action (CCA 10, 11), akin to notices of claims that must be served upon other municipal entities under General Municipal Law 50-e and 50-i. The failure of a claimant to satisfy that aspect of the Court of Claims Act divests the Court of Claims of subject matter jurisdiction to hear the action (*Criscuola v State of New York*, 188 A.D.3d 645, 134 N.Y.S.3d 67 [2nd Dep't. 2020]). Likewise, Court of Claims Act 11(b) requires that claims against the state be verified in the same manner as a complaint in the Supreme Court. The absence of a proper verification on claims against the state is a jurisdictional defect that divests the Court of Claims of subject matter jurisdiction over the matter (*Flowers v State of New York*, 175 A.D.3d 1724, 109 N.Y.S.3d 508 [3rd Dep't. 2019]).

Religious disputes sometimes spill into the state court system. Some are justiciable, some are not. Courts lack subject matter jurisdiction over issues that involve the interpretation of religious doctrine or which involve particular doctrinal beliefs (*Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 N.Y.3d 282, 849 N.Y.S.3d 463, 879 N.E.2d 1282 [2007]; *Russian Orthodox Convent Novo-Diveevo, Inc. v Sukharevskaya*, 166 A.D.3d 1036, 91 N.Y.S.3d 101 [2nd Dep't. 2018]). The reason is that the state courts must avoid becoming entangled in essentially religious controversies or intervening on behalf of groups espousing particular doctrines or beliefs. Conversely, courts possess subject matter jurisdiction over parties who happen to be involved in religious organizations or controversies, where the dispute is capable of resolution by the application of neutral principles of law without reference to religious principles (*Id. See also Jones v Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 [1979]). When the issue is raised, courts must part the Red Sea, so to speak, between deciding issues that can be resolved by application of neutral civil law, versus those that are so intertwined with religious doctrines or principles that subject matter jurisdiction is lacking.

In *Laguerre v Maurice*, 192 A.D.3d 44, 138 N.Y.S.3d 123 (2nd Dep't. 2020), the plaintiff sued the defendant for defamation, and the defendant moved to dismiss the action under CPLR 3211(a)(2) for lack of subject matter jurisdiction. The defendant argued that the alleged statement--that the plaintiff was a homosexual who viewed gay pornography from a church computer, was intertwined with religious doctrine, and therefore, not justiciable in a civil court. The Supreme Court and the Second Department disagreed, finding that the statement's defamatory content, if any, could be resolved without reference to religious principles, doctrines, or practices. Thus, disputes that happen to involve religious persons or organizations, such as not only defamation, but the interpretation of by-laws or the enforcement of contracts, are within the subject matter of the courts. Disputes that are inextricably intertwined with religious doctrine, or which go to the judgment and discretion of church elders, are not.

Attorneys commencing litigations should therefore be careful of subject matter jurisdiction, as it must be a difficult conversation to later explain to a client why the action was brought in the wrong court.

C3211:14 "Other Action Pending," Generally

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While CPLR 3211(a)(4) vests the court with authority to dismiss an action if there is already another action pending between the same parties for the same cause of action, a dismissal of the second action is never mandatory. The statute qualifies the authority of the court, that it "need not dismiss upon this ground but may make such order as justice requires." In other words, the trial court has discretion to fashion a remedy that best suits the circumstances of the parties and the case.

An example of the statute's flexibility was recently seen in *U.S. Bank N.A. v Karnaby*, 190 A.D.3d 1005, 136 N.Y.S.3d 886 (2nd Dep't. 2021). The plaintiff commenced two actions against the same defendant, the first in 2010 and the second at a later time. The defendant moved to dismiss the second of the two actions. The 2010 action was in the process of being discontinued, and was in fact discontinued while the motion to dismiss was pending in the second action. The Supreme Court's denial of the dismissal motion was affirmed on appeal. Yes, the two actions overlapped in terms of the parties, the subject matter of the litigation, and time. But as a practical matter, there was no need for the court to dismiss the second action under CPLR 3211(a)(4) if the first action was in the process of being discontinued while the dismissal motion was pending and was in fact discontinued by the time the motion was decided.

The circumstances addressed by CPLR 3211(a)(4) may be a little more compelling in the context of two duplicitous residential mortgage foreclosure litigations. The reason is that under RPAPL 1301(3), an action to recover upon a mortgaged debt prohibits the commencement of a second such action. The purpose of the statute is to protect the mortgagor of the expense and annoyance of two separate actions at the same time with reference to the same debt (*Central Trust Co. v Dann*, 85 N.Y.2d 767, 628 N.Y.S.2d 259, 651 N.E.2d 1278 [1995]; *U.S. Bank v Stern*, 189 A.D.3d 1313, 134 N.Y.S.3d 272 [2nd Dep't. 2020]). The statute allows an exception, that a second action may be commenced if permission is obtained from the court where the first action is already pending. In *21st Mtge. Corp. v Ahmed*, 173 A.D.3d 951, 105 N.Y.S.3d 467 (2nd Dep't. 2019), the plaintiff commenced two actions against the same defendant homeowner over the same debt, one in 2007 and one in 2015. Leave of court was not sought prior to the commencement of the second action. A stipulation discontinuing the 2007 action had been executed but had not been filed prior to the commencement of the 2015 action. The stipulation of discontinuance was filed after the commencement of the 2015 action but before the defendant in that action moved to dismiss it on the ground of prior action pending. The court denied dismissal of the 2015 action, noting that while under the circumstances leave of court should have been sought and obtained before the commencement of the second action, there was no prejudice to the defendant and no substantive violation of RPAPL 1301(3).

Indeed, dismissal of the second action need not be ordered even where the first action has not been discontinued or been in the process of a discontinuance. In *Bank of N.Y. Mellon v Porfert*, 187 A.D.3d 1110, 134 N.Y.S.3d 57 (2nd Dep't. 2020), two duplicative foreclosure actions were commenced against the same defendant in 2006 and 2014, respectively. There was no activity in the 2006 action since its commencement. The Second Department, in affirming the Supreme Court, held that judicial discretion permitted the denial of the defendant's motion to dismiss the second action under CPLR 3211(a)(4), presumably because of the moribund nature of the earlier of the two actions.

By contrast, where the prior action is not discontinued or in the process of discontinuing, and is not otherwise moribund as in *Porfert*, the dismissal of the second action is warranted (*HSBC Bank USA, N.A. v Pena*, 187 A.D.3d 724, 130 N.Y.S.3d 354 [2nd Dep't. 2020]).

In comparing two actions under CPLR 3211(a)(4), it is not necessary that the precise legal theories presented in the first action also be presented in the second, as long as the *relief* is the same or substantially the same (*Board of Mgrs. of the 1835 E. 14th St. Condominium v Singer*, 186 A.D.3d 1477, 132 N.Y.S.3d 25 [2nd Dep't. 2020]).

C3211:18 Affirmative Defenses Available on Subdivision (a) Motion

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CPLR 3211(a)(5) is a grab bag of different forms of affirmative defenses that have been batched together in a single subdivision of the statute. Each has its own elements which, when established by a moving defendant, may result in the dismissal of the plaintiffs' complaints.

CPLR 3211 may be used against not only complaints, but also cross-claims, counterclaims, and third party complaints. Relatedly, CPLR 3211(b) permits a plaintiff to move for the dismissal of one or more defenses, on the ground that the stated defense has no merit. Therefore, while CPLR 3211 is typically seen in the context of dismissal motions made against plaintiffs' complaints, the applicability of the statute is actually broader. A recent example of a motion by a defendant to dismiss the cross-claims of a co-defendant is *Jaber v Elayyan*, 191 A.D.3d 964, 142 N.Y.S.3d 601 (2nd Dep't. 2021).

Arbitration and Award

The CPLR 3211(a)(5) defense of arbitration and award is easily applied when the same dispute between the parties has already been *resolved* by an earlier arbitration, and where the arbitration has been or is subject to confirmation by the courts under CPLR Article 75. However, if an action is commenced before an agreed-upon arbitration has begun or concluded, the circumstances are more murky. A signed opinion by Justice Linda Christopher, *Wilson v PBM, LLC*, 193 A.D.3d 22, 140 N.Y.S.3d 276 (2nd Dep't. 2021), addressed the issue. She and the Second Department noted that a mere *agreement to arbitrate* a dispute is not a CPLR 3211(a)(5) defense to an action and may therefore not provide a basis for a motion to dismiss (*citing Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y.*, 45 N.Y.2d 735, 408 N.Y.S.2d 476, 380 N.E.2d 303 [1978]). In *Wilson*, the Supreme Court had granted a motion to compel arbitration, and under those circumstances, the Second Department held that rather than dismiss the plaintiff's complaint, the action should instead have been stayed pending the arbitration. *See also Matter of County of Nassau v Detectives Assn., Inc. of Police Dept. of Nassau County*, 188 A.D.3d 1049, 137 N.Y.S.3d 77 (2nd Dep't. 2021).

Collateral Estoppel

Prior Practice Commentaries have focused largely on the circumstances where summary judgment determinations either do or do not have *collateral estoppel* effect on later actions. The same is true for the related topic of *res judicata*, which is also ground for the dismissal of actions under CPLR 3211(a)(5).

A recent decision, *Matter of BZ Chiropractic, P.C. v Allstate Ins. Co.*, 197 A.D.3d 144, 154 N.Y.S.3d 46 [2nd Dep't. 2021]) [signed opinion by Dillon, J.]), addressed whether a court's advisory opinion--which is very rare and to be typically avoided by the courts--is subject to either doctrine. In *BZ Chiropractic*, the Appellate Term for the 2nd, 11th and 13th Judicial Districts addressed an issue of whether certain interest should have been tolled on an insurance-related judgment, and if so, whether a satisfaction should have been entered on the judgment. The Appellate Term determined that no toll of interest was indicated, but then gratuitously stated that the non-tolled interest be computed at the 9% rate of CPLR 5004 rather than at the more specific 2% per month compounded rate of Insurance Law 5106(a). In determining a later motion brought to clarify its holding, the Appellate Term described its language about the *rate* of interest as “advisory” only and not on the merits. An aggrieved party commenced a hybrid turnover proceeding/declaratory judgment action related to the same dispute for various forms of relief, including a declaration that it was entitled to the higher rate of interest on the judgment as authorized by Insurance Law 5106(a). At issue in the Supreme Court, and on appeal, was whether the Appellate Term's advisory language that the parties' judgment was subject to 9% interest under CPLR 5004 collaterally estopped the plaintiff/petitioner from arguing the same issue anew at the Supreme Court on the merits. The Second Department held that the Appellate Term's advisory opinion, and for that matter dicta from the courts, are by nature not determinations of contested issues rendered on the merits after a full and fair opportunity to be heard. Therefore, when an advisory

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opinion is rendered, however rare, the doctrine of collateral estoppel does not bar consideration of the same issue on the merits in a later court proceeding. Further, the Second Department held that since Insurance Law 5106(a) was the more specific interest statute applicable to the dispute, it trumped the general provision of CPLR 5004, and required that the interest be computed at the higher rate of 2% per month, compounded.

C3211:28 Lack of Personal Jurisdiction

The law nationally and in New York continues to mold itself around the U.S. Supreme Court's groundbreaking opinion in *Daimler AG v Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L.Ed.2d 624 (2014). In *Daimler*, general jurisdiction over corporate entities has been narrowly defined to entities "at home" in a state, meaning 1) the state of the entity's incorporation, or 2) the state where the entity maintains its principal place of business, or 3) in truly exceptional cases, where the entity's operations are so substantial and of such nature as to render the corporation at home in the state. New York's general jurisdiction statute is CPLR 301. The absence of personal jurisdiction over a party, including a corporate entity not subject to New York's general or longarm jurisdiction, is a basis for the dismissal of an action under CPLR 3211(a)(8).

The First Department adhered to *Daimler* in its holding rendered in *Okoroafor v Emirates Airlines*, 195 A.D.3d 540, 145 N.Y.S.3d 807 (1st Dep't. 2021). There, the defendant, Emirates Airlines, was headquartered and maintained its principal office in Dubai, UAE. It also maintained an office in New York County, but that office was not the airline's "principal" one. On that basis, the First Department held that the defendant was not amenable to the general jurisdiction of New York State and dismissed the plaintiff's complaint.

The Second Department saw its own share of the action on general jurisdiction in *Aybar v Aybar,* 169 A.D.3d 137, 93 N.Y.S.3d 159 (2nd Dep't. 2019) (signed opinion by Braithwaite-Nelson, J.), which has been followed with interest and discussed in the 2019 and 2020 CPLR Practice Commentaries, C3211:28. The Second Department held in *Aybar* that a corporation's mere registration with the Secretary of State designating it as an agent for the service of process, in connection with obtaining authority to do business within the state, does not constitute consent to the general jurisdiction of New York under CPLR 301, as it is instead a mere convenience to be used for service when jurisdiction may already independently exist.

The *Aybar* case has been closely followed because leave to appeal was granted by the Court of Appeals, which then put its own imprint on the issue in a 5-2 determination rendered on October 7, 2021 (*Aybar v Aybar*, ___ N.Y.3d ___, ___ N.Y.S.3d ___, ___ N.E.3d ___, 2021 WL 4596367, 2021 N.Y. Slip Op. 05393) (Singas, J.). The majority of the Court of Appeals affirmed what had been found by the Second Department; namely, that a foreign corporation's compliance with the relevant statutory provisions for registering with the Secretary of State for authority to do business in New York, and the concomitant designation of the Secretary of State as an agent of the corporation for the service of process, is consent to service of process *only*. It does not establish New York's general jurisdiction over the foreign corporation in and of itself. Interestingly, the Court of Appeals specifically based its conclusion on an analysis of New York precedents, without reaching whether any consent to general jurisdiction by registration would comport with federal due process under *Daimler*. Yet, it appears that the conclusion of the Court of Appeals in *Aybar* is consistent with *Daimler's* directive that that general jurisdiction is cognizable only where a corporate entity is "at home" in a state, defined as being incorporated in the state or maintaining its principal place of business there, or there being other truly exceptional and rare circumstances that do not appear applicable here. Thus, for New York, the issue is now put to rest, that a corporation's registration to do business in New York, standing alone, is not enough to trigger general jurisdiction under CPLR 301. Practitioners seeking to commence actions in New York against foreign corporations with principal offices elsewhere must therefore look away from the ease and convenience of CPLR 301, were it applicable, and instead look to the more complicated longarm provisions of CPLR 302 for obtaining jurisdiction over the entity. CPLR 301 will still remain available for the assertion of general jurisdiction for entities incorporated in New York or which maintain their principal place of business in New York.

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General jurisdiction based upon *Daimler's* third jurisdictional prong, that a corporate entity's operations be so substantial in a state as to represent an exceptional circumstance basis for recognizing general jurisdiction, was found to be lacking in *Lowy v Chalkable, LLC*, 186 A.D.3d 590, 129 N.Y.S.3d 517 (2nd Dep't. 2020).

Daimler left unanswered the question of whether, under an "alter ego test," a parent corporation may be subject to the general jurisdiction of a state based upon the conduct of its subsidiary entity. Cases still remain elusive on this issue. Cases which have come close to addressing this issue have found that the quantum of proof for finding dominion and control by the principal over the subsidiary was lacking, and that the secondary issue of whether an "alter ego" relationship was sufficient to impute general jurisdiction to the principal, if at all, did not then need to be reached (*e.g. Branson v Alliance Coal, LLC*, No. 4:19-CV-00155-JHM, 2021 WL 1031002 [W.D. Kent. Mar. 17, 2020] [but also permitting some discovery on the issue]; *Zia Agricultural Consulting, LLC v Tyson Foods, Inc.*, No. 1:20-CV-445-KWR-JHR, 2021 WL 245686 [D. N.M. Jan. 25, 2021]; *Rivera v Invitation Homes, Inc.*, No. 18-cv-03158-JSW, 2020 WL 8910882 [N.D. Cal. Oct. 29, 2020]). We should expect that the federal courts, where so many cases are based upon the diversity of the parties' citizenship, will be the forums most likely to encounter and address these still-unresolved issues.

General jurisdiction under CPLR 301 should not be confused with longarm jurisdiction under CPLR 302(a)(1) through (4). A defendant not amenable to the general jurisdiction of New York under CPLR 301 may still be independently subject to New York jurisdiction under the longarm statute of CPLR 302.

C3211:29 Jurisdictional Basis Depending on Complaint

There are varied bases for the assertion of longarm jurisdiction over non-domiciliary defendants under CPLR 302, each dependent upon the nature of the defendant's contacts with New York State, or with the defendant, or with the tort or contract at issue in the plaintiff's complaint, or with real property that is the subject of an action.

Subdivision (a)(1) speaks to defendants who transact business in New York State, or who contract anywhere to supply goods or services to New York. Longarm jurisdiction under this subdivision may exist for cases sounding in either tort or contract, but at a minimum must involve the provision of goods within the state. The "transaction" of business in New York refers to a purposeful activity here, even if irregular, where the defendant avails itself of the privileges and protections of New York law. The CPLR 302(a)(1) jurisdictional inquiry is twofold: under the first prong, the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions (*Skutnik v Messina*, 178 A.D.3d 744, 113 N.Y.S.3d 195 [2nd Dep't. 2019]). "Purposeful activities" are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws (*Fischbarg v Doucet*, 9 N.Y.3d 375, 849 N.Y.S.2d 501, 880 N.E.2d 22 [2007]). The requirement of purposeful activities is not met by a single phone call to New York requesting the shipment of goods (*Parke-Bernet Galleries v Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 [1970], *citing M. Katz & Son Billiard Prods. Inc. v Correale & Sons*, 20 N.Y.2d 903, 285 N.Y.S.2d 871, 232 N.E.2d 864 [1967]), the transitory presence of a corporate official in New York (*McKee Elec. Co. v Rauland-Borg Corp.*, 20 N.Y.2d 377, 283 N.Y.S.2d 34, 229 N.E.2d 604 [1967]), or communications from an out-of-state physician serving as a consultant to a New York physician (*Etra v. Matta*, 61 N.Y.2d 455, 474 N.Y.S.2d 687, 463 N.E.2d 3 [1984]). The nature and quality of the contacts are what are important for determining whether a defendant's activities are sufficiently purposeful with New York as to amount to the transaction of business within the state. The defendant need not personally ever be in New York, as the inquiry is whether the defendant's *activities* related to New York were purposeful and there is a substantial relationship between the transaction and the cause of action asserted by the plaintiff (*Paterno v Laser Spine Inst.*, 24 N.Y.3d 370, 998 N.Y.S.2d 720, 23 N.E.2d 988 [2014]; *Glazer v Socata, S.A.S.*, 170 A.D.3d 1685,

96 N.Y.S.3d 791 [4th Dep't. 2019]; *Robert M. Schneider, M.D., P.C. v Licciardi*, 65 Misc.3d 254, 108 N.Y.S.3d 720 [Sup. Ct. Greene County 2019]).

Subdivision (a)(2) speaks to defendants who allegedly commit a tort within New York, except for defamation. The tortious conduct may be negligent or intentional. This general longarm basis makes sense. If an out-of-state defendant commits a civil battery at a tavern within New York and, in so doing, injures a New York plaintiff during the altercation, New York has an obvious interest in exercising jurisdiction over the parties and the related cause of action. The same can be said of out-of-state defendants who may engage in other forms of tortious conduct within the state borders of New York. For this longarm subdivision to apply, the defendant must be physically within the state of New York at the time the tort is committed (*Feathers v McLucas*, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 [1965]). CPLR 302(a)(2) looks to the non-domiciliary defendant's *conduct* that is physically within the state as its basis for jurisdiction, as distinguished from conduct elsewhere that may merely have a residual *effect* in New York.

Subdivision (a)(3) was added to the statute in 1966, after the original version of the 1962 statute had been enacted, to extend longarm jurisdiction to out-of-state defendants who commit torts outside of the state and where the resultant injury is caused to persons or property within the state, except for defamation. The reason for the addition of this subdivision was to close a perceived loophole in the law. The original 1962 version of the longarm statute did not contain any specific provision applicable to strict products' liability claims where a product is defectively designed, manufactured, or sold from outside of New York, and where the effect of the product defect causes injury within New York. The Court of Appeals held so in *Feathers* that non-residents could not be subjected to New York jurisdiction for tortious conduct committed out-of-state under the then-existing language of CPLR 302. *Feathers* involved a Florida defendant that negligently loaded propane gas for delivery in Vermont, which ignited in New York while en route to the beautiful Green Mountains. The state legislature responded to *Feathers* in 1966 by adding CPLR 302(a)(3) to the statutory scheme, expressly and logically extending the longarm concept to out-of-state defendants whose out-of-state conduct causes harm within New York.

CPLR 302(a)(3) contains qualifiers, however. For longarm to apply, even where the foregoing factual underpinnings are in place, the out-of-state defendant must also regularly do or solicit business in New York, or engage in any other persistent course of conduct in New York, or derive substantial revenue from interstate or international commerce, *or* expects or reasonably should expect its acts to have consequences in New York while also deriving substantial revenue from interstate or international commerce. For persons trained in the law, CPLR 302(a)(3) is a veritable gold mine of debatable legal nomenclature which uniquely impacts the cases from one to the next-the meaning of words like “regularly,” “solicits,” “persistent,” “substantial,” and “expects consequences.” Each is briefly discussed below:

Does or Solicits Business: While the “transaction” of business under CPLR 302(a)(1) involves a defendant availing itself of the benefits and protections of New York law, regularly “doing business” or “soliciting business” under the language of CPLR 302[a][3][i]) is broader. It connotes a non-domiciliary defendant's presence in New York that is not merely casual or occasional, but which represents a fair measure of permanence and continuity here (*AirTran, N.Y., LLC v Midwest Air Group, Inc.*, 46 A.D.3d 208, 844 N.Y.S.2d 233 [1st Dep't. 2007]). An entity doing business in New York can be sued in the state, whether the subject of the lawsuit relates to a particular aspect of the business or not.

Persistent Course of Conduct: Persistence regards the ongoing nature of the defendant's activities in New York. A long-term lease in New York, or a series of business transactions within the state, may qualify under CPLR 302(a)(1)(i) (*Williams v Beemiller Inc.*, 33 N.Y.3d 523, 106 N.Y.S.3d 237, 130 N.E.3d 833 [2019] [Feinman, J., concurrence]).

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Derives Substantial Revenue: The concept of deriving "substantial" revenue from New York is a relative term based upon the uniqueness of each individual defendant. A large national corporation might derive only a small percentage of its sales from New York, but because of the entity's "bigness," even a small percentage of overall revenue amounts to a substantial sum of money. Conversely, a small non-domiciliary company, with limited revenue, may derive a substantial percentage of its revenue from New York and thereby be found to derive substantial revenue from the state (*Id.*). The examination of "substantial revenue" under CPLR 302(a)(3)(ii) is therefore not only *sui generis*, but also, both quantitative and qualitative in nature.

The Expectation of Consequences. The statutory prong of CPLR 302(a)(3)(ii) that the defendant may alternatively be subject to longarm jurisdiction when it expects or should reasonably expect its act to have consequences in New York, speaks to foreseeability. The defendant need not foresee the specific injury-producing event in New York. Instead, the statute speaks to foreseeability in a more general sense, such as that the out-of-state manufacture or sale of a product which turns out to be defective would be used in New York and cause injury there (*Darrow v Hetronic Deutschland*, 119 A.D.3d 1142, 990 N.Y.S.2d 150 [3rd Dep't. 2014]).

CPLR 302(a)(4) is a straight-forward basis for longarm jurisdiction, and not one that generates much decisional law. It establishes longarm jurisdiction against non-domiciliary defendants who own, use, or possess real property situated within the state of New York. The lawsuit, incidentally, must relate to that same property within New York (*Zeidan v Scott's Dev. Co.*, 173 A.D.3d 1639, 103 N.Y.S.3d 707 [4th Dep't. 2019]).

Different longarm prongs may overlap with others. Conceivably, a defendant may be subject to more than one basis of longarm at the same time. The plaintiff need only have one such basis to obtain a jurisdictional predicate against the out-of-state defendant. Put another way, a plaintiff seeking to defeat a CPLR 3211(a)(8) motion to dismiss, based on the lack of personal jurisdiction over the defendant, need only provide *prima facie* evidence tending to establish one of the four statutory longarm bases to succeed in defeating the motion.

A statute related to the longarm is VTL 253. For out-of-state motorists, VTL 253 deems the New York Secretary of State as the agent for service of process upon non-domiciliary defendants whose vehicular operation is the subject of a suit in New York. The statute directs that service be effected upon the office of the Secretary of State personally or by mail, plus service by certified mail, return receipt requested, to the defendant at his or her out-of-state address, and then by regular mail if acceptance of the certified mailing is refused at its destination address (VTL 253[2]). The statute also provides other mechanisms for effecting service upon the out-of-state defendant.

For matrimonial actions, CPLR 302(b) allows for New York jurisdiction over a non-domiciliary if New York was the matrimonial domicile before the parties' estrangement, or if the defendant abandoned the marriage from New York, or if the cause of action accrued under New York law such as by a New York separation agreement or a New York prenuptial agreement (*Levy v Levy*, 185 A.D.2d 15, 592 N.Y.S.2d 480 [3rd Dep't. 1993]; *Klette v Klette*, 167 A.D.2d 197, 561 N.Y.S. 2d 580 [1st Dep't. 1990]).

The plaintiff need not allege a longarm jurisdictional basis in the complaint. The lack of a jurisdictional basis is an affirmative defense to be pleaded in an answer (CPLR 3211[a][8]). However, where the jurisdictional predicate is contested, the ultimate burden of proving a basis of jurisdiction, whether it be general or longarm or otherwise, rests with the plaintiff. In opposing a CPLR 3211(a)(8) motion to dismiss, the plaintiff need only make a *prima facie* showing that jurisdiction exists (*Skutnik v Messina*, 178 A.D.3d 744, 113 N.Y.S.3d 195 [2nd Dep't. 2019]; *Hopstein v Cohen*, 143 A.D.3d 859, 40 N.Y.S.3d 436 [2nd Dep't. 2016]). Parties moving to dismiss actions based upon an alleged lack of longarm jurisdiction, and those defending against such motions, must look closely at the particulars of the relevant subdivisions of CPLR 302(a), and key their arguments into the presence or absence of qualifying facts and criteria.

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C3211:32 Absence of a Person Who Should be a Party

CPLR 1001 and 1003 afford the courts with wide latitude in the addition or deletion of parties. The absence of a necessary party may therefore be raised at any stage in the proceedings by any party, or by the court on its own motion (*Migliore v Manzo*, 28 A.D.3d 620, 813 N.Y.S.2d 762 [2nd Dep't. 2006]).

C3211:55 Waiving Objection Contained in Paragraphs 8 or 9 of 3211(a)

A defendant with a basis for seeking the dismissal of the plaintiff's complaint on the ground that personal jurisdiction is lacking (CPLR 3211[a][8]) cannot sit on the right. CPLR 3211(e) requires that the right to seek such a dismissal is waived under either of three procedural circumstances. One is where the defendant unsuccessfully moves to dismiss the complaint under any grounds set forth in CPLR 3211(a) but does not raise the lack of personal jurisdiction as one of those grounds. The second circumstance is where the defendant serves an answer to the complaint which does not contain the lack of personal jurisdiction as an affirmative defense. The third circumstance is where the lack of personal jurisdiction is raised in the answer as an affirmative defense but the defendant does not move to dismiss on that basis within 60 days of the answer's service. In other words, the issue of personal jurisdiction has a fixed shelf life, and must be raised by the defendant early in the course a litigation.

Much of foregoing presumes that the defendant has, in fact, appeared and answered the plaintiff's complaint. The mere filing of a notice of appearance by counsel, without an answer raising a jurisdictional objection and without a motion to dismiss under CPLR 3211(a)(8), has the same effect of waiving the defense (*U.S. Rof III Legal Tit. Trust 2015-1 v John*, 189 A.D.3d 1645, 140 N.Y.S.3d 59 [2nd Dept. 2020]). An interesting twist occurred in the notice of appearance case of *Federal Nat. Mortg. Assoc. v Beckford*, 196 A.D.3d 546, 147 N.Y.S.3d 466 [2nd Dep't. 2021]), where a defendant sought to vacate a default judgment on the ground that *inter alia* she had never been properly served with process. There, the defendant denied that an attorney was ever authorized to appear for her in the action prior to the default, and was supported by an affirmation of the attorney that his name on a document earlier submitted to the court had been the product of an unfortunate scrivener's error. The Supreme Court denied the defendant's vacatur motion on the ground that the proffered jurisdictional defense had been waived. The Second Department disagreed and remitted the matter for a Traverse hearing, finding from the documentation that the attorney's purported appearance was unauthorized and therefore failed to trigger a waiver of the defendant's affirmative defense that personal jurisdiction was never obtained over her.

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

"SLAPP" is an acronym for the "strategic lawsuit against public participation." It involves suits commenced by property owners, real estate developers, or others who seek public approval for proposed projects, such as those needing a permit, a variance, municipal approvals, or licenses. Persons who oppose the project by means of public petition and participation have been known to be sued for doing so, upon a variety of legal theories such as defamation, prima facie tort, and tortious interference with contractual relations, i.e., the SLAPP suit. The public policy concern is that SLAPP suits could potentially be designed and initiated to stifle public opposition to what is proposed, which is contrary to the importance society places upon the right to free-expression. The legislature, seeking to protect the public's right to petition and participation, had enacted in 1992 subdivision (g) to CPLR 3211, which is specific to SLAPP suits (L.1992, ch. 767, sec. 4). By that amendment, defendants may move for the dismissal of the plaintiff's complaint, cross-claim, or counterclaim by merely establishing that the claim qualifies as a SLAPP suit as defined by Civil Rights Law 76-a(1)(a). Such a dismissal motion "shall be granted" unless the opposing party demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification, or reversal of existing law (CPLR 3211[g]). Clearly, the statute is written to make it difficult, though still possible in creditable cases, for plaintiffs to litigate SLAPP suits beyond the pleading

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stage. But gone for SLAPP suits is the concept embodied by CPLR 3026, applicable to other actions generally, that pleadings be "liberally construed."

CPLR 3211(g) was amended effective November 10, 2020. The amendments break CPLR 3211(g) into four subdivisions, with the new material contained in CPLR 3211(g)(2) through (4).

CPLR 3211(g)(2) states that the court shall examine the pleadings and the supporting and opposing affidavits of the parties in determining subdivision (g) dismissal motions. While that language might appear at first glance to add little to our jurisprudence, the only other statute that has specifically addressed attaching a copy of the pleadings to the moving papers, until now, was CPLR 3212(b) for summary judgment. CPLR 3211(g)(2) further states that the fact a determination was made on the motion, and the content of the determination itself, is not admissible later in the action, or in any subsequent action. In other words, the CPLR 3211(g) determination is "evidence" of nothing. The legislature also clarifies in subdivision (g)(2), as if to underscore the foregoing point, that the motion determination does not affect the burden of proof in the continuing action or in any subsequent action. That latter directive is well-taken, as CPLR 3211(g) reverses the burden of proof that normally lies with the moving party, to the party opposing dismissal, requiring the proponent of the SLAPP claim to establish its "substantial" legal basis in order to survive the claim's dismissal. As the recent amendment to CPLR 3211(g)(2) makes clear, that altered burden of proof does not carry beyond the dismissal motion itself and its determination.

CPLR 3211(g)(3) directs that once a dismissal motion is made in a SLAPP case, all discovery, hearings, or other motions are stayed, pending determination of the dismissal motion. Typically, since CPLR 3211 dismissal motions are made early in a litigation and in lieu of an answer, actions will not have progressed to discovery, hearings, or motions in any event. The amendment to (g)(3) removes all doubt, and under all relevant circumstances including those where, for whatever reason, a dismissal motion is made later in a litigation. Wisely, the state legislature realized that there may be occasions where the party opposing dismissal needs some measure of discovery in order to present facts essential to justify its opposition. After all, the burden of proof has effectively been flipped to the SLAPP party, and it would be unjust to expect a party with that burden to be simultaneously prohibited from obtaining any discovery that might be reasonably necessary for opposing the dismissal motion. Subdivision (g)(3) therefore provides a Solomonic solution, permitting the court, upon receipt of a motion made on notice, to order specified discovery limited to the issues raised by the motion to dismiss. While the statute does not expressly say so, it impliedly requires that under such circumstances, the court will hold the CPLR 3211(g) dismissal motion in abeyance pending the parties' conduct of the specified discovery. In that regard, the treatment is similar to that expressly permitted for summary judgment motions in CPLR 3212(d), where, *inter alia*, considerations of summary judgment may be subject to a "continuance" to permit discovery of facts essential to justify opposition to the motion.

CPLR 3211(g)(4) has been added to the statute to prevent any ambiguity from arising over what is subject to the overall provisions of subdivision (g); namely, it applies to complaints, cross-complaints, petitions, plaintiffs, cross-complainants, petitioners, defendants, cross-defendants, and respondents.

C3211:70 Greater Scrutiny of Complaint Where Defendant is Design Professional

CPLR 3211(h) is not seen very often, as the number of actions that might implicate it are limited. When an appellate division addresses subdivision (h) of CPLR 3211, it is worth noting.

Subdivision (h) was enacted in 1996 as a special aid to licensed architects, engineers, land surveyors or landscape architects who are sued in the courts of the state. To understand the statute, one must first read CPLR 214-d. CPLR 214-d(1) provides that when a person seeks damages for personal injuries, wrongful death, or injury to property against a licensed architect, engineer, land surveyor or landscape architect or their business entities, based upon the acts or omissions of their professional performance more than 10 years before the claim, such defendant is

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entitled to a written notice of claim. The notice of claim is to be served at least 90 days before the commencement of the action, including a description of the performance, the acts or omissions complained of on information and belief, and shall include a request for general and special damages. A copy of the notice of claim and proof of its service is to be filed with the court within 30 days from the commencement of the action to which they apply. Compliance with the procedural requirements of CPLR 214-d is a condition precedent to any lawsuit against the licensed architects, engineers, land surveyors, and landscape architects. In fact, compliance with the condition precedent must be affirmatively pleaded in the complaint and proven when CPLR 214-d is applicable (*Kretschmann v Board of Educ. of Corning Painted Post School Dist.*, 294 A.D.2d 39, 744 N.Y.S.2d 106 [4th Dep't. 2002]; *Dorst v Eggers Partnership*, 265 A.D.2d 294, 696 N.Y.S.2d 478 [2nd Dep't. 2002]).

That all said, CPLR 3211(h) provides that for actions subject to CPLR 214-d(1), the moving defendant's CPLR 3211 motion to dismiss, brought under (a)(7) of the statute, "shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct, or omission was a proximate cause" of the damages claimed "or is supported by a substantial argument for an extension, modification, or reversal of existing law." In essence, CPLR 3211(h) flips the burden of proof, which is normally on the movant, to the party opposing the motion to establish proximate cause between the negligent acts or omissions on the one hand and the personal injury, wrongful death, or property damage claimed on the other, or to articulate early in the litigation a "substantial" argument for the extension, modification, or reversal of existing law. The statute's treatment of the dismissal motion is similar to the changed burden imposed by CPLR 3211(g) for dismissal motions in SLAPP suits. The statute does not affect any statute of limitations. CPLR 3211(h) must be viewed in tandem with CPLR 3211(g), which accomplishes the same inversion of the burden of proof for dismissal motions in SLAPP suits, and CPLR 3212(i), which likewise inverts the burden of proof for qualifying actions involving licensed architects, engineers, land surveyors, and landscape architects in the context of summary judgment.

In addition to the various protections afforded to the qualifying professionals and entities named in CPLR 214-d and CPLR 3211(h), the latter statute confers upon those professionals the additional benefit that their dismissal motions shall be given a preference. These protections, collectively, reflect a public policy goal of the state legislature that for acts or omissions of qualifying professionals from more than 10 years before, only the most credible of those actions be permitted to survive beyond the stage of a motion to dismiss in lieu of an answer.

The operation of CPLR 3211(h) is seen in *Golby v N & P Engrs. & Land Surveyor, PLLC*, 185 A.D.3d 792, 128 N.Y.S.3d 34 (2nd Dep't. 2020). *Golby* is a tragic case. The plaintiff's decedent, who was in a wheelchair, rolled off a pier into the water and died the next day as a result of the occurrence. A defendant had been an engineer involved in the design of pier renovations performed in the mid-1990s. The plaintiff alleged that the pier was defectively designed in the area where boats were not moored, by not placing protective pedestrian railings there. The defendant moved to dismiss the action in lieu of an answer, and the Supreme Court and Second Department applied the heightened standard of CPLR 3211(h). In opposition to the dismissal motion, the plaintiff presented a transcript of the defendant's representative, which was taken as part of pre-action discovery, that railings are used on pedestrian piers to prevent persons from falling into the water. The Second Department, affirming the Supreme Court, found that under the heightened evidentiary standard, the plaintiff raised a material question of fact proximately linking the defendant's failure to recommend use of a pedestrian railing to the decedent's injuries and death.

The official texts of CPLR 3211(h) and 3212(i) each contain a typographical error. The statutes incorporate by reference, in long form, CPLR 214(1). In fact, the legislature intended to incorporate CPLR 214-d(1), which is the only way that CPLR 3211(h) and 3212(i) make any sense. CPLR 214(1) involves the statute of limitations in actions brought against sheriffs, constables, or other officers for the non-payment of money collected upon an execution and has nothing to do with the actual subject matter here.

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C3211:5 Grounds for Dismissal

The dismissal of actions under CPLR 3211 may occur when there is a specified ground for doing so under one of the enumerated grounds of subdivision (a)(1) through (11) of the statute. CPLR 3211 does not include a "catch-all" provision for the dismissal of actions for non-enumerated grounds. While complaints may be stricken or dismissed for other reasons set forth in the CPLR, such as the dismissal of complaints for willful and contumacious discovery non-compliance under CPLR 3126 or summary judgment under CPLR 3212, the grounds for dismissal under CPLR 3211 are exclusive and restricted. The point is illustrated by whether an action may be dismissed by a plaintiff's non-compliance with the Certificate of Merit requirement of CPLR 3012-a applicable to medical, dental, and podiatric malpractice actions.

For actions sounding in medical, dental, or podiatric malpractice, complaints shall be accompanied by a certificate executed by the plaintiff's attorney declaring that the attorney has reviewed the facts of the case and has consulted with at least one licensed physician, dentist, or podiatrist who the attorney believes to be knowledgeable about the relevant issues of the action, and that as a result of such review and consultation, the attorney has concluded that the action has a reasonable basis. The purpose of the requirement is to discourage frivolous litigations that raise the insurance premiums charged to physicians and thereby help control health care costs within the state. While there are certain exceptions to when the certificate of merit be filed such as those based upon time constraints, the unavailability of medical or hospital records, the plaintiff's reliance solely upon a theory of *res ipsa loquitor*, and actions commenced by plaintiffs pro se (CPLR 3012-a[2], [3]), the bulk of medical malpractice actions require the filing of certificate and the bar honors the statutory requirement for it.

What if the plaintiff's attorney in a medical malpractice action erroneously believes that the action does not require a certificate of merit and does not file one? What are the remedies of the statute if there is a failure of compliance? Notably, CPLR 3012-a does not contain any language whatsoever about how courts are to deal with non-compliance.

These issues were extensively discussed in *Rabinovich v. Maimonides Medical Center*, 179 A.D.3d 88, 113 N.Y.S.3d 198 (2d Dep't. 2019) (opinion by Dillon, J.). The first of two primary issues in the case was whether the plaintiff's action raised issues of medical malpractice, which would require a certificate of merit, or ordinary negligence, which would not. The plaintiff claimed damages for personal injuries sustained as a result of the negligent performance of a blood draw at a blood donation center in Brooklyn, resulting in the plaintiff experiencing an adverse reaction, the loss of consciousness, and a fall down. The defendant moved to dismiss the action for non-compliance with CPLR 3012-a. In opposition, the plaintiff argued that the gravamen of the action was ordinary negligence as the plaintiff's blood had not been drawn by a physician, but by a phlebotomist. On that issue, the appellate opinion surveyed decisional authorities that addressed the dividing line between medical malpractice and ordinary negligence, noting that the former exists when the task performed by the professional bears a substantial relationship to the rendition of medical treatment. In *Rabinovich*, the plaintiff's complaint and bill of particulars described the defendant's negligence in detailed medical terms, including failing to screen for health problems, failing to monitor the plaintiff's physical conditions and hemoglobin levels, and failing to keep the plaintiff at the donation site for a proper interval of observation. The court concluded that these allegations involved medical judgments beyond the knowledge of ordinary persons that style the action as one for medical malpractice. Indeed, the court noted that actions have been recognized as involving medical malpractice against non-physicians including phlebotomists, nurses, emergency medical technicians, and x-ray technicians. A CPLR 3012-a certificate of merit was therefore required of plaintiff's counsel given the particular nature of the case.

Remedially, the *Rabinovich* opinion noted that CPLR 3012-a does not contain any language for non-compliance with the statute. There was no reason in *Rabinovich* for the court to believe that the failure to provide a certificate of merit was motivated by anything other than a good faith but erroneous assessment by plaintiff's counsel that none

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was required. The Second Department therefore declined to dismiss the action, and instead provided the plaintiff's attorney with a 60-day window to comply with CPLR 3012-a measured from service upon him of a copy of the appellate order.

CPLR 3012-a performs a ministerial function of reducing the commencement of medical malpractice actions that lack sufficient merit. The statute does not regard the ultimate substantive merits of actions, and hence, non-compliance with the statute does not implicate the dismissal provisions of CPLR 3211 or the summary judgment provisions of CPLR 3212. *Rabinovich* should not be read to suggest that courts are without authority to enforce CPLR 3012-a. Non-compliance should be dealt with in the first instance ministerially, or by court order, and failing that, perhaps with monetary sanctions against the recalcitrant attorney under 22 N.Y.C.R.R. 130-1.1.

C3211:8 *Sua Sponte* Dismissals

Trial judges continue, from time to time, dismissing plaintiffs' complaints on *sua sponte* grounds. The occasional practice continues despite the fact that there has been a long and consistent line of cases, developed over many years, routinely reversing trial judges who do so. The reason that a court's *sua sponte* dismissal is problematic is that a dismissal, which is dispositive, is ordered without the plaintiff being given the due process of notice and an opportunity to be heard. *Sua sponte* dismissal, however many or few there are in a given year, typically occur when a defendant moves to dismiss a plaintiff's complaint under CPLR 3211 under stated grounds, which the plaintiff may or may not oppose. The court, unable or unwilling to grant dismissal on a noticed ground, then does so on another ground not raised in the moving papers.

The law governing these circumstances is clear: a court's power to dismiss a complaint *sua sponte* is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal (*Deutsche Bank National Trust Company v Winslow*, 180 A.D.3d 1000, 120 N.Y.S.3d 81 [2d Dep't. 2020]). Extraordinary circumstances virtually never exist. Reversals of *sua sponte* dismissals include where the court's dismissal is for the plaintiff's lack of prosecution despite having made a motion for an order of reference (*Deutsche Bank National Trust Company v Winslow*, 180 A.D.3d at 1002), the plaintiff's failure to comply with foreclosure-related administrative orders (*J.P. Morgan Chase Bank, N.A. v Laszlo*, 169 A.D.3d 885, 94 N.Y.S.3d 343 [2d Dep't. 2019]; *LaSalle Bank National Association v Lopez*, 168 A.D.3d 697, 91 N.Y.S.3d 259 [2d Dep't. 2019]), the alleged failure of the plaintiff to comply with RPAPL 1303 (*HSBC Bank USA, N.A. v Lopez*, 178 A.D.3d 679, 111 N.Y.S.3d 223 [2d Dept. 2019]), and the plaintiff's alleged lack of standing (*Consumer Solutions, LLC v Charles*, 137 A.D.3d 952, 27 N.Y.S.3d 216 [2d Dep't. 2016]). The reader may note that improper *sua sponte* dismissals arise almost exclusively in the Second Department, and within that department almost exclusively in the realm of residential mortgage foreclosure actions, which have in recent years become a significant portion of civil actions filed in certain counties of New York City and its suburbs, and on appeal.

Practitioners may, if they be so advised, move to reargue *sua sponte* dismissals that arise from noticed motions, or appeal them to an appellate court, as the odds of reversing the determination, particularly on appeal, are statistically very, very good.

C3211:10 Defense Based on "Documentary Evidence"

The Practice Commentaries for 2020 noted that while e-mails are not generally material that qualifies as "documentary evidence" for CPLR 3211(a)(1) purposes, decisional authorities were increasingly recognizing circumstances where e-mails can qualify under the statute for potential dismissals. As noted then, e-mails may be properly considered by courts determining CPLR 3211(a)(1) motions when the e-mails themselves are central to a party's cause of action, such as whether statements in an e-mail are a non-defamatory opinion as a matter of law (*International Pub. Concepts, LLC v Locatelli*, 46 Misc.3d 1213[A], 9 N.Y.S.3d 593 [Sup. Ct., New York County

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2015]), or where e-mails establish the absence of a gross disregard of the truth in defense of a defamation action (*Stone v Bloomberg, L.P.*, 163 A.D.3d 1028, 83 N.Y.S.3d 78 [2d Dept. 2018]), or when an e-mail chain between parties may or may not establish a meeting of the minds between parties about the material terms of an alleged extended contact (*Kolchins v Evolution Markets, Inc*. 31 N.Y.3d 100, 73 N.Y.S.3d 519, 96 N.E.3d 784 [2018]).

Since publication of the last Practice Commentaries, further decisional authority has been rendered suggestive of a continuing and growing flexibility by courts to consider e-mail as a proper basis for potential CPLR 3211(a)(1) dismissals. In an action involving legal malpractice, the First Department considered the content of e-mails exchanged between the plaintiff/clients and the defendant/attorneys, and other materials, in determining that the clients understood the terms of business transactions they had entered into, as well as alternative options. The e-mails were found by the Supreme Court, New York County, and by the First Department, as conclusively establishing the absence of legal malpractice by the attorneys as a matter of law (*Binn v Muchnick, Golieb & Golieb, P.C.*, 180 A.D.3d 598, 121 N.Y.S.3d 13 [1st Dep't. 2020]).

In *Flink v Smith*, 66 Misc.3d 1229[A], 125 N.Y.S.3d 529 (Sup. Ct., Albany County 2020), the court likewise held that e-mails exchanged between parties in a breach of contract action were properly admissible in deciding a CPLR 3211(a)(1) motion, on the ground that the e-mails were "unambiguous and of uncontested authenticity." Notably, the court's reliance upon an "unambiguous and of uncontested authenticity" standard was derived from the First Department's determination in *Kolchins v Evolution Markets, Inc*., 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dep't. 2015) which, as the reader knows, was later affirmed in 2018 by the Court of Appeals. Yet, in *Flink*, the e-mails that were proffered by the moving party, once considered by the court, were found to insufficiently set forth a basis for the dismissal of the plaintiff's complaint under CPLR 3211(a)(1).

The legal standard that e-mails be unambiguous and authentic, to be considered by courts in deciding whether to grant CPLR 3211(a)(1) motions, appears to be a reasonable, responsible, and prudent evidentiary standard. The Second Department employed the same concept, using very similar language in *S & J Service Center, Inc. v Commerce Commercial Group Inc*., 178 A.D.3d 977, 112 N.Y.S.3d 584 (2d Dep't. 2019). In that breach of contract matter, the Second Department determined that e-mails proffered by the defendant in support of a CPLR 3211(a)(1) dismissal did not qualify as documentary evidence, as the e-mails "were not essentially undeniable." The Second Department recognized a general legal standard that qualifying e-mails be "unambiguous, authentic, and undeniable" (*S & J Service Center, Inc. v Commerce Commercial Group Inc*., 178 A.D.3d at 978, *citing Grenada Condominium III Ass'n v Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 [2d Dep't. 2010]. *See also, Seaman v Schulte, Roth & Zabel LLP*, 176 A.D.3d 538, 111 N.Y.S.3d 266 [1st Dep't. 2019]).

What this developing case law should tell practitioners is that counsel preparing dismissal motions should not only provide e-mails that help establish the grounds for the motion, but also address the lack of ambiguity, authenticity, and undeniability of the e-mails themselves, so that they may be considered on their merits. Conversely, for plaintiff attorneys opposing CPLR 3211(a)(1) dismissal motions, the argument should be made, where appropriate, that the proffered e-mails are ambiguous, or arguably inauthentic, or deniable. Less clear, for now, is whether the same legal standards will be applied to alleged communications made on more casual forms of social media such as Twitter and Instagram, but expect case law to develop as to those platforms in the years ahead.

C3211:11 Lack of Subject Matter Jurisdiction

The Supreme Court, which is a court of general and unlimited jurisdiction, is not, in fact, unlimited. Matters that are exclusive to the state Court of Claims, or to the federal courts, are the categories of matters that should not be brought in the Supreme Court.

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Recent examples of cases involving the absence of subject matter jurisdiction include those where a cause of action is pre-empted by federal law (*Klingsberg v Council of School Supervisors and Administrators-Local 1*, 181 A.D.3d 949, 122 N.Y.S.3d 335 [2d Dep't. 2020]), non-judiciable internal church disputes based on religious rather than secular principles (*Eltingville Lutheran Church v Rimbo*, 174 A.D.3d 856, 108 N.Y.S.3d 39 [2d Dep't. 2019]), the absence of a timely notice of claim as required for actions in the state Court of Claims (*Jones v State*, 171 A.D.3d 1362, 98 N.Y.S.3d 366 [3d Dep't. 2019]), and the failure by the plaintiff to exhaust administrative remedies (*City of New York Human Resources Administration v Hewitt*, 120 N.Y.S.3d 571 [App. Term, New York 2020]; *IKON Business Group, Inc. v Police Athletic League, Inc.*, 65 Misc.3d 1226[A], 119 N.Y.S.3d 700 [Sup. Ct. New York County 2019]).

C3211:12 Plaintiff's Lack of Capacity

As noted in the 2020 Practice Commentaries and other legal literature, the language of CPLR 3211(a)(3), which authorizes the dismissal of actions for plaintiffs' lack of capacity, has been interpreted as also applying to plaintiffs' lack of standing even though the term "standing" is absent from the statute itself. New York State's legislature enacted a significant amendment to the Real Property Actions and Proceedings Law (RPAPL) regarding the defense of standing, effective December 23, 2019. The amendment at issue here, RPAPL 1302-a (2019 NY Sess. Laws, c. 739, sec. 1), involves only residential mortgage foreclosure actions involving defaulted home loans.

Until December 23, 2019, standing in residential mortgage foreclosure actions was a defense waived by the defendant homeowner if not asserted as a basis for dismissal in either a pre-answer motion to dismiss or as an affirmative defense in the defendant's answer. This principal was concretized in *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.3d 247 (2d Dept. 2007), and followed by courts in countless foreclosure actions in the years that followed.

However, RPAPL 1302-a has nullified a significant body of case law that had, until now, been recognized throughout the State on New York on the issue of standing. The amendment adds to the RPAPL an entirely new section, 1302-a (2019 NY Sess. Laws, c. 739, sec. 1). The new RPAPL 1302-a provides that in qualifying foreclosure actions, a defendant's failure to raise standing as a defense in a responsive pleading or motion to dismiss does not constitute a waiver.

The purpose of the law is to help assure that standing issues be resolved on their merits, so that only lenders who own a loan by direct lending, purchase, or assignment are permitted to collect upon the mortgaged debt (NY Sponsor's Memorandum, 2019 S.B. 5160 [April 14, 2019]).

The statutory enactment that the standing defense is not waived was placed by the state legislature specifically in the RPAPL, and not in the CPLR that governs all actions generally. RPAPL 1302-a is expressly limited to residential mortgage foreclosure actions. The amendment therefore creates an odd legal dichotomy, that the failure to raise standing as an affirmative defense does constitute a waiver in qualifying residential mortgage foreclosure actions, but the same defense continues to be waived in all other litigations outside the scope of RPAPL 1302-a. The procedural rules of standing will therefore vary from now on, depending on the nature of the litigation at issue.

If a foreclosure defendant files a motion to dismiss on grounds other than standing, and is unsuccessful, a logical construction of the new statute is that the defendant may then include standing as an affirmative defense in the answer that follows. This is true because the language of RPAPL 1302-a is notwithstanding any of the provisions of CPLR 3211(e).

RPAPL 1302-a does not apply to all mortgage foreclosure actions, but only those involving a "home loan" as that term is defined by RPAPL 1304(6). Commercial and other secured loans are outside the scope of the statute's

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standing-related protections. The incumbent version of RPAPL 1304(6) was scheduled to sunset on January 14, 2020, and a newer definition of "home loan" was to become effective from January 14, 2020, forward. However, the new definition that was scheduled to take effect was itself repealed (L. 2019, c. 55, part VV), as a result of which the incumbent definition contained within RPAPL 1304(6) remains in effect.

RPAPL 1304(6)(a)(1) and (2) define home loans as those involving natural persons in family dwellings and condominiums within the state, occupied or intended to be occupied by the borrower(s) in whole or in part as a personal residence, inclusive of reverse mortgages. Actions involving any other forms of loans are outside the scope of the new standing-related homeowner protection afforded by RPAPL 1302-a.

RPAPL 1302-a became effective on the date it was signed, which was December 23, 2019. It applies not only to residential foreclosure actions that will be filed in the future, but also to actions already pending in the courts as of its effective date.

Limiting language in the newly-enacted RPAPL 1302-a provides that the standing defense is waived if the action has already resulted in a foreclosure sale, except when the judgment was rendered on the default of the defendant. Defendants who have lost their cases on the merits, after a full and fair opportunity to be heard, may not seek to now litigate standing for the first time, if a judgment of foreclosure and sale has already been rendered. The provision of RPAPL 1302-a allowing for standing to be raised and contested by defaulted homeowners, even after a foreclosure judgment has been rendered and the property has been sold, might prove the law of unintended consequences. The obvious purpose of the provision is to assist homeowners, but as noted by Melissa Clement in the March 2020 issue of the Albany Bar Association's *Bar News*, potential buyers may be less inclined to purchase real property at foreclosure sales if there is uncertainty over whether the sale might be set aside in the future for the bank's lack of previously-unlitigated standing. Such uncertainty may have the effect of depressing foreclosure sale prices, generate fewer funds for homeowners to apply toward deficiency judgments, and dissuade lenders from financing the purchase of distressed properties (Clement, Melissa, "The Good, The Bad, and The Ugly: RPAPL 1302-a and Residential Foreclosure Proceedings" 25, *Bar News* [March 2020]). In other words, the portion of the new statute that allows for a standing defense to be raised after the property has been foreclosed upon may cause unintended harm to the homeowners that the law is intended to protect.

While the issue of a plaintiff's lack of capacity is often presented to courts in the context of whether the individual is subject to a disqualifying disability such as infancy or mental illness, capacity may also be an issue as to the plaintiff's corporate form and legal ability to bring an action in a New York forum. The latter was an issue in *Montvale Surgical Center, LLC v State Farm Mutual Automobile Insurance Co*., 66 Misc.3d 1215[A], 120 N.Y.S.3d 720 (Dist. Ct. Suffolk County 2020). The plaintiff assignee in *Montvale Surgical Center* was a New Jersey limited liability company that commenced an action to recover No Fault benefits paid for medical and surgical services provided to the assignor. The defendant No Fault insurer sought to dismiss the action on the ground of lack of capacity to sue, as the plaintiff had never registered with the New York Department of State to authorize its conduct of business in New York pursuant to BCL 1312(a). Indeed, there was no question between the parties that the plaintiff was a New Jersey entity with no BCL registration at the Department of State. The District Court denied the defendant's motion to dismiss, finding that under the circumstances of the action, the plaintiff's litigation efforts in New York were incidental to its business, rather than systematic, as a result of which no BCL registration was required of it. In the alternative, the court also noted that the absence of a registration with the Department of State, if required, was not a jurisdictional defect, but a curable one at any time prior to the resolution of the action (*Montvale Surgical Center, LLC v State Farm Mutual Automobile Insurance Co*., 66 Misc.3d 1215[A], at *3).

Capacity may also involve the legal authorization of an administrator to bring an action on behalf of an estate, as in *Rodriguez v River Valley Care Center, Inc*., 175 A.D.3d 432, 108 N.Y.S.3d 126 (1st Dep't. 2019). *Rodriguez* involved causes of action for damages arising from alleged medical malpractice, and for wrongful death. The first

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of two actions was commenced by the named plaintiff as a "proposed administrator," which was dismissed for lack of capacity since no letters of administration had been issued. Facing a ticking clock on certain statutes of limitations, the same named plaintiff commenced a second action as the estate's "voluntary administrator," again without the benefit of letters of administration at the time of commencement, and the defendants once again moved to dismiss the action for lack of capacity. However, while the dismissal motion was pending in the second action, the Surrogate's Court issued the plaintiff his long-awaited letters of administration, on a date that was within six months from the dismissal of the first action. The First Department, reviewing the matter on appeal, held that while the plaintiff lacked capacity when commencing his actions, the defect was cured by his ultimate receipt of letters of administration and by timely application of the six-month savings provision of CPLR 205(a).

Capacity, and more precisely standing, also arises in the context of cases where a plaintiff has filed for the protection of a bankruptcy court. Upon the filing of a Chapter 7 or 11 bankruptcy petition, all property that the debtor owns, including the civil cause of action, vests in the bankruptcy estate (11 U.S.C. 541[a][1]; *Keegan v Moriarty-Morris*, 153 A.D.3d 683, 59 N.Y.S.3d 779 [2d Dep't. 2017]). The plaintiff's cause of action becomes an asset of the bankruptcy court which is to be disclosed as such on the appropriate bankruptcy schedules. The failure to disclose the cause of action on the bankruptcy schedule of assets deprives the plaintiff of the legal capacity to sue on the claim (*Keegan v Moriarty-Morris*, 153 A.D.3d at 684). Upon filing for bankruptcy and the disclosure of the cause of action as a bankruptcy asset, the party that has standing to prosecute the civil action is not the plaintiff who was allegedly caused damages, but the appointed bankruptcy trustee, and the commencement of an action by the plaintiff-debtor can be dismissed under CPLR 3211 (*Burbacki v Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, & Wolf, LLP*, 172 A.D.3d 1300, 99 N.Y.S.3d 671 [2d Dep't. 2019]).

An action commenced by a plaintiff in bankruptcy will typically be dismissed for the absence of standing, whether the cause of action is disclosed on the bankruptcy schedule of assets or not. Since standing and capacity-related dismissals are not on the merits, the bankruptcy trustee may commence a new civil action for the debtor so long as the statute of limitations has not expired in the meantime. However, plaintiffs and their trustees have the benefit of the six-month grace provision of CPLR 205(a), and the timeliness of a second action will not be a problem so long as the trustee commences it within the six-month window measured from service of the order dismissing the first action (*Goodman v Skanska USA Civil, Inc*., 169 A.D.3d 1010, 95 N.Y.S.3d 243 [2d Dep't. 2019]) with notice of its entry.

C3211:15 Same Parties, Same Causes of Action

CPLR 3211(a)(4) permits the dismissal of a plaintiff's complaint if there is already another action pending between the same parties for the same cause of action in New York, or another state, or in a federal court. The dismissal of an action is a discretionary determination of the trial court, addressed in connection with the "second" of the two actions or proceedings.

The statute is most frequently applied when the same party is the plaintiff in two separate actions. But there are variations to that general concept. A dismissal for "prior action pending" may be obtained to dismiss a defendant's counterclaim in an action, if the counterclaiming defendant has asserted in an already-pending action a cause of action for the same relief based on the same facts between the same parties (*744 E. 215 LLC v Simmonds*, 65 Misc.3d 1234[A], 119 N.Y.S.3d 828 [Civ. Ct. City of New York 2019]).

C3211:18 Affirmative Defenses Available on Subdivision (a) Motion

CPLR 3211(a)(5) contains a veritable grab bag of grounds on which defendants may move to dismiss complaints.

Infancy of Other Disability of the Moving Party

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The infancy or other disability of a defendant is a basis for seeking dismissal of a plaintiff's complaint under CPLR 3211(a)(5), but mere proof of a minor's age or of other disability is not necessarily enough for the defendant to actually win the motion. More is required per the holding in *US Bank National Association for Deutsche Bank, Alt-A Securities Mortgage Loan Trust Series 2007-2 v McGown*, 60 Misc.3d 808, 80 N.Y.S.3d 643 (Sup. Ct. Kings County 2018). In that action, the plaintiff's predecessor in interest had loaned money in 2007 to the defendant, James McGown (McGown) in exchange for an $816,000 promissory note and mortgage upon the property. Later that year, McGown transferred title to the property to his minor child, A.M., pursuant to the Uniform Transfer to Minors Act (UTMA). The deed and recording documents did not reveal the relationship between McGown and A.M., the UTMA, or that A.M. was a minor. Upon the loan's default, the plaintiff commenced an action against McGown and A.M., and process was served upon both at their home by means of suitable age and discretion method of CPLR 308(2). No answer was served and an order of reference was granted. A.M., by her mother and natural guardian, moved to vacate the default and dismiss the action on the ground that A.M. was a minor under the age of 14. Although a birth certificate evidenced A.M.'s age, the Supreme Court denied dismissal of the action. The court held that for the plaintiff to be subject to the special service provisions for minors set forth in CPLR 309, the plaintiff must have actual or constructive notice that the party to be served is, in fact, a minor. The Supreme Court further held that the defendant, as moving party, bore the initial burden of proving actual constructive notice that A.M. was a minor, which was not accomplished where the deed transfer made no mention of A.M.'s age, did not mention the UTMA, and where service was effected upon an adult of suitable age and discretion. The court noted that under the UTMA, McGown was required to identify A.M. as a minor, and that his failure to do so secreted A.M.'s age from the bank.

Release

As a general rule, the existence of a valid release constitutes a complete bar to an action on a claim that is the subject of the release (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 929 N.Y.S.2d 3, 952 N.E.2d 995 [2011]). A release is a contract and its construction is governed by contract law. When a defendant moving to dismiss an action under CPLR 3211(a)(5) produces a copy of a signed release from the plaintiff's claim, the burden shifts to the plaintiff to show, under well-established contract principles, that the release was a product of fraud, coercion, duress, mutual mistake, or other conduct sufficient to void it (*Cames v Craig*, 181 A.D.3d 851, 119 N.Y.S.3d 888 [2d Dep't. 2020]). A plaintiff's failure to controvert a facially valid and relevant release will result in the dismissal of the cause of action.

Statute of Limitations

The determination of motions to dismiss for alleged untimeliness under CPLR 3211(a)(5) is similar to the procedures used for determining summary judgment motions for alleged untimeliness under CPLR 3212. The party moving for a CPLR 3211(a)(5) dismissal has the initial burden of establishing *prima facie* that the plaintiff's time to sue had expired (*Horowitz v Foster*, 180 A.D.3d 783, 120 N.Y.S.3d 49 [2d Dep't. 2020]). Such proof can be typically established by reference to the date of accrual typically ascertainable from the plaintiff's complaint, the date of commencement ascertainable from the filing date reflected on the summons or in the e-filing system, and a mathematical overlay of the controlling statute of limitations. If the moving defendant fails to meet the *prima facie* burden of proof, the dismissal motion will be denied (*Horowitz v Foster*, 180 A.D.3d at 784), at least as to its statute of limitations grounds. Where a complaint alleges more than one cause of action, the defendant should take care to apply the same exercise to each separate cause of action within the scope of the motion, as different causes of action may have different dates of accrual or be subject to different limitations periods. If the moving defendant meets the *prima facie* burden of proof, the plaintiff then undertakes the burden of raising a question of fact that the action is timely, such as by there being a later date of accrual, the existence of a limitations toll or extension, or a revival of

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a limitations period (*e.g.*, *U.S. Bank National Association v Vitolo*, 182 A.D.3d 627, 120 N.Y.S.3d 791 [2d Dep't. 2020]; *Mello v Long Island Vitreo-Retinal Consultant, P.C.*, 172 A.D.3d 849, 99 N.Y.S.3d 414 [2d Dep't. 2019]).

Statute of Frauds

One of the CPLR 3211(a)(5) grounds for dismissal is that the plaintiff's cause of action may not be maintained on account of the statute of frauds. The determination of these motions may sometime depend on which statute of frauds provision in the General Obligations Law is controlling of the action. This parsing of the statute of frauds was recently seen in *Korman v Corbett*, 183 A.D.3d 608, 123 N.Y.S.3d 192 (2d Dep't. 2020). The plaintiff sought specific performance of an alleged oral agreement with a decedent, where the plaintiff cared for the decedent prior to her death in exchange for the plaintiff being given an option to buy the residence from her estate for $1.2 million. The decedent's estate moved to dismiss certain causes of action under CPLR 3211(a)(5) on the ground that the alleged agreement, which was never memorialized in writing, was unenforceable under the statute of frauds. At issue at the trial level, and on appeal, was whether the causes of action were governed by G.O.L. 5-701, which requires agreements involving the purchase of real property be in writing and contains no language authorizing courts to grant specific performance, and G.O.L. 5-703, which more specifically enables courts to award specific performance of real property agreements where there is evidence of partial performance. As between the two statutes, the Appellate Division held that G.O.L. 5-703 was the statute more specific to the plaintiff's factual and legal claims, and on that basis, held that the dismissal of the relevant causes of action was not appropriate.

C3211:28 Lack of Personal Jurisdiction

Last year's Practice Commentary for CPLR 3211(a)(8) reviewed the significant legal developments arising from the U.S. Supreme Court's decision on general jurisdiction in *Daimler AG v Bauman*, 571 U.S. 117, 134 S. Ct. 746 (2014). The Supreme Court clarified the law on general jurisdiction, by requiring that corporations be “at home” in a state to be subject to its general jurisdiction and be sued for any claim there. A corporation is “at home” in a state where 1) it is incorporated, or 2) maintains its principal place of business, or 3) in truly exceptional circumstances, where the corporation's operations are so substantial and of such nature as to render the corporation at home in the state. *Daimler* does not affect the states' exercise of specific jurisdiction, such as longarm jurisdiction recognized in New York under CPLR 302. While *Daimler* does not extend general jurisdiction liability between parent corporations and subsidiaries under an “agency” theory, which the Supreme Court directly addressed, it left unresolved the question of whether general jurisdiction can be extended between a parent corporation and a subsidiary under the parallel “alter ego” theory, which was not addressed. Last year's Practice Commentary predicted that future federal and state cases will be needed to definitively address whether general jurisdiction may be asserted between corporate parents and subsidiaries on an “alter ego” basis, and to flesh out the true meaning of *Daimler's* third basis for the assertion of general jurisdiction regarding truly exceptional cases where a corporation's operations are so substantial and of such nature as to render the entity “at home” in the state.

New York's general jurisdiction statute is CPLR 301. Decisions are slowly trickling in on issues related to that statute post-*Daimler*.

In one reported decision, a complaint was dismissed under CPLR 3211(a)(8) where a corporate president established in an affidavit that the defendant principal office was in New Jersey rather than New York, thereby depriving the plaintiff of general jurisdiction (*Robins v Procure Treatment Centers, Inc.*, 179 A.D.3d 412, 116 N.Y.S.3d 35 [1st Dep't. 2020]).

On the issue of whether an “alter ego” relationship between a corporate parent and subsidiary permits the assertion of general jurisdiction, where a party is not incorporated in the state and does not maintain a principal office here, an early canary in a coal mine may be *RP Business Marketing, Inc. v Timlin Industries, Inc.*, 67 Misc.3d 1205(A),

2020 WL 1856604 (Sup. Ct. New York County 2020) (Barrok, J.). The defendant, Timlin Industries, Inc. (Timlin), was in the telemarketing business and was sued by RP Business Marketing, Inc. (RPB) for allegedly breaching the exclusivity provisions of an agreement and by the improper sharing of proprietary information. Contractually, RPB and Timlin had agreed that any disputes between them would be governed by the law of the state of New York, and that any litigation between them would be venued in a state or federal court within New York. The party that Timlin allegedly worked with in breach of the contractual exclusivity provision was SM Consulting, LLC (SMC), which was also named as a defendant in the action, but which was not incorporated in New York and did not maintain its principal office within the state. SMC moved to dismiss the plaintiff's action against it on the ground that it was not subject to the general jurisdiction of the New York courts. The court focused on evidence about whether SMC was so dominated and controlled by Timlin as to be an alter ego or Timlin. Although the court held that SMC was subject to New York's longarm jurisdiction under CPLR 302, which rendered questions of general jurisdiction academic, it alternatively held that SMC was also subject to the general jurisdiction of New York courts as an alter ego of Timlin. Traditionally, New York has recognized a principal's domination and control over a subsidiary as an "alter ego" basis for the assertion of general jurisdiction. New York has avoided the nomenclature of "alter ego" in favor of what it instead calls the "department test" focused on whether the parent corporation's domination of control of a subsidiary is so extensive that the subsidiary is rendered a mere department of the parent. The court's recognition of an alter ego (department) basis for general jurisdiction addressed an issue that the U.S. Supreme Court did not address in *Daimler*, that an alter ego basis may be properly used for asserting general jurisdiction, but may arguably be called into question by *Daimler*. *RP Business* will not be the last word on the subject, as significant federal and, likely, appellate determinations in New York, should be expected.

The establishment of *Daimler's* third basis for general jurisdiction, based on exceptional circumstances, will not be easy for plaintiffs to meet. One reason is that the U.S. Supreme Court limited this basis to circumstances that are not just exceptional, but "truly exceptional." The Supreme Court further limited the basis to circumstances where the corporate defendant's operations within the state are "so substantial and of such nature" as to render the entity at home in the state. The bar is raised high. It was not met in *Aybar v Goodyear Tire & Rubber Company*, 175 A.D.3d 1373, 106 N.Y.S.3d 361 (2d Dep't. 2019).

Complaints and answers may be properly examined to determine whether the plaintiff has a basis for general jurisdiction in New York. In *Gibson v Air & Liquid Systems Corporation*, 173 A.D.3d 519, 103 N.Y.S.3d 391 (1st Dep't. 2019), the plaintiff's complaint alleged that the defendant was a corporation duly organized in the state of New York, which the defendant did not deny in its answer. The First Department concluded that the allegation of incorporation was admitted and binding upon the defendant, notwithstanding the fact that the answer had been prepared prior to the U.S. Supreme Court's determination in *Daimler*. General jurisdiction therefore existed based on an admission in the pleadings.

On the issue of whether general jurisdiction can be asserted against a parent corporation through the New York presence of a subsidiary, practitioners should be aware of *Sabol v Bayer Healthcare Pharm., Inc*., 439 F.Supp.3d 131 (2020) (Marrero, J.). A metal called gadolinium is used as a contrast agent for persons undergoing MRIs, and is supposed to be eliminated from the body through the kidneys. The plaintiff, who underwent 23 MRIs, alleged that she was caused physical injuries because the contrast agent was retained in her body, and sought damages under theories of negligence and strict products' liability for the defendants' failure to warn. The defendants included General Electric Healthcare (GEHC), which manufactured and distributed some of the gadolinium-based contrast agents. GEHC moved to dismiss the plaintiff's amended complaint on the ground, *inter alia*, that it was neither headquartered nor incorporated in New York. The plaintiff argued that GEHC was amenable to the court's general jurisdiction as it was a wholly-owned subsidiary of co-defendant General Electric Company (GE), a New York corporation. The court noted, as this Practice Commentary did last year, that it is unusual for a party to seek to extend jurisdiction over a subsidiary through its parent, rather than *vice versa*. The Southern District found that general jurisdiction was lacking over GEHC for two reasons. The first was that under *Daimler*, an agency theory between

the parent and subsidiary was expressly rejected by the U.S. Supreme Court for the assertion of general jurisdiction through one entity to another. Second, as to the "alter ego" basis for extending general jurisdiction from one related entity to another, as discussed in *Ranza v Nike, Inc*., 793 F.3d 1059 (9th Cir. 2015), the court stopped short of accepting "alter ego" as a jurisdictional path. Instead, the court said that *if* general jurisdiction could be imputed to a subsidiary under an alter ego analysis, the plaintiff would need to assert more than just the parent-subsidiary relationship between the parties. Indeed, in this instance, there appears from the court's decision to be no evidence from the plaintiff meeting New York's long-standing "department" test for establishing the parent's domination and control over its subsidiary, including the most important element of the parent's 100% stock ownership of the subsidiary.

Thus, for plaintiff practitioners, the message from *Sabel* v *Bayer Healthcare Pharm., Inc*. is that New York courts have not yet adopted *Ranza's* alter ego basis for the imputation of general jurisdiction, and may or may not do so. If the day comes when it does so, the parent-subsidiary relationship, in and of itself, will not be sufficient for the assertion of general jurisdiction, and the plaintiffs should be prepared to meet the four-part "department test" for the assertion of such jurisdiction; namely, 100% stock ownership by the parent of the subsidiary, the financial dependency of the subsidiary upon the parent, the parent's influence on the composition of the subsidiary's board, and the parent's control over the marketing and operational responsibilities of the subsidiary (*Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp*., 751 F.2d 117 [2nd Cir. 1984]; *Varga v McGraw Hill Financial Inc*., 2015 WL 4627748 [Sup. Ct. New York County 2015]).

In *Homeward Residential, Inc v Thompson Hine, LLP*, 172 A.D.3d 459, 100 N.Y.S.3d 233 (1st Dep't. 2019), the defendant was a limited liability partnership formed in Ohio with a principal office in that state. When the defendant moved to dismiss the action for lack of general jurisdiction, the plaintiff argued that the defendant should be estopped from asserting the defense that general jurisdiction was lacking, as the defendant had allegedly misrepresented that it maintained its principal place of business in New York upon which the plaintiff relied in commencing the action in New York. The Supreme Court, New York County, and the Appellate Division in the First Department, were unimpressed with the plaintiff's argument, as the plaintiff's reliance upon the defendant's alleged representations for venue-selection purposes was found to not be reasonable.

Discovery is of course permissible between parties to help determine whether a defendant is, or is not, subject to New York's general jurisdiction. To be entitled to jurisdictional discovery, the plaintiff must merely make an initial showing that is a "sufficient start," establishing facts that *may* exist for the exercise of personal jurisdiction (*Best v Guthrie Medical Group, P.C*., 175 A.D.3d 1048, 107 N.Y.S.3d 258 [4th Dep't. 2019]). Conversely, the absence of any initial showing, such as would contradict the defendant's readily-available evidence of non-New York incorporation and principal office location, does not provide a basis for fishing-expedition discovery on personal jurisdiction (*Qudsi v Larios*, 173 A.D.3d 920, 103 N.Y.S.3d 920 [2d Dep't. 2019]).

The pre-action discovery procedures of CPLR 3102(c) are generally available for acquiring material that is relevant to the potential assertion of general jurisdiction against a party in New York. Pre-action discovery, when sought, is requested by a petition in a special proceeding. In *Matter of Legal Aid Society of Suffolk County to Compel Production of Documents From Indeed, Inc. Prior to Commencement of Action*, 66 Misc.3d 1212(A), 120 N.Y.S.3d 720 (Sup. Ct. Suffolk County) (St. George, J.), the target entity, Indeed, Inc. (Indeed), was a Delaware corporation with a principal office located in Texas. Under *Daimler*, therefore, there would be no basis for general jurisdiction over Indeed, unless the circumstances were truly exceptional in maintaining operations in New York that were so substantial and of such nature as to render the entity at home in New York. While Indeed had registered to do business in New York, the court correctly noted that registration is not sufficient under *Daimler* to support the assertion of general jurisdiction over an entity, particularly as New York's registration statutes do not require the foreign corporation to consent to the general jurisdiction of the New York courts (BCL 1301, 1304[a]). No basis was stated in the pre-action discovery petition for the assertion of longarm jurisdiction over Indeed. As a consequence,

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the Supreme Court, Suffolk County, denied the petition for pre-action discovery from Indeed, as the petitioner failed to provide any basis for jurisdiction. A similar result was reached in *Kline v Facebook, Inc. and Google, Inc.*, 62 Misc.3d 1207(A), 112 N.Y.S.3d 875 (Sup. Ct. New York County) (Freed, J.), where the petitioner seeking pre-action discovery failed to establish that the respondents, who were not incorporated in New York and did not maintain their principal offices here, was nevertheless potentially subject to New York's general jurisdiction.

C3211:32 Absence of a Person Who Should be a Party

Actions may be dismissed under CPLR 3211(a)(10) when the court should not proceed in the absence of a necessary party. The language of CPLR 3211(a)(10) is a little misleading, because the plaintiff's mere failure to name a necessary party does not automatically mean that the action will be dismissed. A party is defined as "necessary" when his or her presence is needed for complete relief to be accorded between persons who are parties to the action or who might be inequitably affected by a judgment in the action (CPLR 1001[a]).

The first issue, therefore, is whether a party is necessary. By nature and definition, the issue arises under CPLR 3211(a)(10) only where a potentially affected party is *not* named in the caption of the action, as the party's presence in the action would obviate consideration of a dismissal on this statutory ground.

The second issue that a court must address in determining CPLR 3211(a)(10) dismissal motions is whether the absent party is amenable to the personal jurisdiction of the court. If so, the court is not to dismiss the action in a kneejerk fashion, but instead, shall order the necessary party "summoned" (CPLR 1001[b]; *Deutsche Bank National Trust Company v Bandalos*, 173 A.D.3d 1136, 105 N.Y.S.3d 489 [2d Dep't. 2019]). If the summoned party enters the case, the problem of the party's absence is resolved, and no continuing legal basis exists for the dismissal of the action.

A third issue arises if the necessary party is not amenable to jurisdiction in response to the second or refuses to voluntarily appear. The court still does not automatically dismiss the action, but must engage in a balancing of five statutory factors set forth in CPLR 1001(b). These factors include the availability of other remedies in the event of a non-joinder, the prejudice that might accrue from non-joinder to the defendant or the party not joined, whether and by whom prejudice might be avoided in the future, the feasibility of a protective provision by order of the court or in the judgment, and whether an effective judgment may be rendered in the absence of the person not joined. No one factor is determinative (*Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards and Appeals*, 5 N.Y.3d 452, 805 N.Y.S.2d 525, 839 N.E.2d 878 [2005]), and granting a dismissal of the action will only occur if, upon a balancing of the delineated factors, it is reached as a last resort (*JP Morgan Chase, National Association v Salvage*, 171 A.D.3d 438, 98 N.Y.S.3d 6 [1st Dep't. 2019]). CPLR 3211(a)(10) motions therefore tend to be complicated, and do not lend themselves to easy resolution such as a black-and-white determination of a mathematical statute of limitations dismissal, or dismissals based upon uncontroverted documentary evidence, payment, release, arbitration and award, *res judicata*, and other potential grounds.

There is authority that the absence of a necessary party may be raised for the first time on appeal (*City of New York v Long Island Airports Limousine Service Corp.*, 48 N.Y.2d 469, 423 N.Y.S.2d 651, 399 N.E.2d 538 [1979]). If so, the appellate court has no authority to order that an additional party be added to an action, and by extension cannot dismiss an action on that basis, but must instead remit the question to the trial court for an initial determination of whether the matter should proceed in the absence of the party (*Velez v New York State, Department of Corrections and Community Supervision*, 163 A.D.3d 1210, 80 N.Y.S.3d 719 [3d Dep't. 2018]).

C3211:53 Waiving Objection Contained in Paragraph 1, 3, 4, 5, or 6 of 3211(a)

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Last year's Practice Commentary for C3211:53 discussed a significant case from the Second Department regarding the waiver of affirmative defenses, *U.S. Bank National Association v Nelson*, 169 A.D.3d 110, 93 N.Y.S.3d 138 (2d Dept. 2019). *Nelson* is a residential mortgage foreclosure action where the plaintiff included in its complaint an allegation that it had standing to seek a judgment of foreclosure, even though standing is not an element of the cause of action that need to be pleaded. The defendant's answer responded to the allegation by denying knowledge or information sufficient to form a belief ("DKI"), but did not plead the lack of standing as a separate affirmative defense. The issue on appeal was whether a defendant's denial ("D") or DKI could be construed as an implicit and cognizable assertion of the standing defense, which could be raised, and not be waived, at the time of a lager dispositive motion. The Second Department held in a 3-1 decision that the standing defense is waived unless raised as a separate affirmative defense in the defendant's answer. The reasoning is the difference between CPLR 3018, which draws a clear statutory distinction between denials, which places the burden of proof upon plaintiffs, from affirmative defenses, which raise a new defensive matter which the defendant is obligated to prove. Any conflation of the two concepts can cause surprise and confusion at trial, which CPLR 3018 is designed to avoid.

As noted on C3211:12, the state legislature enacted RPAPL 1302-a, effective December 23, 2019, which provides that in residential mortgage foreclosure actions only, standing is not waived by the defendant's failure to raise it as an affirmative defense in the answer. The enactment of RPAPL 1302-a therefore renders academic the portion of *Nelson* that addressed whether a standing defense may be implicitly recognized by a defendant's denial or DKI of related allegations or whether a separate affirmative defense is required to preserve the defense. However, *Nelson's* general holding that defendants must actually plead standing as an affirmative defense in order to preserve it remains relevant and good law as to all actions---tort, contract, or otherwise---that do not involve residential mortgage foreclosures under RPAPL 1302-a. Therefore, per *Nelson*, if a defendant in any action outside of RPAPL 1302-a has a good faith basis to challenge the plaintiff's standing in the answer, the defendant should follow the well-known colloquial maxim: use it or lose it.

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C3211:10. Defense Based on "Documentary Evidence"

CPLR 3211(a)(1) permits dismissal of an action where "a defense is founded upon documentary evidence." While the language seems straight-forward, the operative inquiry is what specific types of documentation qualify as "documentary evidence" under the statute. A motion to dismiss under CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 [2002]).

Sequentially, a proffered document must first be of the type that qualifies under the statute, and if so, the court then determines whether its contents provide a defense warranting the dismissal of the action as a matter of law. Decisional authorities have not examined the issue in terms of a two-step sequence, but that is, in effect, the steps that courts must take. Documents that have traditionally qualified for evidentiary consideration under CPLR 3211(a)(1) are those which are 1) unambiguous, 2) of undeniable authenticity, and 3) reflect content that is essentially undeniable (*Koziatek v SJB Dev. Inc.*, 172 A.D.3d 1486, 99 N.Y.S.3d 480 [3d Dep't. 2019]; *VXI Lux Holdco S.A.R.L. v SIC Holdings, Inc., LLC,* 171 A.D.3d 189, 98 N.Y.S.3d 1 [1st Dep't. 2019]; *Mehrhof v Monroe-Woodbury Central School District*, 168 A.D.3d 713, 91 N.Y.S.3d 503 [2d Dep't. 2019]). Documents that have been found to qualify as documentary evidence have included judicial records, mortgages, deeds, contracts, and other papers the contents of which meet the requirements of being essentially unambiguous, authentic, and undeniable *(Magee-Boyle v Reliastar Life Ins. Co. of New York*, 173 A.D.3d 1157, 105 N.Y.S.3d 90 [2d Dep't. June 26, 2019]). In a recent case, a copy of an insurance policy was found to be documentary evidence permitting the dismissal of the plaintiff's cause of action for breach of contract, where the defendant insurer had denied the plaintiff coverage for a claimed loss under the policy's terms (*Calhoun v Midrox Ins. Co.*, 165 A.D.3d 1450, 86 N.Y.S.3d 769 [3d Dep't. 2018]).

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Conversely, documents that tend to be self-serving or prepared for litigation do not qualify as documentary evidence for 3211(a)(1) dismissals, such as letters, affidavits, e-mails (*Magee-Boyle,* 173 A.D.3d 1157, 105 N.Y.S.3d 90; *Phoenix Grantor Tr. v Exclusive Hosp., LLC,* 172 A.D.3d 923, 101 N.Y.S.3d 175 [2d Dep't. 2019]; *First Choice Plumbing Corp. v Miller Law Offices, PLLC*, 164 A.D.3d 756, 84 N.Y.S.3d 171 [2d Dep't. 2018]; *Phillips v Taco Bell Corp*., 152 A.D.3d 806, 60 N.Y.S.3d 67 [2d Dep't. 2017]) and text messages (*Kalaj v 21 Fountain Place, LLC*, 169 A.D.3d 657, 94 N.Y.S.3d 106 [2d Dep't. 2019]).

The use of e-mails has been a source of vigorous argument and continuing controversy on the question of whether they are the type of document that may be considered by courts within the intended scope of CPLR 3211(a)(1). Courts often grapple with legal issues that arise from ever-changing technology, oftentimes one step behind. There are a fair number of cases where e-mails have not found traction as appropriate documentary evidence. E-mails were recently found to not be documentary evidence within the scope of CPLR 3211(a)(1) in *Members of DeKalb Avenue Condominium Association v Klein* (172 A.D.3d 1196, 102 N.Y.S.3d 207 [2d Dep't. 2019]) and in *First Choice Plumbing Corp.* (164 A.D.3d 756, 84 N.Y.S.3d 171 [2d Dep't. 2018]).

Nevertheless, the propriety and use of e-mails as documentary evidence in support of a CPLR 3211(a)(1) dismissal motion has been evolving, and is seen with some increasing flexibility. In *Kolchins v Evolution Markets, Inc.,* 31 N.Y.3d 100, 73 N.Y.S.3d 519 (2018), the Court of Appeals had occasion to consider whether e-mails exchanged between an employer and employee evidenced the existence of an employment contract. The plaintiff employee and defendant employer had entered into two separate three-year employment agreements that ended in 2009 and 2012, respectively. As the end of the second agreement approached, the defendant sent an e-mail to the plaintiff stating *inter alia* that the essential terms of its offer were the same as those of the parties' existing contract; the plaintiff responded by sending e-mail accepting the offer; and the defendant replied by e-mail with congratulations. When the terms of a written contract document could not later be agreed upon, the plaintiff was notified that his employment had ceased at the conclusion of the second contract in 2012. The plaintiff commenced an action for breach of contract, arguing that the e-mail exchanges between the parties evidenced the existence and terms of a third contract which incorporated by reference the terms of the second contract. The defendant moved to dismiss, arguing that the e-mails did not evidence the parties' mutual assent to material contract terms, and that indefiniteness rendered any purported contract invalid as a matter of law. The Court of Appeals ultimately determined that the e-mails failed to conclusively establish the absence of material terms or indefiniteness, as would be required to permit dismissal of the plaintiff's complaint. The Court of Appeals found that the e-mails permitted competing inferences about whether a new and enforceable contract had been reached, rendering a CPLR 3211(a)(1) dismissal inappropriate (*see also Tozzi v Mack*, 169 A.D.3d 547, 92 N.Y.S.3d 648 [1st Dep't. 2019]).

How, then, may *Kolchins* be reconciled with *Members of DeKalb Avenue Condominium Association, First Choice Plumbing Corp*., and many other reported cases that have disavowed the appropriateness of e-mails as documentary evidence for purposes of CPLR 3211(a)(1) dismissals? The answer appears to lie in the fact that in *Kolchins*, the e-mails that were exchanged by the parties bilaterally suggested an offer and an acceptance of a contract, or at least failed to refute that an offer and acceptance had occurred beyond mere preliminary and non-binding communications. The fact that the e-mails were exchanged, and the nature and authenticity of their contents, were not contested by the parties. E-mails in other conceivable actions sent by a party unilaterally, or which fail to authentically establish an offer and acceptance of the material and enforceable contractual terms, would likely fail to qualify as documentary evidence under *Kolchins* for 3211(a)(1) dismissals.

Of course, if the e-mails are themselves central to a cause of action or defense, they should qualify as documentary evidence for CPLR 3211(a)(1) purposes. For instance, in an action of alleged defamation, a news media outlet was able to establish that its reporting did not represent a gross disregard for the truth, by providing *inter alia* an e-mail chain between its reporters and police regarding the investigation that was reported upon (*Stone v Bloomberg, L.P.*, 163 A.D.3d 1028, 83 N.Y.S.3d 78 [2d Dep't. 2018]). Another example is where the e-mails are central to the cause of

action, such as alleged defamation contained in the e-mail itself, and the e-mail is proffered as evidence to establish that the statements constituted non-actionable opinion warranting dismissal of the cause of action under CPLR 3211(a)(7) (*International Pub. Concepts, LLC v Locatelli*, 46 Misc.3d 1213[A], 9 N.Y.S.3d 593 [Sup. Ct., New York County 2015]). The appropriateness of letters, e-mails, or texts as documentary evidence therefore depends in many instances upon the nature and circumstances of the action or its available defenses.

C3211:12. Plaintiff's Lack of Capacity

The concepts of "capacity" and "standing" have been described as difficult to distinguish and as "twins" (David D. Siegel and Patrick M. Connors, N.Y. Practice § 136 at 349 [6th ed.]). Nevertheless, the two concepts are distinct. Both fall within the scope of CPLR 3211(a)(3), permitting the dismissal of actions on either ground by means of a pre-answer motion (David D. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:13 [2011]). The difference between the concepts is that "capacity" regards the ability of a plaintiff to competently bring an action in a civil court, without being afflicted by a disqualifying disability such as infancy or mental illness (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 N.Y.2d 148, 615 N.Y.S.2d 644 [1994]; *HSBC Bank USA Nat. Ass'n v Roumiantseva*, 39 Misc.3d 1239[A], 975 N.Y.S.2d 709 [Sup. Ct., Kings County 2013]). In contrast, "standing" involves whether a plaintiff with capacity to litigate has a sufficiently cognizable stake in the outcome of the action or proceeding as cast the dispute in a form traditionally capable of judicial resolution (*Community Bd. 7 of Borough of Manhattan,* 84 N.Y.2d 148, 615 N.Y.S.2d 644). Defense attorneys wishing to dismiss an action for lack of standing may do so under CPLR 3211(a)(3), even though the word "standing" is missing from the grounds specifically listed in the subdivision.

The defense of lack of capacity under CPLR 3211(a)(3), if asserted as an affirmative defense in a defendant's answer, is not waived by the defendant's participation in the defense of the action (*Gulledge v Jefferson County*, 172 A.D.3d 1666, 101 N.Y.S.3d 493 [3d Dep't. 2019]).

C3211:15. Same Parties, Same Cause of Action

An action may be dismissed under CPLR 3211(a)(4) if there is already another action pending between the same parties for the same cause of action in a court of any state or the United States. The purpose of CPLR 3211(a)(4) is to prevent a party from being harassed or burdened by having to defend against multiple law suits from the same plaintiff (*LaBuda v LaBuda*, 175 A.D.3d 39, 105 N.Y.S.3d 585, [3d Dep't. July 3, 2019]).

Dismissal is always discretionary, as the statute specifically provides that the court "may" dismiss the action, not "shall." In exercising that discretion, courts may examine the circumstances under which the second action is brought. In *LaBuda*, a second action was commenced by a substituted attorney to merely add new claims ahead of an expiring statute of limitations, though with 20/20 hindsight the attorney might have more easily sought leave to amend the original complaint. The Appellate Division, Third Department, was satisfied that the second action was commenced for credible, non-harassment purposes, reasoning that a joinder or consolidation of the two actions could be the more appropriate remedy for fostering judicial economy under the circumstances of that case.

The cases seen under this subdivision of the CPLR tend to involve whether two actions truly involve 1) the same parties, 2) the same causes of action, and 3) the same requested relief. The mere relatedness of causes of action or parties is not sufficient to justify CPLR 3211(a)(4) dismissals. The CPLR contemplates something more.

A complete identity of the parties is not necessary for a dismissal under CPLR 3211(a)(4) so long as there is a "substantial" identity of parties, which generally requires that there be at least one plaintiff and one defendant common to both actions (*Jaber v Elayyan*, 168 A.D.3d 693, 93 N.Y.S.3d 315 [2d Dep't. 2019]).

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Similarly, for CPLR 3211(a)(4) remedies to apply, the precise legal theories and prayers for relief presented in both actions need not be precisely identical, so long as they are at least "substantially the same" (*Id*.).

An example of causes of action being related, but not quite similar enough for CPLR 3211(a)(4), is *Spicer v Spicer*, 162 A.D.3d 886, 80 N.Y.S.3d 328 (2d Dep't. 2018). *Spicer* involved a mother and a father who were already divorced. An action was commenced in the Supreme Court, Nassau County, where the parties executed an agreement modifying their custody arrangement, and the agreement was awaiting a So Ordered signature of the assigned justice. As that was pending, the mother commenced a proceeding in the Family Court, Nassau County, seeking to hold the father in contempt for allegedly violating the terms of the modification agreement. While the court attorney referee was found on appeal to have erred in dismissing the Family Court petition for failing to state a cause of action, a related issue on appeal was whether the Family Court should have dismissed its proceeding on the ground that a prior action between the same parties was pending at the Supreme Court. As to that issue, the Second Department held that while the parties were identical in both proceedings, the relief sought by them in each forum was very different--one involved a modification of custody, and the other involved alleged contempt and its related remedies. *Spicer* makes clear that a mere connection between the parties and the relief sought in the two forums is not enough, as CPLR 3211(a)(4) speaks more to avoiding an actual duplication of causes in different courts.

If a prior action is pending, but abandoned, dismissal of the second action is not warranted (*MLB Sub I, LLC v Grimes*, 170 A.D.3d 992, 96 N.Y.S.3d 594 [2d Dep't. 2019]). In *MLB Sub I*, the plaintiff had moved to discontinue its first action against the defendant, commenced the second action three weeks later, and the Supreme Court granted the discontinuance of the first action six weeks after that. The Supreme Court and Appellate Division, Second Department, held that the defendant was not entitled to a dismissal of the second action, as the first action had effectively been abandoned by the time the defendant's CPLR 3211(a)(4) motion to dismiss was made.

RPAPL 1301(3) prohibits the commencement of a mortgage foreclosure action if a prior action for the same relief is active, absent leave of court (*U.S. Bank Tr., N.A. v Humphrey*, 173 A.D.3d 811, 103 N.Y.S.3d 98 [2d Dep't. June 5, 2019]; *Deutsche Bank Nat. Tr. Co. v Fandetta*, 60 Misc.3d 1220[A] [Sup. Ct., Suffolk County 2018]).

Actions should not be dismissed on the ground of prior action pending by courts acting *sua sponte* (*DLJ Mortg. Capital v Mahadeo*, 166 A.D.3d 512, 89 N.Y.S.3d 26 [1st Dep't. 2018]).

C3211:18. Affirmative Defenses Available on Subdivision (a) Motions

Statute of Limitations

One of the staple grounds asserted in support of motions to dismiss is the statute of limitations, which is among the grab bag of grounds set forth in CPLR 3211(a)(5). A signed opinion of Justice Robert Miller of the Appellate Division, Second Department, resolved at the appellate level an issue of first impression that had divided several trial-level courts. In *Bank of New York Mellon v Dieudonne*, 171 A.D.3d 34, 96 N.Y.S.3d 354 (2d Dep't. 2019), a lender commenced a residential mortgage foreclosure action against a homeowner who allegedly defaulted in the payment of the installment loan obligation. The note underlying the mortgage contained language in Paragraph 22 setting forth conditions that needed to be satisfied for the lender to accelerate the full balance due on the note. Separately, Paragraph 19 of the note provided that upon default, the homeowner had the right to reinstate the note and mortgage by paying all monies due up to the time of, *inter alia,* the final judgment. The balance of the *Dieudonne* loan debt was duly accelerated by the lender in June of 2010 but the action was not commenced until October of 2016, beyond the six year statute of limitations of CPLR 213(2). The homeowner moved to dismiss the action pursuant to CPLR 3211(a)(5) and CPLR 213(2). In opposition, the lender argued, with reliance upon certain trial-level decisional authority, that because the homeowner possessed the right to reinstate the loan and mortgage under the conditions defined in Paragraph 19 of the note, the statute of limitations did not begin to run until the

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homeowner's reinstatement rights were extinguished. In effect, the lender argued that the statute of limitations had not even begun to run, as the homeowner's contractual right to reinstatement continued until the time of the entry of final judgment which had not yet occurred.

The Second Department held in *Dieudonne* that the lender's action was untimely and dismissed the complaint. It reasoned that Paragraphs 19 and 22 of the note were independent of one another, and that the lender's right to accelerate the outstanding loan debt expressly preceded the exercise or extinguishment of the homeowner's reinstatement rights. The court's holding makes sense. If the lender's legal argument were taken to its logical conclusion, a homeowner's right to reinstatement until the time of the final judgment, or until some other contractually-defined deadline late in the foreclosure process, would essentially nullify any statute of limitations from applying to residential mortgage foreclosure actions, and provide quite a boon to the banks. The lender's legal argument that the statute of limitations had not begun to run despite the acceleration of the full outstanding loan debt, while clever, fell short of earning a congratulatory cigar.

By virtue of *Dieudonne*, the following reported trial-level decisions, which had agreed with the same or similar bank arguments, are no longer good law and should not be followed: *U.S. Bank Nat'l Ass'n v Nail*, 2018 NY Slip Op. 32897(U), 2018 WL 6172080 (Sup. Ct., Westchester County 2018); *Wells Fargo Bank, N.A. v Fetonti*, 2018 NY Slip Op. 30193(U), 2018 WL 823782 (Sup. Ct., Westchester County 2018); *HSBC Bank, USA, NA v Margineanu*, 61 Misc.3d 973, 86 N.Y.S.3d 694 (Sup. Ct., Suffolk County 2018); *U.S. Bank Trust, N.A. v Monsalve*, 2017 NY Slip Op. 32764(U), 2017 WL 6994224 (Sup. Ct., Queens County 2017); and *Nationstar Mortgage, LLC v MacPherson*, 56 Misc.3d 339, 54 N.Y.S.3d 825 (Sup. Ct., Suffolk County 2017).

Res Judicata

The well-worn definition of res judicata is that it prohibits re-litigation of a matter when an earlier action disposed of the same transaction or series of transactions, involving the same parties, and there was a full and fair opportunity for the parties to be heard in the prior forum (*Paramount Pictures Corp. v Allianz Risk Transfer AG,* 31 N.Y.3d 64, 73 N.Y.S.3d 472 [2018]; *Wilson v Dantas,* 29 N.Y.3d 1051, 58 N.Y.S.3d 286 [2017]; *O'Brien v City of Syracuse*, 54 N.Y.2d 353, 445 N.Y.S.2d 687 [1981]).

An instructive case about res judicata and the identity of parties is *Aponte v Estate of Aponte*, 172 A.D.3d 970, 101 N.Y.S.3d 132 (2d Dep't. 2019). In *Aponte*, the plaintiff sought the appointment of an administrator for his son's estate, claiming that he had retained an attorney to commence an action against the estate to recover monies allegedly owed to him as a result of business dealings. The Surrogate's Court, Queens County, appointed the son's wife as the estate's administratrix, who filed a final account with the Surrogate's Court that the plaintiff did not oppose in that forum. Approximately one month after the Surrogate's Court issued a final decree settling the final account for the estate, the plaintiff commenced an action in Supreme Court for various forms of relief against the son's estate, the son's wife, and a corporate entity allegedly owned by the wife, in connection with the business dealings between them. The issue for the Supreme Court, and on appeal, was whether the Supreme Court action was barred by the doctrine of res judicata. The Second Department applied a pragmatic test analyzing how the facts of the two proceedings were related in time, space, origin, and motivation, whether the facts formed "a convenient trial unit," and whether treating the facts as a unit "conform[ed] to the parties' expectations or business understanding" (*Aponte*, 172 A.D.3d at 972, 101 N.Y.S.3d at 133). The Second Department concluded that causes of action for damages and for a constructive trust in connection with the business should have been dismissed on the ground of res judicata under CPLR 3211(a)(5), as those claims could have and should have been asserted against the estate in the Surrogate's Court proceeding. Indeed, the Second Department specifically held that res judicata applies with equal force to judicially-settled accounting decrees. However, the Second Department also held that as to causes of action in the Supreme Court against the son's wife, res judicata did not apply or warrant dismissal, since her appearance in the Surrogate's Court proceeding was in an administratrix capacity whereas her appearance

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in the Supreme Court action was in an individual capacity. The corporate entity was not a party to the Surrogate's Court proceeding at all, and therefore was also not entitled to a dismissal of the Supreme Court action against it on account of res judicata. The case demonstrates how courts may parse individual parties, and individual causes of action, in determining which, if any, should be dismissed from an action on the ground of res judicata.

A stipulation of discontinuance with prejudice, without a reservation of right or limitation of the claim disposed by it, is entitled to res judicata effect (*Wells Fargo Bank Nat'l Ass'n v Enbar*, 173 A.D.3d 938, 104 N.Y.S.3d 183, 2019 WL 2439783 [2d Dep't. June 12, 2019]).

The res judicata defense applies to arbitration awards (*Piller v Princeton Realty Assoc., LLC*, 173 A.D.3d 1298, 104 N.Y.S.3d 344, 2019 WL 2375424 [3d Dep't. June 6, 2019] [signed opinion by Mulvey, J.]). If a party fails to comply with a confirmed arbitration award, the remedy is an enforcement or contempt application in the action or proceeding which confirmed the arbitration award (CPLR 7502[a][iii]), as a separate later action is subject to dismissal on the ground of res judicata (*Id.*).

Release

While the existence of a release is a basis for the dismissal of a plaintiff's complaint under CPLR 3211(a)(5), the dismissal motion should be denied where the release is a product of fraud or duress in its procurement (*Paulino v Braun*, 60 Misc.3d 1201[A] [Sup. Ct., Bronx County 2018]). A release is a species of contract, and as such, is governed by the principles of contract law in its execution, interpretation, and enforcement. In *Paulino*, the defendant seeking dismissal met his initial burden of proof by submitting an authenticated copy of a release executed by the plaintiff, a copy of a $6,000 check forwarded to the plaintiff, and an affidavit of the defendant's insurance adjustor that the release and payment pertained to the same automobile accident that became the subject of the plaintiff's complaint. But in opposition, the defendant raised questions of fact about whether the release was signed under circumstances of unfairness and overreaching, which were described. Thus, while the existence of a release is a defense permitting the dismissal of actions, the release itself must be a product of proper attainment.

C3211:21. Failure to State a Cause of Action, Generally

Where the plaintiff is a contractor asserting a cause of action against a consumer, and the contractor is required by state or local law to be licensed, the complaint must allege that the plaintiff was duly licensed at the time that services were provided, and shall identify the license's name, number, and the of governmental agency of its issuance (CPLR 3015[e]). If a complaint fails to reflect such information, the defendant may move for dismissal of the complaint under CPLR 3211(a)(7) for its failure to state a cause of action (CPLR 3015[e]). The policy behind CPLR 3015(e) is to protect consumers. Additionally, if a contract between an unlicensed contractor and a consumer is illegal by virtue of the contractor's failure to obtain a license, the courts cannot provide the contractor with relief for the consumer's non-payment. The contractor's unlicensed status forecloses a recovery for both money damages and in quantum meruit (*Holistic Homes, LLC v Greenfield*, 138 A.D.3d 689, 27 N.Y.S.3d 892 [2d Dep't. 2016]).

Certainly, unlicensed contractors have been caught unaware of this pleading requirement, and have suffered the dismissal of their actions as a result of non-compliance with licensing laws (*Kristeel, Inc. v Seaview Development Corp.,* 165 A.D.3d 1243, 87 N.Y.S.3d 600 [2d Dep't. 2018]). A new twist occurred in *Rusin v Design-Apart USA, Ltd.*, 173 A.D.3d 1231, 104 N.Y.S.3d 675 (2d Dep't. 2019). In *Rusin*, it was the consumer, rather than the unlicensed contractor, who commenced an action for breach of contract, seeking as damages the return of monies previously paid to the contractor. What is good for the goose is good for the gander. The court held on appeal that when a consumer obtains a benefit of services from an unlicensed contractor, as here, a recoupment of monies already paid is not permitted. As stated by the Appellate Division, "The parties, in these circumstances, should be left as

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they are" (*Rusin v Design-Apart USA, Ltd.*, 173 A.D.3d at 1231, *citing* *Segrete v Zimmerman*, 67 A.D.2d 999, 413 N.Y.S.3d 732 [2d Dep't. 1979]).

C3211:28. Lack of Personal Jurisdiction

General Jurisdiction Under CPLR 301

The U.S. Supreme Court caused a moderate earthquake in 2014 with the opinion it rendered in *Daimler AG v Bauman*, 571 U.S. 117, 134 S. Ct. 746 (2014) regarding the issue of all-purpose general jurisdiction against corporate defendants. Professor Patrick M. Connors of Albany Law School was one of the earliest observers out of the gate to recognize the procedural significance of *Daimler* to New York practice (Patrick M. Connors, *Impact of Supreme Court Decisions on New York Practice*, NYLJ, June 18, 2014). The shockwaves of *Daimler* are being felt nationwide generally, and in New York specifically, and it is predicted here that a few years of litigation will be required to fine-tune secondary issues that arise from the case.

Daimler involved several Argentinian plaintiffs who sued a corporate defendant, Daimler AG ("Daimler") in federal court in California, seeking damages for the alleged criminal actions committed in Argentina by a Daimler subsidiary. Daimler is a German entity headquartered in Stuttgart, Germany. The plaintiffs sought to assert general jurisdiction over Daimler in California based upon the presence there of yet another Daimler subsidiary that distributed automobiles in California and elsewhere. The difference between "general jurisdiction" and "specific jurisdiction" is that with the former, a forum state may hear any and all claims against the entity, because the entity's affiliations with the state are so continuous and systematic as to render it essentially "at home" there (*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846 [2011]). However, in *Goodyear*, the Supreme Court stopped short of defining how and under what circumstances a corporate entity is considered "at home" in a state, keeping its tradition of not deciding questions beyond what is immediately before it. By contrast, "specific jurisdiction" depends on an identifiable affiliation between the state and the underlying controversy, principally activity or an occurrence that takes place in the forum state, or having effect in the forum state, and is therefore subject to the state's regulation (*Id.*).

The issue of whether Daimler was subject to the general jurisdiction of California courts made its way to the U.S. Supreme Court. The majority opinion, written by Justice Ginsburg, held that even assuming the California subsidiary's activities were jurisdictionally imputable to Daimler, Daimler was still not subject to the general jurisdiction of the California courts. The reason is that the Supreme Court re-defined--or perhaps we should say "clarified"--the definition of general jurisdiction over corporate entities. Previously, such jurisdiction derived in New York and elsewhere from a corporation's permanence and continuity within a state (*Tauza v Susquehanna Coal Co.*, 220 N.Y. 259 [1917]), the so called "doing business" test (*Frummer v. Hilton Hotels Intl.* (19 N.Y.2d 533, 281 N.Y.S.2d 41 [1967]). The Supreme Court in *Daimler* gave a much narrower focus to general jurisdiction, holding, as it did in *Goodyear*, that such jurisdiction applies only when the corporate entity is "at home" in the state. However, for the first time, the Supreme Court defined a corporation as being "at home" only in a state 1) where it is incorporated, or 2) where it maintains its principal place of business, or 3) in truly exceptional cases, where the corporation's operations are so substantial and of such nature as to render the corporation at home in the state. Otherwise, the corporation is not "at home" in a state, and is not subject to that state's general jurisdiction.

The effect of *Daimler* was to obliterate New York's "doing business" test with both barrels, wiping out New York's construct for general jurisdiction that has been utilized for several decades. One of the biggest casualties of New York case law was *Frummer v. Hilton Hotels International*, not to mention its progeny.

The first two definitions of being "at home" in a state, based upon the places of the entity's incorporation and principal office, are clear-cut, objective, and documented. Like pregnancy, it exists or it does not with no ground for

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argument in between. The "third" definition of being "at home" is what may require further litigation to clarify, to determine more precisely the meaning and permutations of having operations so substantial and of such nature as to be tantamount to the corporation being at home in a state, even though its incorporation and principal office lies elsewhere. The language of the U.S. Supreme Court that this third basis for general jurisdiction is "exceptional" suggests that the plaintiffs, rather than the defendants, will face the uphill climb in convincing courts that general jurisdiction be applied on a case-by-case basis to out-of-state corporations.

Daimler represented such a jurisdictional departure from what had previously been understood that the U.S. Supreme Court felt the need to reaffirm its holding three years later in *BNSF Ry. Co. v Tyrrell*, __ U.S. __, 137 S. Ct. 1549 (2017).

A plaintiff who is unable to obtain general jurisdiction over a foreign corporation is not necessarily out of luck in maintaining an action in New York, or forced to travel to another jurisdiction where the corporate defendant is at home. General jurisdiction, which is embodied in CPLR 301, is distinctly different from specific jurisdiction which is embodied in CPLR 302. New York's longarm statute, CPLR 302(a), may independently provide a basis for the assertion of specific jurisdiction, especially where the causes of action in the complaint relate to the foreign corporation's New York activities (*Qudsi v Larios*, 173 A.D.3d 920, 103 N.Y.S.3d 492, 2019 NY Slip Op. 04742 [2d Dep't. June 12, 2019]). These may include, for example, breach of contract actions involving the supply of goods or services to New York, or cases involving the foreign defendant's alleged commission of a tortious act within New York, or product liability cases involving acts outside New York which have an effect within New York (CPLR 302[a][1], [2], [3]).

May the liability of a subsidiary at home in a state where the action is pending be jurisdictionally imputed to a corporate parent not at home in the state? Justice Ginsburg's opinion in *Daimler* shuts down the question, holding that the corporate parent must itself be at home in the state to be subject to its general jurisdiction, *if* the basis for extending jurisdiction over the out-of-state parent is merely an "agency" relationship between the corporate parties. Justice Ginsburg's majority opinion in *Daimler* did not address whether jurisdiction over a subsidiary at home in the state may be extended to an out-of-state parent under an "alter ego" relationship between the corporate parties. The difference between corporate "agency" and corporate "alter ego," and the significance of the two theories to the extension of general jurisdiction, is discussed below.

And what of the converse? May an entity incorporated in New York or maintaining a principal office here be held vicariously liable for the acts of its non-New York subsidiary, perhaps through a piercing of the corporate veil? May the contacts of a parent company incorporated or headquartered in New York be extended to a foreign subsidiary for the assertion of general jurisdiction over that subsidiary? There, the questions become more dicey.

So far, there is no reported case in New York that directly addresses the question of whether an "at home" parent corporation may be held liable for the acts of a foreign subsidiary not "at home" in the forum state. One case of potential guidance, from the West Coast, is *Ranza v Nike, Inc*., 793 F.3d 1059 (9th Cir. 2015). *Ranza* involved a plaintiff's claim for age and sex discrimination allegedly committed against her by her employer, Nike European Operations Netherlands, B.V. (NEON) in Hilversum, Netherlands. NEON's parent company is Nike, Inc. (Nike), which is headquartered and "at home" in Oregon. The plaintiff commenced her action in the federal District Court, District of Oregon. The Ninth Circuit determined that NEON was not incorporated or headquartered in Oregon, and that its contacts with Oregon were not so extraordinary, continuous, and systematic as to render it essentially at home in the forum state. NEON's contacts with Oregon might have been sufficient for the assertion of specific jurisdiction if there had been some connection between the conduct complained of and NEON's contacts with Oregon, but there was no such connection and specific jurisdiction was not an issue in the action. The Ninth Circuit then considered whether Nike's contacts with Oregon could be imputed to its subsidiary, NEON. It determined that a mere parent-subsidiary relationship, standing alone, is insufficient to permit the imputation, because corporate

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separateness insulates a parent corporation from the liabilities of its subsidiary absent circumstances permitting a piercing of the corporate veil. Prior to *Daimler*, federal courts had allowed the corporate veil to be pierced for jurisdictional purposes under either of two tests, the "agency test" and the "alter ego test". The "agency test" requires the plaintiff to demonstrate that there were tasks so important to the parent corporation that if the subsidiary did not perform them, the parent corporation's own officials would undertake them. The "alter ego test" looks to whether the parent and subsidiary are not truly separate entities, if the parent dominates and controls the subsidiary's internal affairs or daily operations. More specifically, the alter ego test examines whether there is such unity of interest and ownership that the separate personalities of two corporate entities no longer exist, and if so, whether the failure to disregard their separate identities would result in fraud or injustice (*e.g. Williams v Yamaha Motor Co. Ltd*, 851 F.3d 1015 [9th Cir. 2017]). According to the Ninth Circuit, *Daimler* invalidated the agency test but left intact the alter ego test. Under the facts of *Ranza*, the Ninth Circuit determined that the plaintiff failed to provide evidence that Nike and NEON did not observe their separate corporate formalities, and on that basis, general jurisdiction was not permissible under the alter ego test. The holding in *Ranza* assuredly suggests that had the alter ego test been satisfied by the plaintiff, Nike's contacts with Oregon, where it was "at home," would have permitted the extension of general jurisdiction over NEON, its foreign subsidiary.

The reasoning of *Ranza* was followed at the federal District Court level in *Maple Leaf Adventures Corporation v Jet Tern Marine Co. Ltd.*, 15-CV-02504-AJB-BGS, 2016 WL 3063956 (S.D. Cal. 2016). There, the court found that the plaintiff failed to establish that a foreign parent corporation was an alter ego of its California subsidiary, but granted the plaintiff the alternative relief of conducting jurisdictional discovery so the issue could be revisited later.

Notably, the entity at home in California in *Maple Leaf Adventures Corporation* was the subsidiary, while the entity at home in Oregon in *Ranza* was the corporate parent. Should it matter to general jurisdiction, for imputation purposes, whether the "at home" entity is the parent or the subsidiary? That question was addressed by the Ninth Circuit in *Ranza*, acknowledging that it is more typical for the subsidiary to be the "at home" entity, with the plaintiff's efforts to extend general jurisdiction directed at the foreign parent corporation. That said, the Ninth Circuit held that where the alter ego test is satisfied for the imputation of general jurisdiction, it does not matter whether the corporate parent or the subsidiary is the "at home" party or which entity is foreign. Its analysis was supported by a federal District Court case and by a law review article that analyzed why it should not matter which of the related entities was at home and which was not (*In re Chocolate Confectionary Antitrust Litig*., 674 F.Supp.2d 580, 599 n. 25 [M.D. Pa. 2009]; Lea Brilmayer and Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Calif. L. Rev. 1, 13-15 [1986]). Notwithstanding the analysis in *Ranza*, it actually seems that if two entities are to be treated as one under an alter ego theory, it makes more sense that the "home" of the dominated entity definitionally be the state where the parent is incorporated or maintains its headquarters, as would have been the case in *Ranza* had alter ego evidence been established. If that were to be the case, then general jurisdiction may be extended by a forum state to a foreign subsidiary.

What should make *Ranza* particularly compelling to New York practitioners is that our state recognizes its own alter ego test, though New York courts refer to it as a "department test" with slightly different definitional nomenclature. New York's "department test," roughly similar to the "alter ego test" recognized in Oregon, California, and elsewhere, examines whether a parent corporation's control over the foreign subsidiary's operations is so complete that the subsidiary is, in fact, merely a "department" of the parent (*Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany*, 29 N.Y.2d 426, 328 N.Y.S.2d 653 [1972]; *Pub. Adm'r of Cnty. of N.Y. v. Royal Bank of Can.*, 19 N.Y.2d 127, 278 N.Y.S.2d 378 [1967]; *Benefits by Design Corp. v Contractor Management Servs., LLC*, 75 A.D.3d 826, 905 N.Y.S.2d 340 [3d Dep't. 2010] [signed opinion by Garry, J.]; *Varga v McGraw Hill Financial Inc*., 2015 WL 4627748 [Sup. Ct., New York County 2015]; *Transasia Commodities Ltd. v Newlead JMEG, LLC*, 45 Misc.3d 1217[A] [Sup. Ct., New York County 2014]). New York courts consider four factors when assessing whether a mere "department" relationship exists between a parent and a subsidiary; namely: (1) an identical ownership interest, (2) the financial dependency of the subsidiary upon the parent, (3) the parent's influence on the composition of the board

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and operations of the subsidiary, and (4) the parent's control over the marketing and operational responsibilities of the subsidiary (*Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp*., 751 F.2d 117 [2d Cir. 1984]; *Varga,* at 2015 WL 4627748). The first of the four factors is regarded as essential, while the remaining three factors are merely important (*Volkswagenwerk Aktiengesellschaft,* 751 F.2d at 120-22). The first factor, that there be identical ownership between the corporate parent and the subsidiary, requires the parent to own 100% of the subsidiary, or nearly so (*Volkswagenwerk Aktiengesellschaft,* 751 F.2d at 120 [wholly-owned subsidiary established the common ownership factor]; *OneBeacon Am. Ins. Co. v Newmont Mining Corp*., 82 A.D.3d 554, 918 N.Y.S.2d 470 [1st Dep't. 2011] [general jurisdiction inapplicable as corporate parent owned only 51% of its subsidiary]). From that standpoint, New York's "department test" may be somewhat more detailed and sophisticated than the "alter ego test" that focuses primarily upon the corporate parent's domination and control if its subsidiary.

If the alter ego test survives future U.S. Supreme Court review for the assertion of general jurisdiction over a foreign entity, then New York's decisional authorities regarding its department test should probably remain viable as well. If, on the other hand, the U.S. Supreme Court determines in the future that the alter ego test is no longer applicable to the assertion of general jurisdiction over a foreign entity, then a portion of New York's jurisprudence may be overruled. Thus, the true parameters of general jurisdiction, extending or not extending through an "at home" entity to related foreign entities, will not be fully known until the U.S. Supreme Court takes up this issue in a future appeal. Only a reader of tea leaves might predict whether the Supreme Court will decide if, in addition to a vicarious relationship between the two entities, a New York entity and a related foreign entity must each be at home for general jurisdiction to attach to them, or whether proof of an alter ego relationship between them may suffice to extend general jurisdiction over the foreign entity.

As *Ranza* demonstrates, if a general jurisdictional extension is permissible against a foreign subsidiary and/or parent, the plaintiffs will need to provide *evidence* sufficient to satisfy the alter ego test, and general jurisdiction will not be sustained if that test is not satisfied. The same would be true of New York's "department test."

What if a corporation is registered to do business in a state for service of process and has designated the Secretary of State as its agent for service of process (BCL 1301, 1312[a]), but is incorporated in and maintains its principal office elsewhere? Is registration equivalent to an incorporation or principal office for general jurisdictional purposes? A signed opinion of Justice Valerie Brathwaite-Nelson of the Appellate Division, Second Department, holds that a mere corporate registration allowing for service of process upon a designated agent within the state is not a consent to the general jurisdiction of that state, but is instead merely a convenience to be utilized when jurisdiction exists (*Aybar v Aybar*, 169 A.D.3d 137, 93 N.Y.S.3d 159 [2d Dep't. 2019]. *See also Amelius v Grand Imperial LLC*, 57 Misc.3d 835, 64 N.Y.S.3d 855 [Sup. Ct., New York County 2017]). It appears that state and federal courts throughout the nation agree with the same reasoning (*Brown v Lockheed Martin Corp.,* 814 F.3d 619 [2d Cir. 2016]; *Gorton v Air & Liquid Sys. Corp.*, 303 F.Supp.3d 270 [M.D. Pa. 2018]; *Gulf Coast Bank v Designed Conveyor Sys., LLC,* No. 16-412-JJB-RLB, 2017 WL 120645 [M.D. La. 2017]; *Perez v Air and Liquid Sys. Corp.,* No. 3:16-CV-00842-NJR-DGW, 2016 WL 7049153 [S.D. Ill. 2016]; *Genuine Parts Co. v Cepec*, 137 A.3d 123 [Del. 2016]; *DeLeon v BNSF Ry Co.* 426 P.3d 1 [Mont. 2018]; *State ex rel. Norfolk S. Ry. Co. v Dolan*, 512 S.W.3d 41 [Mo. 2017]; *Segregated Account of Ambac Assurance Corp. v Countrywide Home Loans, Inc*., 898 N.W.2d 70 [Wis. 2017]. *But see Bailen v Air & Liquid Sys. Corp*., 2014 NY Slip Op. 32079(U), 2014 WL 3885949 [Sup. Ct., New York County 2014]). The holding in *Aybar* makes sense, as the mere doing of business within a state is not enough under *Daimler* to render a corporation "at home" in the state, unless in a given action the third definition in *Daimler* applies--that it be a truly exceptional case where the corporation's operations are so substantial and of such nature as to render the corporation at home in the state.

A contractual forum selection clause naming New York as the forum for litigation is enforceable notwithstanding *Daimler*, as the forum selection clause represents the formal consent of the defendant to the personal jurisdiction of

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New York courts (*Zucker v Waldman,* 46 Misc.3d 1214[A], 9 N.Y.S.3d 596 [Sup. Ct., Kings County 2015]; *Putnam Leasing Co., Inc. v Pappas*, 46 Misc.3d 195 [Dist. Ct., Nassau County 2014]).

Daimler's restriction of general jurisdiction to states where a corporate defendant is at home does not extend to proceedings to recognize or enforce a foreign judgment against a foreign entity. In doing so, the court is merely performing a ministerial function in according recognition to a foreign judgment of unquestioned finality (*AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A*., 160 A.D.3d 93, 73 N.Y.S.3d 1 [1st Dep't. 2018]).

The state that may be most affected by *Daimler* is Delaware, the one state out of 50 where many national corporations tend to incorporate, regardless of their principal office locations. Suits may always be maintained against corporate entities in their state of incorporation, which may increase the volume of suits filed against corporate defendants in Delaware now that *Daimler* has restricted the meaning of general jurisdiction.

The absence of general jurisdiction is an affirmative defense to actions, within the grounds contemplated by CPLR 3211(a)(8) (*Time Equities, Inc. v Naeringsbygg 1 Norge III AS*, 50 Misc.3d 1221[A], 36 N.Y.S.3d 50 [Sup. Ct., New York County 2016]). That basis for dismissal is therefore subject to a strict 60-day deadline for the filing of a dismissal motion, measured from the service of the defendant's answer with its affirmative defense that personal jurisdiction is lacking. Thus, if a defendant is not subject to general or specific jurisdiction of the New York courts, the party should not sit on its right but instead file a motion to dismiss within the limited time constraints of CPLR 3211(e).

The plaintiff bears the ultimate burden of establishing personal jurisdiction over the defendant, via general jurisdiction or otherwise. Since time-sensitive dismissal motions are made early in litigations, a plaintiff, in opposing a jurisdiction-based dismissal motion, may not yet be possessed of complete information for establishing the existence of general jurisdiction over the defendant. This is particularly true if the basis for general jurisdiction is the defendant having operations in the forum state so substantial and of such nature as to be tantamount to the corporation being “at home” there, or if the jurisdictional basis requires evidence of an alter ego (i.e. “department”) relationship between the related domestic and foreign entities. When that is the case, the plaintiff opposing the dismissal motion may, in addition to providing the court with whatever opposition evidence is available, alternatively request discovery on the jurisdictional issue. To successfully oppose a CPLR 3211(a)(8) motion to dismiss on the ground that discovery on the issue of personal jurisdiction is necessary, the plaintiff not need make a *prima facie* showing of jurisdiction, but rather, must only set forth “a sufficient start, and [show its] position not to be frivolous”(*Marist College v. Brady*, 84 A.D.3d 1322, 1323, 924 N.Y.S.2d 529, 531 [2d Dep't. 2011], *quoting Petersen v. Spartan Indus*., 33 N.Y.2d 463, 467, 354 N.Y.S.2d 905, 908 [1974]. *See Archer-Vail v LHV Precast Inc*., 168 A.D.3d 1257, 92 N.Y.S.3d 434 [3d Dep't. 2019]).

Indeed, CPLR 3211(d) provides that if facts essential to justify opposition to a motion to dismiss exist, but cannot then be stated, the court may deny the motion so that the defendant may assert the affirmative defense in a responsive pleading if that pleading has not yet been served, with leave to renew the motion upon the completion of discovery (*Qudsi v Larios*, 173 A.D.3d 920, 103 N.Y.S.3d 492 [2d Dep't. June 12, 2019]), or alternatively, hold the dismissal motion in abeyance to permit discovery about the jurisdictional issue (*Fernandez v DaimlerChrysler, A.G.*, 143 A.D.3d 765, 40 N.Y.S.3d 128 [2d Dep't. 2016]). The plaintiff's opposition to dismissal on general jurisdiction grounds cannot be based upon mere speculation, conjecture, surmise, wishful-thinking, fortune telling, or unsupported allegations to justify a denial of the motion with leave to renew, or to justify a continuance of the motion pending discovery. The plaintiff must instead tender at least some tangible evidence or basis which refutes the defendant's argument that general jurisdiction is lacking (*Robins v Procure Treatment Centers, Inc*., 157 A.D.3d 606, 70 N.Y.S.3d 457 [1st Dep't. 2018]). Plaintiffs have been denied disclosure, and had their actions dismissed, where they failed to make credible non-frivolous showings that facts *may exist* to support the exercise of personal

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jurisdiction (*Glazer v Socata, S.A.S.*, 170 A.D.3d 1685, 96 N.Y.S.3d 791 [4th Dep't. 2019]; *Abad v Lorenzo*, 163 A.D.3d 903, 82 N.Y.S.3d 486 [2d Dep't. 2018]).

Prohibited Service on the Religious Sabbath

General Business Law 11 prohibits service of process on Sundays, and relatedly, General Business Law 13 prohibits service on Saturdays as to any persons who observe that day as a holy time. The Sunday prohibition, which was enacted in 1965 (L. 1965, c. 1031, sec. 45), is consistent with local "blue laws" that existed at that time where businesses were closed for rest on the Lord's Day. The Saturday prohibition, which is protective of Jewish defendants, goes so far as to render a violation of the statute by a process server a misdemeanor. In any event, service of process in violation of GBL 11 or 13 renders the service void (*Foster v. Piasecki,* 259 A.D.2d 804, 686 N.Y.S.2d 184 [3d Dep't. 1999] [Sunday service]; *JP Morgan Chase Bank, Nat'l Ass'n. v Lilker*, 153 AD3d 1243, 61 N.Y.S.3d 578 [2d Dep't. 2017] [Saturday service upon an observant]), and subjects the plaintiff to a dismissal of the complaint for failing to obtain personal jurisdiction over the defendant.

For a defendant that observes Saturdays as a holy time, dismissal of the complaint for improper service is only warranted where 1) the defendant is not merely Jewish, but observes Saturday as a no-work holy time, *and* 2) the timing of service is motivated by malice. Malice speaks to the state of mind of the process server, or perhaps by imputation to that of the plaintiff's attorney (*Hirsch v. Ben Zvi*, 184 Misc.2d 946, 712 N.Y.S.2d 238 [Civ. Ct., Kings County 2000]). Dismissals will be denied if the defendant fails to establish that he or she is, in fact, observant (*e.g., Chase Manhattan Bank, N.A. v Powell*, 111 Misc.2d 1011, 445 N.Y.S.2d 928 [Sup. Ct., Nassau County 1981]), or where the necessary element of malice is not shown (*e.g.*, *Matter of Kushner*, 200 AD2d 1; 613 N.Y.S.3d 363 [1st Dept. 1994]). Malice can be demonstrated by the drawing of a reasonable inference from the circumstances, or from actual knowledge that the defendant is religiously observant on Saturdays (*Hirsch v. Ben Zvi*, 184 Misc.2d at 948, 712 N.Y.S.2d at 238).

These issues arose in *Hudson City Savings Bank, FSB v Schoenfeld,* 172 A.D.3d 692, 99 N.Y.S.3d 389 [2d Dep't. 2019]). Few details of the service of process were discussed in the published decision. However, in *Schoenfeld*, a Jewish defendant was served with process on Sukkot, which did not fall that year on a Saturday or Sunday. The defendant moved to dismiss the action on the ground that, *inter alia*, the service of process on Sukkot violated GBL 13. The Appellate Division, Second Department agreed with the Supreme Court that on the record before it, a dismissal of the complaint for improper service was not warranted under CPLR 3211(a)(8) or GBL 13. The Second Department determined that since the contested service did not occur on a Saturday, there was no actual violation of GBL 13, and in any event, the defendant failed to establish that the timing of service was motivated by a malicious intent.

The plain language of GBL 13 does not protect Jewish defendants from being served with process on any holy days, except for when they occur on Saturdays, or in the case of everyone, Sundays under GBL 11. Thus, service on Passover or Yom Kippur is not statutorily prohibited upon a Jewish defendant unless the holy day happens to fall on a Saturday (GBL 13) or a Sunday (GBL 11). Similarly, service of process upon a Christian defendant is permissible on various non-Sunday holy days, but is never allowed on Easter because that holy day always falls by definition on a Sunday (GBL 13).

One may question whether the statutory dichotomy between weekly holy days and annual holy days makes sense, as the public policy for not permitting service of process on Sundays, or on Saturdays for those who are observant then, is no less compelling than for major annual holy days that receive as much or more sincere religious attention. Conversely, were GBL 11 and 13 interpreted to apply to non-weekend holy days, or if the statutes were amended by the legislature to say so, would process be off limits upon observant Jewish defendants during all eight days of Chanukah? Or the entire 30-day month of Ramadan for defendants observant of the Muslim faith? The issue

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of extending the prohibition of service to non-Saturday or non-Sunday religious holy days would necessarily raise difficulties for the secular legislature in defining which holy days of each religion is significant *enough* to warrant protections against the service of process on those days, and which secondary holy days would not qualify for that protection. One can imagine the problems inherent in drawing such Christian, Jewish, Muslim, and other religious denominational lines. The current language of GBL 11 and 13 sets forth lines that are bright. The Second Department's holding in *Schoenfeld* therefore appears to be correct to the extent it is based upon the plain and unambiguous language of GBL 13.

That said, there is no excuse for process servers to effect process on Sundays in violation of GBL 11, and in virtually all instances, they know better. The statute applies in favor of all defendants and the prohibition is clear-cut. Service on Saturdays is arguably more dicey, particularly if the plaintiff or process server knows or has reason to know that the defendant is Jewish, but does not know the depth of the defendant's religiosity. If a Jewish defendant is located for service of process at a work place on a Saturday, the service should survive jurisdictional challenge as a defendant engaged in employment should be unable to simultaneously claim the religious observance protection of GBL 13. If a Jewish defendant is found elsewhere, and the extent of religiosity is not known, the process server might be advised to speak to the defendant about the process before effecting it, or alternatively, be even better advised to effect process on another day that avoids the complications and pitfalls of GBL 13.

C3211:53. Waiving Objection Contained in Paragraph 1, 3, 4, 5, or 6 of 3211(a)

Since the time Moses parted the Red Sea, or at least since 1962, CPLR 3211 has identified certain affirmative defenses which, if not raised in the defendant's answer or in a pre-answer motion to dismiss, are waived by the defendant. CPLR 3018(b) also provides that defendants must plead affirmative defenses of matters which, if not pleaded, would likely surprise the plaintiff. If a defendant merely denies an allegation in a complaint which requires the plaintiff to then prove the matter, may a court deem the denial the equivalent of an "affirmative defense," even though no separate affirmative defense is actually pleaded in the answer? There have been conflicting appellate decisions on this issue, but recently, the Second Department rendered an extensive analytical opinion that answers the question with a definitive "No."

This pleading issue came to a head in the context of a residential mortgage foreclosure appeal, though it could have appeared as easily in other types of civil litigations. There have been foreclosure actions where plaintiff lenders asserted allegations in their complaints to establish their standing to commence the foreclosure actions against the defaulted homeowners and their collateralized properties. In certain of those appeals, defendant homeowners had served answers either denying the standing-related allegations outright ("D") or denying information sufficient to form a belief ("DKI"), but without separately interposing an affirmative defense that the lenders lacked standing. If a mere "D" or "DKI" of allegations were to qualify as an implicit and cognizable affirmative defense that standing is lacking, the plaintiff lenders would be required to prove those allegations as part of their *prima facie* burden when moving for summary judgment. Otherwise, not. The adequacy of moving papers hung in the balance at the trial courts and on appeal. The reader can substitute allegations about standing with those about the statute of limitations, or the statute of frauds, or other legal mainstays, and the query raised here is the same.

The significance of the issue, particularly for defendants, is that several defenses are waived under CPLR 3211(e) unless set forth as an affirmative defense in the responsive pleading or as a ground for a pre-answer dismissal motion. These waivable defenses include many of the staples relied upon by defense attorneys including, among others, the plaintiff's lack of capacity to sue, standing, collateral estoppel, res judicata, the statute of limitations, and the statute of frauds.

A 3-1 holding was rendered by the Appellate Division, Second Department in *U.S. Bank National Association v Nelson,* 169 A.D.3d 110, 93 N.Y.S.3d 138 (2d Dep't. 2019) (signed opinion by Mastro, J.), which now definitively

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holds that affirmative defenses are *not* cognizable by a defendant's mere denial or "DKI" of allegations contained in the complaint. Instead, for affirmative defenses to be cognizable and preserved, they must specifically be set forth in the answer as such. The reason is found in CPLR 3018, which draws a distinction between denials, which place at issue proofs that the plaintiff must provide at trial, from affirmative defenses, which raise new defensive matter beyond the elements that plaintiffs must affirmatively plead in a complaint and then prove. Without separately pleaded affirmative defenses, plaintiffs could be surprised by defenses raised later, which CPLR 3018(b) expressly seeks to avoid.

Moreover, though not mentioned in the *Nelson* opinion, a clearly-defined separation between complaint allegations on the one hand, and affirmative defense allegations on the other, properly directs the parties' respective burdens of proof to their own allegations. Since standing is not an element that plaintiffs must plead and prove, and is instead purely in the nature of a defense, the denial or "DKI" of allegations that incidentally implicated standing failed in *Nelson* to qualify as an "affirmative defense." One appellate justice dissented, arguing that mere denials, and "DKIs" that are to be treated for pleading purposes as denials under CPLR 3018(a), raise affirmative defenses by putting plaintiffs to their burden of proving the matters actually asserted in the complaint.

To argue that a mere "D" in response to an allegation qualifies as an affirmative defense is problematic, and if adopted would wreak havoc upon practitioners and courts. While CPLR 3014 provides that pleadings shall consist of plain and concise statements containing as far as practicable a single allegation, it is not unusual for practitioners to craft pleadings that contain multiple fragmented allegations within a single paragraph. The defendant answering the complaint may provide a fragmented response in the answer, or may deny the entirety of a complaint paragraph even if only one specific allegation within the paragraph is deniable. Where a multi-allegation paragraph is answered with a blanket "D," the plaintiff does not necessarily know which one or more fragments of the complaint paragraph prompted the denial of the entire paragraph. In some of those circumstances, it would be impossible for the plaintiff or the court to know what, if any, affirmative defense is supposedly and implicitly invoked by the defendant's responsive denial of the paragraph in the complaint. Complicating matters further are answers consisting of a "general denial," where the defendant denies in a single sentence all of the allegations in a plaintiff's complaint. While general denials tend to be seen in response to shorter, simpler complaints, the omnibus denial makes it likely difficult or impossible for the plaintiff's attorney or the court to discern what affirmative defense(s) the general denial is intended to convey by implication. Thus, the best practice for lawyers, litigants, and courts, is to follow the well-reasoned logic of *Nelson* by requiring defendants who are vested of defenses to plead them as affirmative defenses in their answers, especially where the failure to do so results in a waiver of those defenses (CPLR 3211[e]).

Even more problematic is the argument that a mere "DKI" is sufficient to implicitly raise an affirmative defense against the complaint paragraph that it is responds to, without more. The reason is that if a defendant responds to an allegation using a "DKI," the defendant is saying in good faith that he or she does not know whether to admit or deny the allegation. If the defendant does not know whether to admit or deny because sufficient information is lacking, how can it simultaneously be said that the defendant knows enough to assert an affirmative defense against that same allegation? The two concepts are irreconcilable with each other, and untenable considering that many answers are verified by a party or counsel (CPLR 3020[b]) and all answers contain good faith attorney and *pro se* certifications as required by the Rules of the Chief Administrator (22 NYCRR 130-1.1-a). Thus, while CPLR 3018(a) provides that a "DKI" "shall have the effect of a denial," that statutory provision should be interpreted as meaning that "D" and "DKI" are treated the same only in regard to issues of proof at trial, and not be used as a substitute for the separate requirement of CPLR 3018(b) that affirmative defenses be expressly pleaded at the outset of the litigation. Once again, the *Nelson* opinion provides sage guidance that avoids the confusion that would result if a mere "D" or "DKI" were to be allowed by courts to constitute affirmative defenses, without actually pleading the defenses as such.

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The *Nelson* case, while postured as one for summary judgment and an order of reference, says more about the assertion of affirmative defenses under CPLR 3211(a) than it says about CPLR 3212.

Based on the majority holding in *Nelson*, the following Second Department cases which held to the contrary are no longer good law and should not be followed in that department: *Bank of America, N.A. v. Barton*, 149 A.D.3d 676, 50 N.Y.S.3d 546 (2d Dep't. 2017), *Nationstar Mortgage, LLC v. Wong*, 132 A.D.3d 825, 18 N.Y.S.3d 669 (2d Dep't. 2015), *Bank of America, N.A. v. Paulsen*, 125 A.D.3d 909, 6 N.Y.S.3d 68 (2d Dep't. 2015), and *U.S. Bank National Association v. Faruque*, 120 A.D.3d 575, 991 N.Y.S.2d 630 (2d Dep't. 2014). If factual or legal defenses exist for defendants, counsel should robustly assert them as affirmative defenses in the answers, or in CPLR 3211 motions to dismiss, and fulfill the true purpose of CPLR 3018(a) as intended by the state legislature, which is to prevent surprise to adversary parties.

SUPPLEMENTARY PRACTICE COMMENTARIES

by John R. Higgitt

2018

C3211:6. Specifying the Ground of the Motion.

CPLR 2214, an important motion-requirement statute of general applicability, Commentary C3211:3, directs a movant to specify in the notice of motion, among other things, the grounds for the motion. CPLR 2214(a). "Grounds" means the legal reasons why the relief sought in the motion is warranted. In the CPLR 3211(a) context, identifying the specific paragraphs of subdivision (a) (e.g., CPLR 3211(a)(3), 3211(a)(7)), or stating the specific grounds (e.g., lack of capacity, failure to state a cause of action), should satisfy CPLR 2214(a). *See* Commentary 3211:6 (main vol.).

Violations of CPLR 2214(a) are not uncommon. The failure of a movant to specify in the notice of motion the grounds for the relief sought can be--but is not necessarily--fatal to the motion. If the grounds for the motion are clearly expressed in the papers supporting the motion, such as an affirmation in support or memorandum of law, and the party opposing the motion has not been prejudiced by the CPLR 2214(a) violation, the court may overlook the procedural misstep. *See* Commentary 3211:6 (main vol.). In determining whether to overlook a CPLR 2214(a) violation, a court will also consider whether the notice of motion contains a broadly-worded "wherefore" clause, i.e., a provision stating that, in addition to the specific relief sought, the movant requests "such other, further, or different relief as th[e] court may deem just and proper." *See* Commentary, C2214:5, at 114-115 (main vol.); *see also Kreamer v. Town of Oxford*, 96 A.D.3d 1130, 946 N.Y.S.2d 284 (3d Dep't 2012); *Llano v. Leading Insurance Services, Inc.*, 45 Misc.3d 131(A), 3 N.Y.S.3d 285 (table), 2014 W.L. 6638365 (App. Term, 1st Dep't 2014).

That a court *may* consider a ground that is not apparent from the face of a notice of motion doesn't mean that it *will* do so. *See Abizadeh v. Abizadeh,* 159 A.D.3d 856, 72 N.Y.S.3d 566 (2d Dep't 2018) ("Supreme Court providently exercised its discretion in denying the plaintiff's cross motion on the ground that the plaintiff's notice of cross motion was deficient. The plaintiff's notice of cross motion failed to sufficiently specify the relief sought, against whom it was sought, and the grounds therefor. Although the plaintiff's supporting papers supplied the missing information, a court is not required to comb through a litigant's papers to find information that is required to be set forth in the notice of motion") (internal citations omitted). Whether a court will overlook the movant's failure to specify the grounds for the motion is a matter of discretion. *See* CPLR 3211:6 (main vol.).

C3211:10. Defense Based on "Documentary Evidence."

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A Plaintiff Can Respond to "Documentary Evidence" With Other Evidence ("Documentary" or Not) in an Effort to Defeat a CPLR 3211(a)(1) Motion.

In the main volume, we observe that, "[i]n opposing a CPLR 3211(a)(1) motion, a plaintiff is free to submit evidence demonstrating that the defendant's [documentary] evidence does not conclusively resolve the action." Commentary C3211:10, at 27. In *Matter of Koegel*, 160 A.D.3d 11, 70 N.Y.S.3d 540 (2018, Austin, J.), the Second Department highlighted the virtue of opposing a CPLR 3211(a)(1) motion with evidence. There, the party confronted with a "documentary evidence" motion beat it back by tendering some of her proof. The party against whom the motion was made submitted affidavits that suggested that, notwithstanding the movant's "documentary evidence," the challenged pleading may be meritorious. Thus, *Matter of Koegel* highlights additionally that, although a defendant is required to submit "documentary evidence" in support of a CPLR 3211(a)(1) motion, a plaintiff opposing such a motion "is free to submit [any] evidence demonstrating that the defendant's evidence does not conclusively resolve the action (or challenged causes of action)." Commentary C3211:10, at 27 (main vol.).

Court Reviews the Ways in Which Documentary Evidence May be Used to Dismiss Defamation Claims.

Defamation--libel or slander, depending on the manner in which the offensive comments were communicated--is a complex tort. Many defamation actions involve the intersection of federal constitutional and state tort law. Defamation law is beyond the scope of these Commentaries. *Cf.* 2A P.J.I.2d 3:23, et seq. In *Greenberg v. Spitzer*, 155 A.D.3d 27, 62 N.Y.S.3d 372 (2d Dep't 2017), the court, in an opinion by Justice Chambers, reviews various uses of "documentary evidence" for a defamation defendant seeking dismissal under CPLR 3211(a)(1).

C3211:12. Plaintiff's Lack of Capacity.

Court of Appeals Reviews the Issue of Whether a "Public Benefit Corporation" has the Capacity to Challenge the Constitutionality of a State Statute.

"Municipalities and other local governmental corporate entities and their officers [generally] lack capacity to mount constitutional challenges to acts of the State and State legislation." *City of New York v. State of New York*, 86 N.Y.2d 286, 289, 631 N.Y.S.2d 553, 655 N.E.2d 649 (1995, Levine, J.). That's to say that municipalities and other local governmental entities and their officers usually don't have the power to attack in court the constitutionality of state policy and state laws. *See* Commentary C3211:12 (main vol.). Does this rule apply to a "public benefit corporation"?

First of all, what is a public benefit corporation? It's one of three types of "public corporations," the other two being "municipal corporations" and "district corporations." *See* General Construction Law § 65(b). The public benefit corporation is "organized to construct or operate a public improvement wholly or partly within the [S]tate, the profits from which inure to the benefit of this or other states, or to the people thereof." General Construction Law § 66(4). These entities fund public works projects while insulating the State from direct, long-term debt. *Schulz v. State of New York*, 84 N.Y.2d 231, 244, 616, N.Y.S.2d 343, 639 N.E.2d 1440 (1994, Kaye, C.J.). Although created by the State, the public benefit corporation is independent of the sovereign.

Can a public benefit corporation, which bears some of the marks of a state entity and some of the marks of a private one, assert in court that a state statute is unconstitutional? Phrased differently, is the rule preventing municipalities and other public entities from leveling constitutional challenges against state policies and state laws applicable to public benefit corporations?

The Court of Appeals considered the subject in *Matter of World Trade Center Lower Manhattan Disaster Site Litigation*, 30 N.Y.3d 377, 67 N.Y.S.3d 547, 89 N.E.3d 1227 (2017). In an opinion by Judge Feinman, the Court

concludes that "public benefit corporations have no greater stature to challenge the constitutionality of state statutes than do municipal corporations or other local governmental entities." 30 N.Y.3d at 393, 67 N.Y.S.3d at 558, 89 N.E.3d at 1238 (rejecting the argument that a court must engage in a "particularized inquiry" to determine whether a public benefit corporation should be treated like a municipal corporation).

Above, we noted the general rule that municipalities and other local governmental entities and their officers lack the capacity to challenge the constitutionality of state action. However, a state-created or sanctioned entity does have capacity to make such challenges if the Legislature expressly authorizes that entity to do so; that's "a question of legislative intent and substantive state law." 30 N.Y.3d at 384, 67 N.Y.S.3d at 551, 89 N.E.3d at 1231. Additionally, "special circumstances" occasionally permit a public entity to bring a constitutional challenge. 30 N.Y.3d at 386-387, 67 N.Y.S.3d at 553, 89 N.E.3d at 1233. The special circumstances exceptions are ad hoc and narrow. 30 N.Y.3d at 387, 67 N.Y.S.3d at 553, 89 N.E.3d at 1234. Therefore, a public benefit corporation, like a municipality, may rebut the presumption that it lacks capacity to challenge the constitutionality of a state action by demonstrating that the public benefit corporation was expressly authorized to bring that challenge or that special circumstances warrant a dispensation from the general rule.

C3211:15. Same Parties, Same Cause of Action.

An Open Question as to Whether the Plaintiff Could Get Full Relief in a Federal Action Precludes Dismissal Under CPLR 3211(a)(4) of a Similar New York State Court Action.

CPLR 3211(a)(4) provides a remedy for a defendant to a New York action "where there is another action pending between the same parties for the same cause of action in a court of any state or the United States." To disturb an action under that paragraph, the action in which the 3211 relief is sought and the other action must involve the same parties and the same cause of action. Commentary C3211:15 (main vol.). Two actions involve the same parties and the same cause of action where the following elements of the actions are substantially similar: (1) the parties; (2) the causes of action; and (3) the relief sought. *Id*.

The court in *Rothschild v. Braselmann*, 157 A.D.3d 1027, 69 N.Y.S.3d 375 (3d Dep't 2018, Pritzker, J.), identified a unique concern that may be present when the other action pending is in federal court.

The plaintiff in *Rothschild* was an inmate at New York State correctional facilities. During his incarceration, the plaintiff suffered serious urological problems that led to hospitalization for septic shock. The plaintiff initiated three actions in three different courts seeking redress for injuries stemming from his medical ordeal. First, the plaintiff commenced a 42 U.S.C. § 1983 action in federal court, alleging that, in violation of the federal constitution's prohibition of cruel and unusual punishment, he received inadequate medical care. Second, the plaintiff filed a claim in the New York State Court of Claims, alleging negligence and medical malpractice by doctors who treated him and their employees. Third, the plaintiff commenced an action in Supreme Court; the claims of negligence and malpractice in the Supreme Court action were similar to the claims lodged in the Court of Claims action.

As is relevant here, two of the medical doctor defendants who provided contractual medical services to the inmate-plaintiff sought dismissal of the Supreme Court action as against them on the basis that the federal court and Court of Claims actions related to the same parties and same cause of action as the Supreme Court action. (We'll refer to these physicians as "the moving defendants.") Supreme Court granted that relief.

The Third Department reinstated the Supreme Court complaint as against the moving defendants. With respect to the federal action, the Third Department provided the following analysis: the federal court had subject matter jurisdiction over the plaintiff's action by virtue of his federal law claim (§ 1983); the federal law claim provided a predicate for the federal court to exercise supplemental jurisdiction over the plaintiff's state law negligence and

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medical malpractice claims; stringent proof is required to prevail on a § 1983 claim and, therefore, the plaintiff's federal law claim might ultimately be dismissed by the federal court; in the event the federal court dismissed the federal law claim, that court could--but would not be required to--retain jurisdiction over the related state law claims; because the Appellate Division could not ascertain whether the federal court would retain jurisdiction over the state law claims and, relatedly, whether the federal court would ultimately adjudicate those claims on their merits, the plaintiff might be unable to obtain full relief in the federal action. 157 A.D.3d at 1028-1029, 69 N.Y.S.3d at 379. Thus, the Third Department declined to find that the federal court and Supreme Court actions involved the same parties for the same cause of action. 157 A.D.3d at 1029, 69 N.Y.S.3d at 379 ("Because it is impossible to speculate whether the federal court would dismiss or retain jurisdiction in this situation, the federal action cannot be said to be duplicative, as plaintiff may be unable to obtain full relief therein.").

Regarding the relationship between the Supreme Court and Court of Claims actions, the Third Department noted that the legal theories in the actions were nearly identical, and that both actions arose out of the same set of facts. However, there was a chance that the plaintiff could prevail in the Court of Claims action, but be left with a judgment that was wholly or partially unenforceable.

It's a possibility that exists by virtue of the relevant state-actor indemnification statutes: Correction Law § 24-a and Public Officers Law § 17. Under those provisions, a physician who provided medical care to an inmate at the request of the State Department of Correction is entitled to indemnification and a defense from the State, unless it's determined that the physician engaged in intentional wrongdoing.

If the Court of Claims determined--in that court, the judge serves as the finder of fact (see Court of Claims Act § 12(3))--that one or both of the moving defendants engaged in intentional wrongdoing, the plaintiff's recovery in that action might be diminished. That's because a plaintiff in a Court of Claims action can recover damages from the State, but not individuals. Thus, if the State doesn't owe statutory indemnity to a state actor for his or her conduct, the plaintiff will not be compensated in the context of the Court of Claims action for the fault of the state actor.

Given the factual allegations and theories of liability in the Court of Claims action, a determination that the moving defendants engaged in intentional wrongdoing was "unlikely." But the potential was there; the State neither conceded nor admitted in any of its Court of Claims submissions that the State was bound to indemnify the moving defendants. Therefore, dismissal of the Supreme Court action under CPLR 3211(a)(4) and the concomitant elimination of a forum in which the plaintiff could seek redress directly from the moving defendants was not warranted. Instead, the Third Department stayed the Supreme Court action pending the outcome of the Court of Claims action, a result that "effectively preserve[d] any rights of recovery that [the] plaintiff ha[d] available, prevent[ed] disparate outcomes and limit[ed] duplicative and costly litigation." 157 A.D.3d at 1030, 69 N.Y.S.3d at 379; *see* Commentary C3211:17 (main vol.).

C3211:21. Failure to State a Cause of Action, Generally.

A Court Reviewing a CPLR 3211(a)(7) Motion Must Focus on the Allegations in the Complaint.

CPLR 3211(a)(7)--the failure-to-state-a-cause-of-action dismissal ground--is the workhorse of subdivision (a). No other paragraph gets more exercise. That's because it allows for dismissal where the plaintiff fails to plead a cognizable claim or where the defendant submits evidence rebutting the plaintiff's factual allegations. *See* Commentary C3211:21 (2018 Pocket Part "CPLR 3211(a)(7): the Most Versatile of the Dismissal Grounds" entry).

Regardless of which type of CPLR 3211(a)(7) motion is made against a complaint, a plaintiff is aided by three rules of decision: (1) give the complaint a liberal construction, (2) accept the allegations as true, and (3) provide the plaintiff with the benefit of every possible favorable inference. Commentary C3211:21 (main vol.).

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In *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 69 N.Y.S.3d 520, 92 N.E.3d 743 (Stein, J., 2017), the Court of Appeals highlighted important caveats to those rules of decision: the court must focus on the allegations in the complaint, and avoid reading into the complaint assertions or theories that are contrary to those that were expressly pleaded by the plaintiff. *See Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 53 N.Y.S.3d 598, 75 N.E.3d 1159 (Rivera, J., 2017) ("We may not read into [the plaintiff's] allegations a claim for cognizable damages, which he did not actually incur, under the guise of liberally construing the complaint."). The application of these caveats proved critical in *Nomura*.

The majority in *Nomura* applied the familiar rules of decision to the allegations and claims asserted by the plaintiff, and concluded that the complaint could not survive the defendants' CPLR 3211(a)(7) motion. The majority declined to construe the complaint as asserting a theory that was not expressed in the complaint and was contrary to plaintiff's allegations.

CPLR 3211(a)(7): the Most Versatile of the Dismissal Grounds.

Most of the grounds in CPLR 3211(a) are narrow, allowing for dismissal under specific circumstances. Paragraph 1 provides for dismissal based on "documentary evidence"; paragraph 2 provides for dismissal based on lack of subject matter jurisdiction; paragraph 3 provides dismissal for lack of capacity or standing; paragraph 4 provides remedies where there is another action pending relating to the same matter; paragraph 5 provides dismissal for certain enumerated affirmative defenses; paragraph 6 provides for dismissal for a non-interposable counterclaim; paragraph 8 provides for dismissal for want of personal jurisdiction; paragraph 9 provides for dismissal for want of rem or in rem jurisdiction; paragraph 10 provides remedies for failure to join an important individual or entity as a party; and paragraph 11 provides for dismissal in favor of certain uncompensated officials of not-for-profit organizations. Paragraph 7, however, is a broad dismissal ground.

That's because under CPLR 3211(a)(7), the failure-to-state-a-cause-of-action tool, dismissal can eventuate for either a pleading defect or because an allegation material to a facially-sufficient complaint has been bested by evidence. *See Lubonty v. U.S. Bank National Association*, 159 A.D.3d 962, 74 N.Y.S.3d 279 (2d Dep't 2018) ("By showing [with evidence] that a material fact as claimed by the plaintiff was not a fact at all, [the defendant] established its entitlement to dismissal of the action pursuant to CPLR 3211(a)(7)").

Let's count the number of situations in which a paragraph 7 motion can generate the dismissal of a complaint (or a particular aspect of it):

1. Where the complaint does not identify a cause of action cognizable at law, e.g., civil conspiracy, educational malpractice.

2. Where the complaint identifies a cognizable cause of action, but fails to plead all of the material elements of it. *See* Commentaries C3013:3, C3013:15A (main vol.).

3. Where the complaint identifies a cognizable cause of action and pleads all of the material elements of it, but fails to set forth "[s]tatements ... sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions intended to be proved." CPLR 3013; *see Mid-Hudson Valley Federal Credit Union v. Quartararo*, 31 N.Y.3d 1090, 78 N.Y.S.3d 703, 103 N.E.3d 774 (2018); Commentaries C3013:2, C3013:15A (main vol.). Concrete factual allegations must be asserted in the complaint supporting or tending to support the elements of the cognizable cause of action. *See Sager v. City of Buffalo*, 151 A.D.3d 1908, 58 N.Y.S.3d 796 (4th Dep't 2017). Allegations consisting of bare legal conclusions will not suffice. *See Connaughton v. Chipotle Mexican Grill, Inc.*,

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29 N.Y.3d 137, 53 N.Y.S.3d 598, 75 N.E.3d 1159 (2017); *Mid-Hudson Valley Federal Credit Union v. Quartararo*, 155 A.D.3d 1218, 64 N.Y.S.3d 389, *aff'd* 31 N.Y.3d 1090, 78 N.Y.S.3d 703, 103 N.E.3d 774.

4. Where the complaint identifies a cognizable cause of action, pleads all of the material elements of it, and contains sufficient factual allegations supporting those elements, but the defendant submits evidence convincingly refuting a material allegation in the complaint. *See Lubonty v. U.S. Bank National Association*, *supra*. Just how powerful must defendant's evidence be to warrant dismissal? The courts aren't in agreement on this important question. See Commentary C3211:23 (main vol.)

5. Where the complaint identifies a cognizable cause of action, pleads all of the material elements of it, and contains sufficient factual allegations supporting those elements, but the plaintiff's submissions in opposition to the motion to dismiss convincingly refute a material allegation in the complaint. *See M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd*., 12 N.Y.3d 798, 879 N.Y.S.2d 812, 907 N.E.2d 690 (2009) ("Because plaintiff's own evidentiary submissions 'conclusively establish that it has no cause of action,' dismissal of the complaint as to [certain defendants] is appropriate," quoting *Rovello v. Orofino Realty Co.,* 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976]) (internal brackets omitted).

An additional feature of CPLR 3211(a)(7): it can be raised either pre-or post-answer. CPLR 3211(e). Therefore, there are four different classes of CPLR (a)(7) motions: (1) a pre-answer motion unsupported by evidence, (2) a pre-answer motion supported by evidence, (3) a post-answer motion unsupported by evidence, and (4) a post-answer motion supported by evidence. Commentary C3211:26 (main vol.).

C3211:28. Lack of Personal Jurisdiction.

CPLR 3211(a)(8) Can be Used to Seek Dismissal of an Action on the Ground of Improper Joinder.

CPLR 3211(a)(8) allows a defendant to seek dismissal of a complaint on the basis that the court lacks personal jurisdiction over her. When employing this dismissal ground, the defendant is asserting that, under the circumstances of the case, the court does not have the power to render a judgment binding on her. Commentary C3211:28 (main vol.). The defendant can use paragraph 8 to raise any defect relating to personal jurisdiction. *Id*. Such defects include the absence of any basis upon which the court may exercise its jurisdiction over the defendant (i.e., the court lacks general or specific jurisdiction over the defendant), the failure of the plaintiff to effect proper service on the defendant, and the failure of the plaintiff to commence properly the action. *See id*.

Another defect touching on the court's personal jurisdiction over a defendant is the improper joinder of that party. "Improper joinder" refers to the situation where a plaintiff fails to comply with CPLR article 10 when attempting to add an individual or entity as a party--usually a defendant--to the action.

A plaintiff's failure to obtain leave of court to add the new party is an issue that arises in this context. CPLR 1003, part of the CPLR article 10 club, provides that "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at any time before the period for responding to that summons expires or within twenty days after service of a pleading responding to it."

The Second Department summarized the improper joinder/personal jurisdiction subject this way:

"[t]he failure to obtain leave required under CPLR 1003 create[s] the opportunity for a defendant to claim that the court lacks personal jurisdiction over it because the summons and complaint served were nullities. The purported defect in joinder thus requires a prompt motion to dismiss [under CPLR 3211(a)] or preservation by way of defense in the answer, lest it be deemed

waived (CPLR 3211, subd. [e]).” *McDaniel v. Clarkstown Central District No. 1*, 83 A.D.2d 624, 441 N.Y.S.2d 532 (1981); *see Public Administrator of Kings County v. McBride*, 15 A.D.3d 558, 791 N.Y.S.2d 570 (2d Dep't 2005); *see also Yonker v. AMOL Motorcycles, Inc.*, 161 A.D.2d 638, 555 N.Y.S.2d 416 (2d Dep't 1990); *Warner v. Kain*, 52 Misc. 3d 1209(A), 41 N.Y.S.3d 722 (table), 2016 W.L. 3884726 (Sup. Ct., St. Lawrence County 2016, Muller, J.).

There is no shortage of examples of instances in which a defendant has waived an improper-joinder argument. *See Zheng v. American Friends of the Mar Thoma Syrian Church of Malabar, Inc.*, 67 A.D.3d 639, 889 N.Y.S.2d 55 (2d Dep't 2009); *Santopolo v. Turner Construction Co.*, 181 A.D.2d 429, 580 N.Y.S.2d 755 (1st Dep't 1992); *Gross v. BFH Co., Inc.*, 151 A.D.2d 452, 542 N.Y.S.2d 241 (2d Dep't 1989); *Gavigan v. Gavigan*, 123 A.D.2d 823, 507 N.Y.S.2d 439 (2d Dep't 1986); *Wolfsohn v. Seabreeze Estate LLC*, 28 Misc. 3d 1239(A), 958 N.Y.S.2d 311 (table), 2010 W.L. 3700276 (Sup. Ct., Queens County 2010, McDonald, J.); *Moses v. City of New York*, 18 Misc. 3d 1113(A), 856 N.Y.S.2d 499 (table), 2008 W.L. 89661 (Sup. Ct., Kings County 2008, Battaglia, J.).

In *Martin v. Witkowski*, 158 A.D.3d 131, 68 N.Y.S.3d 603 (2017, NeMoyer, J.), the Fourth Department had occasion to make the point that a defendant seeking to interpose the defense of improper joinder must, under the pains of waiver, raise it in a timely CPLR 3211(a)(8) motion to dismiss, *see* Commentaries C3211:48, 55, or an answer to the amended complaint. (An amended complaint should be the title of the pleading adding a party to an action. *See* Commentaries C1003:2 [main vol.], C3025:3A [main vol.]; Siegel & Connors, New York Practice §§ 49, 65 [6th ed.].)

The court dealt with the improper-joinder subject in the context of a dispute as to who, as between a father and son of the same name, constituted the defendant in the action. The plaintiff had commenced the action against a single defendant, employing the shared name of the father and son without including a suffix (i.e., Sr. or Jr.). Because of the absence of a suffix following the defendant's name in the caption of the action, issues arose as to which gentleman was the actual defendant in the action and whether service of process was effected on the actual defendant. To identify the actual defendant and address the various procedural issues manifested by the plaintiff's failure to supply a suffix to the defendant's name, the *Martin* court reviewed thoroughly the way the law distinguishes between a father and son sharing the same name and, relatedly, the consequences of the presence or absence of “Sr.” or “Jr.” with the name of a party.

C3211:34. Motion to Dismiss Defense, Generally.

Motion to Dismiss a Defense Under CPLR 3211(b) Can be Made at Any Time and is Not Subject to *Brill v. City of New York.*

CPLR 3211(b) provides for the motion to dismiss a defense. The typical beneficiary of subdivision (b) is the plaintiff, but any party who has asserted an affirmative claim (e.g., counterclaim, cross claim) can invoke that subdivision to challenge a defense lodged against the claim. *See* Commentary C3211:34 (main vol.). (We'll assume here that it's the plaintiff that wants to employ CPLR 3211[b].) The plaintiff can seek dismissal of a defense on the ground that it has not been stated or that it has no merit. CPLR 3211(b) therefore sanctions both facial-sufficiency and merits-based challenges to a defense. Commentary C3211:36 (main vol.). One of paragraph (b)'s greatest virtues (in the eyes of the party invoking it) is that it may be made at any time. Commentary C3211:34 (main vol.).

That virtue was displayed in *Zarnoch v. Luckina*, 148 A.D.3d 1615, 50 N.Y.S.3d 709 (4th Dep't 2017). The plaintiff commenced an action to recover damages for injuries he sustained when was working on a construction project. The plaintiff, who was employed by the project's general contractor, brought the action against a subcontractor. The subcontractor obtained leave to amend its answer to assert as an affirmative defense that the plaintiff was its “special employee.” (If the plaintiff was the subcontractor's special employee, the plaintiff could be barred, under the exclusivity provisions of the Workers' Compensation Law, from maintaining a tort action against the

subcontractor. *See* 1B N.Y. P.J.I.3d 2:218 [2018].) The plaintiff sought dismissal of the special-employee affirmative defense under CPLR 3211(b) or summary judgment dismissing that defense. The motion court denied the plaintiff's motion on the basis that it was an untimely summary judgment motion. Apparently the plaintiff's motion in *Zarnoch* was made after the deadline for summary judgment motions and no satisfactory explanation was offered for the untimely motion. *See Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431 (2004).

On appeal, however, the Fourth Department determined that the motion court erred in denying as untimely the plaintiff's motion to dismiss the special-employment affirmative defense because, "[t]o the extent that the ... motion sought relief pursuant to CPLR 3211(b), [the motion] was not subject to the time limit for summary judgment motions under CPLR 3212(a)." (The plaintiff won the procedural battle but lost the substantive war; the motion was denied because he failed to show that the affirmative defense was without merit as a matter of law. *See* Commentaries C3211:35, 36.)

C3211:43. Notice of the Conversion.

The Charting-a-Summary-Judgment-Course Exception to the Notice Requirement Only Applies Where the Parties Signal Unequivocally That They Are Laying Bare Their Proof.

CPLR 3211(c) allows a court to convert a motion to dismiss into one for summary judgment, provided the court gives the parties notice of its intention to do so and an opportunity to submit additional papers. *See* Commentary C3211:43 (main vol.). The notice requirement is important; it gives the parties, who are otherwise operating under the assumption that the motion is subject to the rules of decision and res judicata and collateral estoppel principles applicable to a CPLR 3211 motion, a chance to assemble a summary judgment record. *See Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756, 874 N.E.2d 720 (2007).

The notice requirement has the following exceptions: (1) where conversion is requested by all parties; (2) where the motion raises a pure question of law that was addressed by the parties; and (3) where the parties deliberately chart a summary judgment course. *See* Commentary C3211:43 (main vol.). Exception number three receives the most attention, and was the subject of a decision by the Appellate Term, Second Department, in *Pesce v. Leimsider*, 59 Misc.3d 23, 72 N.Y.S.3d 760 (2018).

In *Pesce*, plaintiffs commenced a property damage case against defendants, one of whom sought dismissal relief under CPLR 3211(a)(7) (failure to state a cause of action). The motion court acknowledged that a motion to dismiss was before it, and converted it to a summary judgment motion without notice. The court did so because, in its estimation, the parties had charted a summary judgment course (exception number three). Upon converting the motion, the court granted summary judgment to the movant.

The Appellate Term disagreed with the motion court's conversion of the motion without notice to the parties, stating that they neither laid bare their proof nor " 'were ... put on notice of their obligation to make a complete record and to come forward with any evidence that could possibly be considered.' " 59 Misc.3d at 26-27, 72 N.Y.S.3d at ___, quoting *Nonnon v. City of New York*, 9 N.Y.3d at 827, 842 N.Y.S.2d at 758, 874 N.E.2d at 722. Had notice been provided, the plaintiffs could have asked for material discovery or sought to obtain evidence in admissible form to oppose the motion. Therefore, the defendant's CPLR 3211(a)(7) motion should have been adjudicated as such. (Because the parties to the appeal briefed the merits of the CPLR 3211 motion, the Appellate Term reviewed whether the defendant was entitled to relief under that statute and concluded that he was not.)

C3211:53. Waiving Objection Contained in Paragraph 1, 3, 4, 5, or 6 of 3211(a).

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Raising a Ground in a Pre-Answer Motion to Dismiss May Preserve the Ground Even if the Motion is Denied and the Ground is Not Included in the Subsequent Answer.

> To preserve an objection under paragraph 1 (documentary evidence), 3 (capacity), 4 (other action pending), 5 (affirmative defenses) or the rarely-exercised 6 (non-interposable counterclaim), a defendant must do one of the following: raise the objection in a timely CPLR 3211(a) motion or assert it in an answer. *See* CPLR 3211(e). If the defendant wants to interpose one of these objections but doesn't do so by pre-answer motion *or* in the answer, the objection is waived. *See* C3211:53. (main vol.). (The waiver is presumptive; the court may allow the defendant to amend her answer to include an otherwise waived defense. *See* C3211:58 [main vol.].)
>
> Here are some common waiver scenarios:

• A defendant raises a given 1/3/4/5/6 objection in a pre-answer motion and the court grants the motion, leading to dismissal of the complaint (or challenged portion of it).

• A defendant raises the 1/3/4/5/6 objection in her answer and subsequently seeks dismissal based on the objection by way of a summary judgment motion or at trial.

• The defendant doesn't raise the 1/3/4/5/6 objection in a pre-answer motion or in the answer, and the objection is therefore waived--unless the court allows for an amendment of the answer to include the previously omitted objection.

> How about this: a given 1/3/4/5/6 objection is lodged in a CPLR 3211(a) motion, the motion is denied, and the defendant wants to pursue the objection again at a later juncture, after the disclosure process has flushed out the facts. Must the defendant in this situation raise the objection in her answer to preserve it? The Second Department looked at this issue in *Outlook Clothing Corp. v. Schneider*, 153 A.D.3d 717, 60 N.Y.S.3d 302 (2017).
>
> The plaintiffs in *Outlook Clothing* commenced an action against two defendants. As against defendant A, the plaintiffs asserted a cause of action for breach of fiduciary duty (A had been an officer and shareholder of one of the plaintiff-corporations, and after resigning as an officer and selling his shares in the corporation, A entered into a lease for commercial space previously occupied by the corporation, which had been evicted from the leasehold.) The defendants made a pre-answer motion under CPLR 3211(a)(5) to dismiss the cause of action asserted against A, claiming that the cause of action was barred by a release given by the corporation to A. Supreme Court denied the motion as "premature," and the defendants (including A) interposed an answer, which didn't include the affirmative defense of release. (Following the denial of the pre-answer CPLR 3211[a] motion, the defendants had 20 days to answer the complaint. See Commentary C3211:67.) The defendants subsequently sought summary judgment dismissing, among other things, the cause of action asserted against A. Their argument: the release barred the cause of action. Supreme Court granted A summary judgment, and the plaintiffs appealed.
>
> The plaintiffs contended that A waived the affirmative defense of release because it was not pleaded in the answer. Rejecting that contention, the Second Department wrote that:

"As with the other defenses and objections listed in CPLR 3211(a)(5), the affirmative defense of release is waived unless it is raised in a pre-answer motion to dismiss or in a responsive pleading. Here, the defendants avoided waiving the affirmative defense of release by raising it in their pre-answer motion to dismiss, and they were thereafter entitled to seek summary judgment based on that defense despite its absence from the answer." 153 A.D.3d at 718, 60 N.Y.S.3d at 304. Internal citations omitted.

What's more, the appellate court affirmed the granting of summary judgment to A.

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Query whether *Outlook Clothing* will apply to the other paragraphs of subdivision a (i.e., 1, 2, 3, 4, 6, 7, 8, 9, 10, and 11)? Note that objections under paragraph 8 are the most susceptible to waiver, see Commentary C3211:55, while objections under paragraphs 2, 7 and 10 are least likely to be waived (an objection under paragraph 2--lack of subject matter jurisdiction--can't be waived). See Commentary C3211:54.

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C3211:5. Grounds of Dismissal.

Dismissal Grounds Outside of CPLR 3211(a).

In the main volume, we note that "CPLR 3211(a) is the central dismissal device, but it is not the only one," Commentary C3211:5, at 19 (main vol.), and list the following sources of dismissal that reside outside of subdivision (a): CPLR 327 (forum non conveniens), CPLR 3012(b) (failure to serve complaint), CPLR 3215(c) (failure to take default judgment proceedings timely), CPLR 3126(3) (recalcitrance in disclosure proceedings), and CPLR 3216 (failure to comply with 90-day notice to prosecute action).

Recent decisions bring to mind two other non-CPLR 3211(a) dismissal grounds.

Rosenblatt v. Doe, 54 Misc.3d 145(A), 2017 N.Y. Slip Op. 50289(U), 2017 W.L. 923496 (App. Term, 2d Dep't 2017), touched on CPLR 1021, which allows for the dismissal of an action (or part of it) in which the substitution of a party is required but the motion for substitution is not made within a reasonable time after the event necessitating the substitution, e.g., the death of a plaintiff. What constitutes a reasonable time in a given case is dictated by the particular circumstances of the case. It's a sui generis question. The court should consider various factors, including the length of time between the substitution-necessitating event and the application for substitution, the extent of prejudice to the other parties, the reasonableness of the excuse (if any) proffered for the delay, and the potential merits of the plaintiff's claim. Commentary C1021:2 (main vol.); *see Alejandro v. North Tarrytown Realty Assoc.*, 129 A.D.3d 749, 10 N.Y.S.3d 616 (2d Dep't 2015).

In *Rosenblatt*, the plaintiff commenced a personal injury action. He subsequently passed away. There was a lengthy delay in securing the appointment of the administrator of the decedent's estate, then another delay in seeking substitution for the decedent-plaintiff. The motion court permitted the substitution, thereby allowing the action to go forward. The Appellate Term, Second Department, affirmed the order allowing the substitution, finding that the motion court did not abuse its discretion in granting the motion, stressing that the defendant failed to show that she would be prejudiced by the substitution.

A dissenting Justice concluded that the action-sustaining substitution should have been denied because of the delays underlying the substitution, the substitute plaintiff's failure to demonstrate a reasonable excuse for those delays, the absence of an affidavit of merit, and the potential prejudice to the defendant stemming from the delays. 54 Misc.3d 145(A), at *2, 2017 N.Y. Slip Op. 50289(U), at *2, 2017 W.L. 923496, at *1 (Weston, J.). The dissenting Justice would've dismissed the complaint, sua sponte, upon the denial of the motion to substitute.

A couple of observations regarding dismissal under CPLR 1021.

First, the question of whether dismissal is warranted under that statute can arise in a few different ways. A party may move for dismissal; a party may cross-move to dismiss in response to a motion to substitute a party; or a court might dismiss sua sponte.

Where a proposed substitute plaintiff moves for substitution, the defendant opposes the motion but does not formally cross-move to dismiss the action, and the court concludes that the movant did not seek substitution within

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a reasonable time of the substitution-necessitating event, sua sponte dismissal by the court might seem appropriate. After all, the finding that substitution was not sought within a reasonable time can serve to bar a substitution, and without a proper plaintiff how can the action go forward? However strong the allure of a sua sponte dismissal may be in a particular case, the court (and the defendant, who would benefit from the dismissal) must be cognizant of the dim view the appellate courts have of sua sponte dismissals. *See* Commentary C3211:8 (main vol.). An additional impediment to a sua sponte dismissal in the context of CPLR 1021: the last sentence of the statute ("whether or not it occurs before or after final judgment, if the event requiring substitution is the death of a party, and timely substitution has not been made[,] the court before proceeding further, *shall, on such notice as it may in its discretion direct*, order the persons interested in the decedent's estate to show cause why the action ... should not be dismissed") (emphasis added).

Second, as we noted above, the issue of what constitutes a reasonable amount of time within which to seek substitution is case-specific and determined by consideration of several factors. One of those factors is the length of delay between the occurrence of the substitution-necessitating event and the point at which substitution is sought (or a defendant seeks dismissal for want of compliance with CPLR 1021). *See* Commentary C1021:2. Some delay is typically associated in identifying and securing a proper substitute for the affected party (e.g., getting letters testamentary to administer a party-decedent's estate). The proposed plaintiff should show that she exercised diligence in seeking substitution, specify any bureaucratic or court delay that accounts for the delay in seeking substitution, and corroborate any such bureaucratic or court delay with appropriate documentation. For her part, the defendant should note the extent of delay and demonstrate how she has been prejudiced by it.

Dismissal for want of compliance with CPLR 3012-a was addressed by the Third Department in *Calcagno v. Orthopedic Assoc. of Dutchess County, PC*, 148 A.D.3d 1279, 48 N.Y.S.3d 832 (2017, Garry, J.). That statute applies in medical malpractice actions, requiring a plaintiff in such an action to submit with the summons and complaint a certificate of merit from counsel declaring that he or she has consulted with at least one physician who (1) is knowledgeable regarding the relevant issues in the action, (2) has reviewed the facts, and (3) has concluded that a reasonable basis exists for the commencement of the action. *See* CPLR 3012-a(a). (The certificate-of-merit requirement also applies in dental and podiatrical malpractice actions.)

Some courts, such as the panel in *Kolb v. Strogh* (158 A.D.2d 15, 558 N.Y.S.2d 549 [2d Dep't 1990, Bracken, J.]) and the court in *Dye v. Leve* (181 A.D.2d 89, 586 N.Y.S.2d 69 [4th Dep't 1992]), have concluded that dismissal as a sanction for a plaintiff's failure to comply with the certificate-of-merit requirement is not permissible. (Although dismissal is permissible if a court issues an order directing a plaintiff to file an adequate certificate of merit but the party fails to do so. *See Kolb v. Strogh*, *supra*; *Dye v. Leve*, *supra*; *see also Monzon v. Chiaramonte,* 140 A.D.3d 1126, 35 N.Y.S.3d 371 [2d Dep't 2016] [court conditionally granted defendant's motion to dismiss complaint unless plaintiff filed and served sufficient CPLR 3012-a(a)(1) certificate of merit within 30 days after notice of entry of order].)

Other courts permit dismissal if a plaintiff seeks but is denied an extension of time within which to file a CPLR 3012-a certificate of merit. A plaintiff's application for such an extension is governed by CPLR 2004, which allows a court to extend most procedural deadlines, provided the party seeking the extension demonstrates "good cause." *See* Commentary to CPLR 2004; *see also* Higgitt, *Requests to Extend Deadlines and the Reach of the CPLR*, Oct. 2, 2013 N.Y.L.J. If a plaintiff seeks a CPLR 2004 extension of the time within which to file a certificate of merit and the court denies the extension, a defendant's motion to dismiss for want of compliance with CPLR 3012-a may be granted. *Calcagno v. Orthopedic Assoc. of Dutchess County, PC, supra*. Dismissal is particularly appropriate in that situation if plaintiff's counsel, in opposing a defendant's motion to dismiss, is unable to make the CPLR 3012-a declaration that a reasonable basis exists for the commencement of the action. *Horn v. Boyle*, 260 A.D.2d 76, 79, 699 N.Y.S.2d 572, 575 (3d Dep't 1999, Carpinello, J.).

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Calcagno highlights the need for plaintiff's counsel to take seriously the CPLR 3012-a certificate-of-merit requirement. If an application for an extension of time to comply with CPLR 3012-a is required, attention to CPLR 2004's good cause element is demanded, as is attention to the quality of the papers supporting the application. Of course, timely compliance with CPLR 3012-a--a sufficient certificate of merit accompanying the summons and complaint--prevents any litigation on the matter.

C3211:8. Sua Sponte Dismissal.

Appellate Division Decisions Show the Frailty of Sua Sponte Dismissals.

A sua sponte dismissal occurs when a court, without the prompting of a motion by a party, discards a complaint or some other affirmative claim (e.g., a counterclaim). The Appellate Division has shown little tolerance of sua sponte dismissals. Absent statutory or regulatory authority for a sua sponte dismissal (e.g., CPLR 3215[c], CPLR 3404, 22 NYCRR 202.27), a court's power to dismiss sua sponte should be exercised "sparingly and only when extraordinary circumstances exist to warrant" that ultimate relief. *First United Mortgage Banking, Corp. v. Lawani,* 147 A.D.3d 912, 48 N.Y.S.3d 190 (2d Dep't 2016); *Citimortgage Inc v. Lottridge*, 143 A.D.3d 1093, 40 N.Y.S.3d 573 (3d Dep't 2016, Peters, P.J.). Examples of "extraordinary circumstances" are few. *See* Commentary C3211:8 (main vol.). The limited power of a court to dismiss sua sponte is constrained further by due process. Even if extraordinary circumstances exist, sua sponte dismissal cannot occur unless the plaintiff had notice that dismissal could eventuate and an opportunity to be heard before the court renders the dismissal. *See Citimortgage, Inc. v. Lottridge*, *supra*; *see also First United Mortgage Banking Corp. v. Lawani, supra.*

First United Mortgage Banking Corp. and *Citimortgage, Inc.* evince the Appellate Division's understandable hostility toward sua sponte dismissals and provide a couple of lessons relating to them.

First United Mortgage Banking Corp. discourages trial courts from straying from the factual record adduced by the parties in deciding motions (save for matter that is subject to proper judicial notice, *see* Bench Book for Trial Judges--New York § 7:3 [2015-2016 ed.]). In *First United Mortgage Banking Corp.*, the plaintiff in a residential mortgage foreclosure action made a motion against the defendants for a default judgment and an order of reference. That motion was not opposed. The motion "court conducted an independent Internet investigation of certain records and digital tax maps purportedly maintained by, among others, the New York City Department of Finance. Based upon the court's research ... [it] concluded that certain discrepancies warranted [sua sponte] dismissal of the action." 147 A.D.3d at 913, 48 N.Y.S.3d at 190. The Second Department reversed the order of dismissal and remitted the matter to Supreme Court for a determination of the plaintiff's motion (sans information obtained from the Internet). The appellate court found that extraordinary circumstances were not present and, therefore, sua sponte dismissal was not warranted. Additionally, the court "caution[ed] that dismissal based almost entirely upon an independent Internet investigation, especially one conducted without providing notice of and an opportunity to be heard by any party, is improper and should not be repeated." *Id.*; *see HSBC Bank USA, NA v. Taher*, 104 A.D.3d 815, 962 N.Y.S.2d 301 (2d Dep't 2013); *see also* Hon. David B. Saxe, *"Toxic" Judicial Research*, 87 N.Y. St. B.J. 36 (Sept. 2015).

In *Citimorgtage, Inc.*, the plaintiff commenced but did not diligently prosecute a residential mortgage foreclosure action. Among other transgressions, the plaintiff allowed the action to "languish" for two years. Supreme Court attempted to spur the plaintiff to pursue the case: the court directed the plaintiff to make an application for a default judgment by a date certain. The plaintiff failed to follow the directive and the court, sua sponte, dismissed the complaint under CPLR 3215(c), which provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned ... unless sufficient cause is shown why the complaint should not be dismissed."

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The Third Department reversed an order denying the plaintiff's motion to vacate the sua sponte dismissal order and granted the motion, thereby restoring the complaint. Dismissal was not warranted under CPLR 3215(c) because the plaintiff did take proceedings for the entry of judgment within one year of the defendants' default. The plaintiff sought (and was granted) an order of reference within the one year period, such "proceedings" manifested an intent not to abandon the action, and the action therefore could not be dismissed for the reason identified by Supreme Court. *See* Commentary C3215:12.

And the dismissal could not be sustained as a proper exercise of the court's power to dismiss sua sponte. "[W]hile plaintiff's conduct [in delaying prosecution of the action and violating a directive of the court] was certainly worthy of criticism," the record did not support a finding of a pattern of willful noncompliance with court-ordered deadlines, conduct that could provide extraordinary circumstances justifying a sua sponte dismissal. 143 A.D.3d at 1095, 40 N.Y.S.3d at 575; *see* Commentary C3211:8 at 22-23 (main vol.). That a plaintiff's conduct "frustrates our justice system," standing alone, is not sufficient to constitute extraordinary circumstances. 143 A.D.3d at 576, 40 N.Y.S.3d at 1095. Additionally, sua sponte dismissal was not appropriate because the record did not indicate that the plaintiff was on notice that dismissal might occur.

Two important observations relating to sua sponte dismissals. First, "courts do not possess the power to dismiss an action [in the pre-note of issue phase] for general delay where [the] plaintiff has not been served with a [CPLR 3216(b)] demand." *Chase v. Scavuzzo*, 87 N.Y.2d 228, 233, 638 N.Y.S.2d 587, 590, 661 N.Y.2d 1368, 1371 (1995, G.B. Smith, J.); *see* Commentary C3216:4A, Cumulative Supplementary Pamphlet, 2017 entry. Second, our "courts ... are empowered to grant the sanction of dismissal only when it has been authorized either by the [L]egislature or by court rules consistent with existing legislation." *Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 7, 550 N.Y.S.2d 572, 574, 549 N.E.2d 1143, 1145 (1989, Alexander, J.). Thus, a dismissal ought to be tethered to an identifiable legal basis--a statute, a regulation, a case law principle. Mere frustration with the lack of progress of a case, while understandable and worthy of criticism, shouldn't result in the ultimate penalty of dismissal.

C3211:10. Defense Based on "Documentary Evidence."

Can an E-Mail Constitute Documentary Evidence Under CPLR 3211(a)(1)?

A defendant may seek dismissal of a complaint (or part of it) based on a defense "founded upon documentary evidence." Whether a particular document constitutes documentary evidence under CPLR 3211(a)(1) has been the subject of a lot of litigation. Rarely does the defendant succeed in persuading the court that her evidence is "documentary." That's because the test for determining whether a paper qualifies as "documentary evidence" is quite stringent; the paper must be unambiguous, of undeniable authenticity, and its contents must be essentially undeniable. Commentary C3211:10, at 25 (main vol.).

In the main volume, we note that an e-mail may (emphasize "may") constitute "documentary evidence"; it's a question that seems to have divided the First and Second Departments. *See id.* The First Department has stated that "[e]-mails can suffice as documentary evidence for purposes of CPLR 3211(a)(1)" (provided, of course, the subject e-mail satisfies the three-element test noted above). *Calpo-Rivera v. Sirioka*, 144 A.D.3d 568, 568, 42 N.Y.S.3d 19, 20 (1st Dep't 2016). The Second Department has signaled that an e-mail cannot be "documentary" in character. *See 25-01 Newkirk Avenue., LLC v. Everest National Ins. Co.*, 127 A.D.3d 850, 851, 7 N.Y.S.3d 325, 326 (2d Dep't 2015) ("letters, e-mails, and affidavits fail to meet the requirements for documentary evidence").

A recent article provides a thorough review of this inter-Department conflict and explores whether an e-mail can constitute documentary evidence under CPLR 3211(a)(1). *See* Bruce H. Lederman, *Role of Emails in CPLR 3211(a)(1) Motions*, vol. 22, no. 1 NYLitigator, N.Y.S.B.A., at 18-22 (Spring 2017).

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C3211:12. Plaintiff's Lack of Capacity.

A Plaintiff Who has Attained the Age of Majority is Presumed Competent and a Defendant has the Burden of Demonstrating Otherwise.

Those are the take-away points from *Vasilatos v. Dzamba*, 148 A.D.3d 1275, 49 N.Y.S.3d 194 (3d Dep't 2017, Lynch, J.). There, the defendants moved to dismiss the complaint of the plaintiff, who claimed that, as an infant, she was exposed to and poisoned by lead particles at the defendants' respective properties. The defendants argued, among other things, that the plaintiff lacked legal capacity (i.e., the power) to bring the lawsuit. *See* Commentary C3211:12 (main vol.). The defendants relied on the complaint--verified by plaintiff's counsel--that contained an allegation that, as a result of the lead poisoning, the plaintiff had been "under a disability pursuant to CPLR 208 since infancy, which never ceased, and [the plaintiff] continues to be insane, deprived of an overall ability to function in society, of unsound mind and/or unable to protect her legal rights." Apparently the defendants offered nothing else to support their assertion that the plaintiff lacked the legal capacity to bring the action. Noting that a plaintiff's competence to commence an action is presumed, that a defendant seeking dismissal under CPLR 3211(a)(3) bears the burden of demonstrating that a plaintiff was not legally competent, and that the plaintiff in *Vasilatos* had not been judicially declared incompetent, the Court determined that "plaintiff's acknowledged cognitive and mental defects[, standing alone,] did not prevent her from commencing th[e] action in her own name." 148 A.D.3d at 1276, 49 N.Y.S.3d at 196.

Court Reviews Considerations Relevant to Whether Governmental Entity Created by a Legislative Enactment has Capacity to Sue.

"Capacity" concerns a plaintiff's power to appear before and bring an action in court. Commentary C3211:12, at 29 (main vol.). "Governmental entities created by legislative enactment ... present capacity problems." *Community Board 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644, 647, 639 N.E.2d 1, 4 (1994, Titone, J.). The Fourth Department reviews those problems in *Matter of Citizen Review Board of the City of Syracuse v. Syracuse Police Department,* 150 A.D.3d 121, 125-126, 51 N.Y.S.3d 708, 711-712 (2017, Curran, J.), and offers factors that can be employed to ascertain whether a given legislatively-created governmental entity has the capacity to commence an action. (Hint: The answer typically lies in legislation creating and governing the entity. *See Excess Line Ass'n of New York v. Waldorf &. Associates*, 30 N.Y.3d 119, 65 N.Y.S.3d 85, 87 N.E.3d 117 (Oct. 19, 2017), 2017 N.Y. Slip Op. 07301.) The Court provides guidance too on the question of whether a legislatively-created governmental entity has standing to bring an action. Capacity and standing are discreet issues; the former is concerned with whether, in the eyes of the law, the plaintiff has the power to bring a case, and the latter asks whether the plaintiff has a sufficient stake in the outcome of the litigation. *See* Commentary C3211:13 (main vol.).

Filing for Bankruptcy Does Not Necessarily Strip a Plaintiff of Standing to Sue; the Character of Bankruptcy Protection--Chapter 7, 11 or 13--is Determinative.

Generally, "[t]he failure of a plaintiff to disclose a cause of action as an asset in a prior bankruptcy proceeding, the existence of which the plaintiff knew or should have known existed at the time, deprive[s] the plaintiff of the [standing] to sue subsequently on that cause of action." *Whelan v. Longo,* 23 A.D.3d 459, 460, 808 N.Y.S.2d 95, 96 (2d Dep't 2005). But the chapter of the debtor/plaintiff's bankruptcy proceeding determines whether the general rule applies.

Chapter 7 and 11 debtors lose standing to maintain civil suits. That which is lost by the chapter 7 or 11 bankruptcy proceeding debtor is found by her bankruptcy trustee; the chapter 7 or 11 bankruptcy trustee has standing to bring or maintain an action for the benefit of the bankruptcy estate. *Collins v. Suraci,* 110 A.D.3d 1214, 973 N.Y.S.2d 828 (3d Dep't 2013, Egan, Jr., J.). A debtor in a chapter 13 bankruptcy proceeding, however, does not lose standing to bring

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a civil suit. *See Nicke v. Schwartzapfel Partners, P.C.,* 148 A.D.3d 1168, 51 N.Y.S.3d 121 (2d Dep't 2017). Why do chapter 13 debtors retain standing while chapter 7 and 11 debtors lose it? Because "in a chapter 13 proceeding, 'the creditors' recovery is drawn from the debtor's earnings, not from the assets of the bankruptcy estate; hence, it is only the chapter 13 debtor who stands to gain or lose from efforts to pursue a cause of action that is an asset of the bankruptcy estate.' " *Collins v. Suraci,* 110 A.D.3d at 1215, n, 973 N.Y.S.3d at 830, n, quoting *Olick v. Parker & Parsley Petroleum Co.,* 145 F.3d 513, 516 (2d Cir. 1998).

Some courts have indicated that the failure of a plaintiff to disclose a cause of action as an asset in a prior bankruptcy proceeding affects the plaintiff's "capacity" to sue subsequently on that cause of action. As mentioned above, capacity and standing are separate (albeit allied) concepts. *See* Commentary C3211:13 (main vol.). Capacity concerns a party's legal power to bring an action, asking whether the plaintiff is the proper bearer of the lawsuit. Commentary C3211:12 (main vol.). Standing concerns itself with whether the plaintiff suffered an injury or other harm as a result of the defendant's alleged conduct or inaction, i.e., whether the plaintiff has a sufficiently cognizable stake in the outcome of the litigation. Commentary C3211:13.

As the language from the *Collins* decision suggests, the bankruptcy issue we are discussing here seems to concern standing. In the chapter 7 and 11 contexts, the debtor's "property," including any cause of action the debtor had, vests in the debtor's bankruptcy estate. Because a cause of action that had been the property of the debtor becomes the property of the bankruptcy estate, it is the estate that has a cognizable stake in the outcome of any litigation relating to the cause of action. Thus, the bankruptcy estate, acting through a bankruptcy trustee, has standing to pursue such a cause of action. In the chapter 13 context, it is the debtor "who stands to gain or lose" from the cause of action. *Collins v. Suraci,* 110 A.D.3d at 1215, n, 973 N.Y.S.3d at 830, n. Bankruptcy therefore affects which individual or entity has a direct stake in the outcome of a litigation.

C3211:14. "Other Action Pending," Generally.

The Importance of Service of a Complaint in Both the Present and the Prior Actions.

CPLR 3211(a)(4) authorizes (but does not require) dismissal of an action on the ground that there is another action pending in any court within the United States. Dismissal of the present action, i.e., the New York action in which the CPLR 3211(a)(4) motion is made, is only appropriate if the present action and the other action involve the same parties and the same cause of action. Commentaries C3211:14, 15 (main vol.). The present action and the other action involve the same parties and the same cause of action if the following elements of the two actions are substantially similar: (1) the parties; (2) the cause of action; and (3) the relief sought. Commentary C3211:15; *see Cellino & Barnes, P.C. v. Law Office of Christopher J. Cassar, P.C.*, 140 A.D.3d 1732, 35 N.Y.S.3d 606 (4th Dep't 2016).

To ascertain whether two actions are substantially similar, a court should compare the allegations in the pleadings of the respective actions. *See Security Title & Guaranty Co. v. Wolfe,* 56 A.D.2d 745, 392 N.Y.S.2d 30 (3d Dep't 1977); *see also* Siegel, New York Practice § 262 (Connors 5th ed.). Therefore, service of a complaint (or other appropriate pleading, i.e., a petition) in both the present action and the other action is typically necessary before the present action can be dismissed under CPLR 3211(a)(4). *See Wharton v. Wharton*, 244 A.D.2d 404, 664 N.Y.S.2d 73 (2d Dep't 1997); *Graev v. Graev*, 219 A.D.2d 535, 631 N.Y.S.2d 685 (1st Dep't 1995); *Sotirakis v. United Services Auto Ass'n*, 100 A.D.2d 931, 474 N.Y.S.2d 843 (2d Dep't 1984); *John J. Canpagna, Inc. v. Dune Alpin Farm Associates*, 81 A.D.2d 633, 438 N.Y.S.2d 132 (2d Dept. 1981); Siegel, New York Practice § 262; *see also Security Title & Guaranty Co. v. Wolfe*, *supra*. Use of information outside of the pleadings to compare the actions has not been permitted. *Louis R. Shapiro, Inc. v. Milspenes Corp.*, 20 A.D.2d 857, 857, 248 N.Y.S.2d 85, 87 (1st Dep't 1964) ("it is not permissible to show by parol proof what an action is for") (internal quotation mark omitted).

If there is another action pending in any court within the United States that involves the same parties and the same cause of action as the present action, the court must consult the first-in-time rule, which provides that generally the action that was commenced first will be the one that is allowed to proceed. Commentaries C3211:14, 15. The general rule favoring the action that was commenced first is not ironclad; the presence of special circumstances permits a court to depart from the first-in-time rule and favor the later-commenced action. Commentary C3211:16.

In *Quatro Consulting Group, LLC v. Buffalo Hotel Supply Co., Inc.*, 55 Misc.3d 615, 49 N.Y.S.3d 252 (Sup. Ct., Monroe County 2017, Rosenbaum, J.), the court seemed to question the prudence of the principle that service of the complaints in both actions is required before a CPLR 3211(a)(4) motion to dismiss the present action will lie.

The parties to the *Quatro Consulting Group, LLC,* action had entered into an agreement under which B provided consulting services to A. B sent a demand for payment to A, claiming that B was owed money for services rendered to A. A responded by commencing a declaratory judgment and damages action against B in Supreme Court, Erie County, by electronically-filing a summons with notice on November 22, 2016. The summons with notice allowed A to commence its action without filing and serving a complaint. (The complaint would come later, upon B's demand. *See* Siegel, New York Practice §§ 60, 231.) Approximately one week later, B commenced a breach of contract action against A in Supreme Court, Monroe County, by filing a summons and complaint with the Monroe County Clerk's Office.

In the context of its Monroe County action, B moved to consolidate that action with A's Erie County action. A then moved (also within the context of the Monroe County action) to dismiss the Monroe County action under CPLR 3211(a)(4).

Supreme Court, Monroe County, granted A's motion to dismiss the Monroe County action. The court reasoned that, under CPLR 304, A's Erie County action was commenced on November 22, 2016, approximately one week before B commenced its Monroe County action, and that, under the first-in-time rule, A's action should get priority. The court rejected B's argument, premised on case law such as *Wharton* and *Graev*, that A's action did not constitute a "prior action pending" because it was commenced by summons with notice. Stressing the plain language of CPLR 304, the court observed that an action is commenced by the filing of a summons and complaint *or* summons with notice, and, therefore, A's summons-with-notice initiated action, which was commenced before B's action, was first-in-time.

Is there any tension between the case law concluding that service of a complaint in both the present action and the other action is necessary before a CPLR 3211(a)(4) motion will lie, and the *Quatro Consulting Group, LLC* court's reasoning? Maybe, maybe not.

The court seemed to question the prudence of the principle that service of the complaints in both actions is a precondition to a CPLR 3211(a)(4) motion to dismiss the present action. But the reason for that principle is to allow the court, based on a comparison of the allegations in the complaints, to ascertain whether both actions involve the same parties and the same cause of action. That inquiry apparently wasn't necessary in *Quatro Consulting Group, LLC*. Rather, the court seemed to operate on the premise that the two actions were substantially similar, and the court focused on the order in which the actions were commenced for the purpose of applying the first-in-time rule.

Perhaps the parties in *Quatro Consulting Group, LLC*, expressly or implicitly acknowledged that the actions involved the same parties and the same cause of action. Or perhaps it was obvious to the court from the submissions on the competing motions that the actions were substantially similar. (Although resort to information outside of the pleadings to compare the actions is generally not permitted. *Louis R. Shapiro, Inc v. Milspenes Corp.*, *supra.*)

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In any event, the court apparently did not need to resolve the issue of whether the two actions were substantially similar--the issue on which the principle requiring service of the complaints in both actions bears. The court's comments regarding that principle came in the context of the court's analysis of the separate and distinct issue of which action was commenced first for the purpose of applying the first-in-time rule. Therefore, the tension between the service-of-the-complaints principle and the *Quatro Consulting Group, LLC* decision may not be all that tense.

A final note on *Quatro Consulting Group, LLC*. Recall that A commenced a declaratory judgment action against B in response to B's demand for payment. Was A, which used a summons with notice to commence the action, in a hurry to get into court before B?

This matter is important because the first-in-time rule, which generally favors the action that was commenced first, yields where special circumstances are present. One factor in the special circumstances calculus: whether the prior action was filed preemptively after the plaintiff in that action learned that the opposing party intended to commence a case. Commentary C3211:16. That the prior action was brought in the form of a declaratory judgment action may serve as a strong signal that it was commenced preemptively. *Id*. That the prior action was commenced by the expedient of a mere summons with notice-instead of a summons and complaint-might be another signal of a preemptive filing. If the first action was filed preemptively, special circumstances are likely present and the later-commenced action is given priority, as the law seeks to discourage a race to the courthouse, an exercise that is not compatible with responsible litigation. *Id*.

C3211:21. Failure to State a Cause of Action, Generally.

Court Reviews the Special Principles Applicable to a Motion to Dismiss a Declaratory Judgment Action.

"An action for a declaratory judgment is one that seeks to have the court establish and promulgate the rights of the parties on a particular subject matter." Commentary C3001:1, at 257-258 (main vol.). The declaratory judgment plaintiff seeks no relief that can be enforced through the enforcement mechanisms in CPLR article 52 or by the court's contempt powers, Siegel, New York Practice § 436 (Connors 5th ed.); the plaintiff will be satisfied with a judicial declaration of the rights of the parties. Commentary C3001:1. The utility of a declaratory judgment action is that it may "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *James v. Alderton Dock Yards*, 256 N.Y. 298, 305, 176 N.E.401, 404 (1931, Crane, J.).

When a defendant in a declaratory judgment action seeks to dismiss it under CPLR 3211(a)(7)--the failure-to-state-a-cause-of-action provision--the ordinary rules of decision apply. *See* Commentary C3211:21, at 47 (main vol.) ("the pleadings must be given a liberal construction, the allegations accepted as true, and the plaintiff accorded every possible favorable inference"); *see also Connaughton v. Chipolte Mexican Grill, Inc.*, 29 N.Y.3d 137, 53 N.Y.S.3d 598, 75 N.E.3d 1159 (2017, Rivera, J.). Some additional special rules apply that reflect the unique nature of the declaratory judgment action.

Guthart v. Nassau County, 55 Misc.3d 827, 52 N.Y.S.3d 821 (Sup. Ct., Nassau County 2017, Palmieri, J.), contains a recitation of those special rules. Here they are:

• A pre-answer CPLR 3211(a)(7) motion to dismiss a declaratory judgment action presents only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration

• Where a cause of action is sufficient to invoke the court's power to render a declaratory judgment, the motion to dismiss should generally be denied

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• A court may reach the merits of a well-pleaded cause of action for declaratory judgment on a CPLR 3211(a)(7) motion if no questions of fact are presented by the parties' controversy

• If the controversy presents no questions of fact, the CPLR 3211(a)(7) motion may be treated as a motion for a declaration in the defendant's favor

See also Professor Connors' treatment of the *North Oyster Bay Baymen's Association* decision in Commentary C3001:22, Pocket Part, 2016 entry.

C3211:28. Lack of Personal Jurisdiction.

Fundamental Rules of Decision Applicable to Several CPLR 3211(a) Grounds Apply to Lack-of-Personal-Jurisdiction Motion.

Afford the complaint a liberal construction. Accept the facts alleged in the complaint as true. Accord the plaintiff the benefit of every possible favorable inference. Those commandments apply to motions made on several CPLR 3211(a) grounds, such as dismissal founded on documentary evidence (paragraph 1), dismissal founded on an affirmative defense (paragraph 5), and dismissal for failure to state a cause of action (paragraph 7). (They essentially apply as well to a motion to dismiss an affirmative defense [CPLR 3211(b)].) Compliments of the Court of Appeals' decision in *Rushaid v. Picket & Cie*, 28 N.Y.3d 316, 45 N.Y.S.3d 276, 68 N.E.3d 1 (2016, Rivera, J.), they apply too when the motion to dismiss is based on paragraph 8, want of personal jurisdiction.

In *Rushaid*, the issue was whether the New York court had personal jurisdiction over the defendants under the transacts-any-business aspect of New York's long arm jurisdiction statute. *See* CPLR 302(a)(1); Siegel New York Practice § 86 (Connors 5th ed.). In evaluating whether the court has personal jurisdiction over a defendant under CPLR 302(a)(1), the court asks whether (1) the defendant conducted sufficient activities to have transacted business in New York, and (2) the plaintiff's claims arise from the transactions. *Rushaid*, 28 N.Y.3d at 323, 45 N.Y.S.3d at 282, 68 N.E.3d at 7. In the course of concluding that the New York courts had personal jurisdiction over the defendants under CPLR 302(a)(1), the Court of Appeals applied to the complaint the pleader-friendly principles associated with other CPLR 3211(a) grounds.

Note that it matters not whether a plaintiff can ultimately prove the factual allegations on which the court is relying to impose personal jurisdiction over a defendant. The inquiry is whether the pleadings set forth facts establishing a basis on which to impose personal jurisdiction over the defendant. *See Licci v. Lebanese Canadian Bank,* 20 N.Y.3d 327, 340, 960 N.Y.S.2d 695, 703, 984 N.E.2d 893, 901 (2012, Read, J.).

C3211:58. Initially Raising Objection in Amended Pleading.

Defendant's Motion for Leave to Amend Answer to Include Statute of Limitations Defense That had Been Waived Under CPLR 3211(e) is Denied Based on Delay in Seeking Leave and Prejudice to Plaintiff.

CPLR 3211(e) directs that most subdivision (a) dismissal grounds must be raised in an answer or made the subject of a timely motion to dismiss. *See* Commentaries C3211:53, 55. This direction is backed by subdivision (e)'s waiver provision: a non-exempted ground is generally waived if neither interposed in the answer nor raised in a CPLR 3211(a) motion to dismiss. We say “generally” because the waiver is presumptive not absolute.

Defenses seemingly waived under subdivision (e) may be interposed by way of an amended answer. Sometimes the amendment can be made as of right under CPLR 3025(a). Owing to the narrow window afforded for an amendment

as of right, the amendment is usually sought by leave of court under CPLR 3025(b). *See generally* Commentary C3211:58. The amendment by leave is to be "freely" given. CPLR 3025(b). Leave to amend an answer to include an otherwise waived subdivision (a) ground should be granted unless the plaintiff would be prejudiced from the delay in seeking leave, or the proposed amendment is palpably insufficient or patently devoid of merit. That said, the court, in exercising its CPLR 3025(b) discretion, should consider how long the defendant was aware of the facts upon which its motion for leave is predicated and whether the defendant has a reasonable excuse for its delay. The liberality with which leave is to be afforded dissipates where the motion for leave is made long after the filing of the trial-ready signifying documents, the note of issue and certificate of readiness. In considering such a belated motion, judicial discretion in allowing amendments should be circumspect.

In a pair of similarly captioned but separate decisions, the Second Department reviews these important amendment-by-leave principles and highlights the danger to the defendant of waiting to seek leave until the action is in the post-note-of-counsel phase. *Civil Service Employees Association v. County of Nassau,* 144 A.D.3d 1075, 43 N.Y.S.3d 390 (2d Dep't 2016); *Civil Service Employees Association v. County of Nassau,* 144 A.D.3d 1077, 44 N.Y.S.3d 50 (2d Dep't 2016). In each of the actions the defendant sought leave to amend its answer (1) approximately six years after service of the initial answer, (2) after discovery had been completed, and (3) after the note of issue and certificate of readiness had been filed. Additionally, in each of the actions the facts underlying the defendant's proposed statute of limitations defense were known to the defendant at the time the initial answer was interposed, and the defendant offered no excuse for its lengthy delay in seeking leave to amend. In light of the circumstances, the plaintiff in each action suffered significant prejudice as a result of the defendant's delay, and the Appellate Division concluded that leave to amend the answers must be denied.

PRACTICE COMMENTARIES

By John R. Higgitt

In General

C3211:1. The Motion to Dismiss, Generally.

CPLR 3211 is the principal dismissal motion in New York civil practice. The motion is available to any party against whom a cause of action has been asserted; it can be used to challenge defenses as well. The availability of the motion to a party in a given situation depends on the party's negotiation of the requirements of CPLR 3211.

Here is a snapshot of CPLR 3211:

- Subdivision (a) lists the grounds on which a motion to dismiss a cause of action may be made.

- Subdivision (b) provides the motion to dismiss a defense.

- Subdivision (c) concerns the evidence permitted on a CPLR 3211 motion, the conversion of a dismissal motion into one for summary judgment, *see* CPLR 3212, and the availability of an immediate trial of issues related to a CPLR 3211 motion.

- Subdivision (d) offers a remedy to a party opposing a motion to dismiss who needs time to gather evidence.

- Subdivision (e), an unwieldy provision, contains significant rules regarding the time for making a CPLR 3211(a) motion and the waiver of certain subdivision (a) grounds, and provides the "single motion rule."

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- Subdivision (f) extends a CPLR 3211 movant's time to serve a responsive pleading.

- Subdivisions (g) and (h) prescribe special standards on CPLR 3211(a)(7) motions relating to actions involving public petition and participation ("SLAPP" suits) and certain actions involving licensed architects, engineers, land surveyors, and landscape architects.

CPLR 3211 is a purely mechanical device, a procedural statute through and through. It authorizes a party to seek dismissal of a cause of action on certain grounds (or a defense on any ground) and sets forth the manner in which the party may do so. CPLR 3211 therefore provides a means by which a party may present its arguments for dismissal to the court. Whether dismissal is warranted in a given situation will depend on law (substantive, procedural or both) that comes from outside CPLR 3211's borders.

An important note: these commentaries focus on contemporary matters, with reference to the history of a provision or the history underlying a particular issue reserved for those instances in which historical context will aid the reader in understanding the law in its current state.

C3211:2. Considerations for the Potential CPLR 3211(a) Movant.

A defendant served with a summons and complaint (or some other form of initiatory papers) can make a pre-answer motion to dismiss the complaint (or parts of it). (As we discuss below, Commentary C3211:4, any party against whom an affirmative claim is asserted can make a CPLR 3211[a] motion.) Alternatively, the defendant can interpose a timely answer that contains CPLR 3211(a) grounds and seek relief on the pleaded grounds at some later time, e.g., on summary judgment. Whether a defendant should make a pre-answer CPLR 3211(a) motion is a case-specific inquiry driven by the contents of the complaint, the information and evidence available to the defendant, the litigation goals of the defendant, and the resources of the defendant. Here are some basic considerations for the defendant pondering whether to make a CPLR 3211(a) motion:

- What potential grounds exist for the motion?

- Will one or more of those grounds terminate the entire action?

- Will some or all of the causes of action be resolved conclusively by the potential grounds for dismissal, i.e., can the potential grounds serve as an absolute bar to a future action, or can the potential objections be remedied and allow for a new action?

- How strong are the arguments in support of the potential grounds?

- What expense would be incurred by the defendant in making the motion and is the defendant willing to incur it?

For an additional discussion of the matters that defense counsel should review when determining whether to make a CPLR 3211(a) motion, *see* Robert L. Haig, Commercial Litigation in New York State Courts, § 8:25 (4th ed.).

C3211:3. General Motion Considerations.

CPLR 3211 is just one motion in the expansive universe of New York civil procedure. CPLR 3211 has of course its own unique requirements, which will be reviewed below. But a CPLR 3211 motion is subject to all of the basic rules of motion practice, and a party's failure to abide by those rules can have significant consequences: for a CPLR 3211 movant, the loss of the right to have the motion potentially determined on its merits (and, therefore, additional litigation that the movant could have potentially avoided); for the party opposing the motion, the loss of the opportunity to put before the court arguments, evidence or both that might persuade the court to deny the motion. We highlight some

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important general rules of motion practice that sometimes cause trouble for the parties on a CPLR 3211 motion. The particulars of these general rules are covered in more detail by Professor Connors in both his Practice Commentaries and book, initially crafted by the late Professor David D. Siegel, New York Practice. Reference to those resources is recommended.

Important General Rules of Motion Practice:

• A notice of motion must "specify the time and place of the hearing of the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefore." CPLR 2214(a); *see* Commentary C2214:3; Siegel, New York Practice § 246 (Connors 5th ed.); *see also* Commentary C3211:6.

• A motion must be served so as to comply with the notice requirements of CPLR 2214(b), and a cross motion must be served so as to comply with the notice requirements of CPLR 2215. *See* Commentaries C2214:6-21, C2215:1A-1C; Siegel, New York Practice §§ 247, 249.

• The parties must furnish the court with all papers necessary to the court's consideration of the motion. CPLR 2214(c); Commentaries C2214:22-23; Siegel, New York Practice § 246. A component of this requirement is that the CPLR 3211 movant submit a copy of the pleading challenged on the motion. *See* Commentary C3211:41.

• In an e-filed action, the parties must provide the court with "working copies" of the documents that were e-filed in connection with the motion (if required to do so by the court). *See* 22 NYCRR 202.5-b(d)(4); 22 NYCRR 202.5-bb(a)(1); Commentary C2214:23 (2014 entry), Siegel, New York Practice § 246.

Subdivision (a)

C3211:4. Parties Who May Use Subdivision (a).

Any party against whom an affirmative claim is interposed may utilize CPLR 3211(a)'s dismissal grounds to seek dismissal of a claim. CPLR 3211(a) is most commonly employed by defendants to seek dismissal of complaints (or parts of them), and the defendant-moving-against-the-complaint is the example we will use in these Commentaries (unless context calls for a different example). But others can invoke subdivision (a)--a plaintiff against whom a counterclaim has been interposed, *see Hyman v. Schwartz*, 127 A.D.3d 1281, 6 N.Y.S.3d 732 (3d Dep't 2015), a defendant against whom a co-defendant has asserted a cross claim, *see Darby Group Companies, Inc. v. Wulforst Acquisition, LLC*, 130 A.D.3d 866, 14 N.Y.S.3d 143 (2d Dep't 2015), and a third-party defendant against whom a third-party complaint has been served, *see Front, Inc. v. Khalil*, 24 N.Y.3d 713, 4 N.Y.S.3d 581, 28 N.E.3d 15 (2015). A non-party cannot move to dismiss under 3211(a) for the simple and obvious reason that no affirmative claim can be asserted against a non-party. *See U.S. Bank, N.A. v. Patterson*, 102 A.D.3d 858, 959 N.Y.S.2d 216 (2d Dep't 2013).

The motion to dismiss a defense is covered by subdivision (b). *See* Commentaries C3211:34-39.

If a defendant (or other party against whom an affirmative claim is interposed) purports to seek dismissal of a complaint (or part of it) under CPLR 3211(b), the court can disregard the mislabeling and treat the motion as made under CPLR 3211(a), provided the specific subdivision (a) grounds upon which the defendant is relying are clear from the moving papers and the plaintiff is not prejudiced by the mislabeling. *See* CPLR 2001; Commentary C3211:6; *see also D'Agostino v. Harding*, 217 A.D.2d 835, 629 N.Y.S.2d 524 (3d Dep't 1995).

C3211:5. Grounds for Dismissal.

A motion to dismiss a complaint (or part of it) under CPLR 3211(a) must be founded on a ground provided by that subdivision. The Legislature provided this dismissal device and that body determines which grounds can serve as

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predicates for dismissal. So, the CPLR 3211(a) movant must find one or more grounds from the list on which to rest its motion. The good news for that party: the list is long and, thanks to the generous interpretation given to it by many courts, the motion to dismiss for failure to state a cause of action, CPLR 3211(a)(7), is a broad ground. *See* Commentary C3211:23; *see also* Commentary C3211:13 (lack of capacity ground includes lack of standing).

CPLR 3211(a) is the central dismissal device, but it is not the only one. A motion to dismiss based on a plaintiff's failure to serve a complaint in an action started with a summons with notice lies under CPLR 3012(b); a motion to dismiss based on a plaintiff's failure to take timely proceedings for the entry of default judgment is in CPLR 3215(c); a motion to dismiss based on a plaintiff's failure to satisfy its obligations in the disclosure process is in CPLR 3126(3); a motion to dismiss based on a plaintiff's failure to comply with a duly served 90-day demand is authorized by CPLR 3216; a motion to dismiss under the doctrine of forum non-conveniens comes from CPLR 327. When a dismissal motion is predicated on CPLR 3211(a) grounds, the motion must comply with the various requirements of CPLR 3211; when the dismissal motion is based on a device other than subdivision (a), the motion is subject to the requirements of the particular statute or court rule giving life to it.

C3211:6. Specifying the Ground of the Motion.

Must the CPLR 3211(a) movant specify the grounds for the motion? CPLR 3211 does not answer that question. But CPLR 2214(a), one of those important motion rules of general applicability, *see* Commentary C3211:3, offers guidance on the point. It requires that a notice of motion specify, among other things, the grounds for the motion. That requirement can be satisfied by stating the grounds in the notice of motion, e.g., lack of personal jurisdiction, statute of limitations, failure to state a cause of action. *See, e.g., Blauman-Spindler v. Blauman*, 68 A.D.3d 1105, 1106, 892 N.Y.S.2d 143, 144 (2d Dep't 2009) ("there is no requirement that a movant identify a specific statute or rule in the notice of motion"). Alternatively, the movant could identify the specific paragraphs of subdivision (a) on which the motion is based, e.g., CPLR 3211(a)(8), 3211(a)(5), 3211(a)(7). *See* Commentary C2214:3.

Note that specification of the grounds should appear in the notice of motion. If they don't, but are clearly laid out elsewhere, such as in an affirmation in support of the motion, the court can overlook the movant's failure to comply with CPLR 2214(a), provided the non-moving party was not prejudiced. *See Matter of LiMandri*, 171 A.D.2d 747, 567 N.Y.S.2d 303 (2d Dep't 1991). So, too, can the court disregard a non-prejudicial mislabeling of a ground--for instance, styling a motion as one to dismiss for failure to state a cause of action when it is in reality one to dismiss under the statute of limitations. *See* Siegel, New York Practice § 258 (Connors 5th ed.). The key is prejudice (or lack thereof): if the party opposing the motion is hindered in the preparation of its opposition papers, the court should not overlook or disregard the movant's failure to comply with CPLR 2214(a). Also, the court should not treat the motion as made under a ground that is neither specified in the notice of motion nor addressed in the movant's papers supporting the motion. *See Matter of Tognino*, 87 A.D.3d 1153, 930 N.Y.S.2d 46 (2d Dep't 2011); *see also Bowen v. Nassau County*, 135 A.D.3d 800, 24 N.Y.S.3d 143 (2d Dep't 2016). That a court can overlook a movant's failure to comply with CPLR 2214(a) does not mean that it will; it is a discretionary call for the judge. *See, e.g., Pace v. Perk*, 81 A.D.2d 444, 440 N.Y.S.2d 710 (2d Dep't 1981).

C3211:7. Subdivision (a) Grounds Available by Motion or Answer.

As noted above, *see* Commentary C3211:2, a party can (but is not required to) raise subdivision (a) grounds in a pre-answer CPLR 3211 motion. The motion is optional, with the other option being to raise the grounds in an answer and seek relief on them later. *See* CPLR 3211(e). As our overview of each of the paragraphs of subdivision (a) will disclose, most grounds must be raised in a pre-answer CPLR 3211 motion or an answer, some grounds can be raised at any time, and a couple grounds must be raised in a pre-answer motion or taken by answer and moved on with dispatch. While a defendant is free to raise some by motion and others by answer, a defendant is permitted only one CPLR 3211 motion, *see* Commentary C3211:51, and waiver provisions are associated with most of the subdivision (a)

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grounds. *See* Commentaries C3211:53-55. Discussions of the "single motion rule" (CPLR 3211[e]) and the nuances of the various waiver provisions are deferred to later in the Commentaries.

C3211:8. Sua Sponte Dismissals.

CPLR 3211(a) provides a lengthy (but not quite exhaustive) list of dismissal grounds. *See* Commentaries C3211:5. Most of these grounds require or at least contemplate a motion by a party invoking one or more of them. Does the law permit a court to dismiss a complaint sua sponte; that is, on its own accord without the prompting of a party? "Yes, but rarely." That is the answer to glean from the recent case law on the subject, which has been receiving some attention in the realm of residential mortgage foreclosure litigation.

In that unique world, the question often arises whether a plaintiff has standing to maintain an action. *See* Commentary C3211:13. This is an outgrowth of the prevalence of the assignment (or other manner of transfer) of notes and mortgages from the original lenders to other banks, financial institutions and financial service companies. Such assignments and transfers were fueled by the rise of the secondary mortgage market. Because of both the volume of these transactions and that a note and the mortgage related to it may be held by separate entities, nailing down the entity that has standing to commence a particular residential mortgage foreclosure action can pose a challenge.

Some trial courts, frustrated by failures of residential mortgage foreclosure plaintiffs to demonstrate standing, have taken to dismissing complaints sua sponte. The Appellate Division has not indulged these dismissals, reversing them and stressing that a court's power to dismiss a complaint sua sponte should be exercised "sparingly and only when extraordinary circumstances exist to warrant dismissal." *E.g., U.S. Bank Nat. Ass'n v. Ahmed*, 137 A.D.3d 1106, 29 N.Y.S.3d 33 (2d Dep't 2016); *U.S. Bank Nat. Ass'n v. Flowers*, 128 A.D.3d 951, 11 N.Y.S.3d 186 (2d Dep't 2015); *Citimortgage, Inc. v. Chow Ming Tung*, 126 A.D.3d 841, 7 N.Y.S.3d 147 (2d Dep't 2015); *see Deutsche Bank Nat. Trust Co. v. Meah*, 120 A.D.3d 465, 991 N.Y.S.2d 92 (2d Dep't 2014). In New York Practice, standing generally does not relate to a court's subject matter jurisdiction over an action; it is an affirmative defense that must be raised by a defendant or it is waived. *See Wells Fargo Bank Minnesota, N.A. v. Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.2d 247 (2d Dep't 2007); *see also* Commentary C3211:13. Because standing is an affirmative defense that a defendant can waive, a plaintiff's failure to demonstrate its standing to maintain a residential mortgage foreclosure action does not present extraordinary circumstances warranting a sua sponte dismissal.

With all of the dismissal grounds authorized by CPLR 3211(a) and elsewhere, why would a court get involved in the sua-sponte-dismissal business? Maybe the court perceives a conclusive affirmative defense to an action but the defendant failed to raise or waived it. Maybe the court believes that a plaintiff is wasting the court's time with a baseless suit. *See Hurd v. Hurd*, 66 A.D.3d 1492, 885 N.Y.S.2d 655 (4th Dep't 2009); *Myung Chun v. North American Mortgage Co.*, 285 A.D.2d 42, 729 N.Y.S.2d 716 (1st Dep't 2001). Or maybe the court is offended at the conduct of a plaintiff. In light of the case law, it is unlikely that either of the first two scenarios provide sufficient cause for a court to dismiss sua sponte. The third scenario, however, might. The Court in *Chun* suggested that "egregious" conduct by a plaintiff that "flout[ed] the integrity of th[e Court]" could allow for a sua sponte dismissal. *Cf. CDR Creances, S.A.S. v. Cohen*, 23 N.Y.3d 307, 991 N.Y.S.2d 519, 15 N.E.3d 274 (2014) (finding that court has "inherent power" to address conduct meant to undermine truth-seeking function of judicial system and place in question integrity of courts and justice system [i.e., "fraud on the court"]); Commentary C3126:12, 2014 Supplementary Practice Commentaries; *Wells Fargo Bank, N.A. v. Pabon*, 138 A.D.3d 1217, 31 N.Y.S.3d 221 (3d Dep't 2016) (sua sponte dismissal inappropriate; record neither supported Supreme Court's finding that affidavit on which plaintiff relied was perjured nor showed fraud by plaintiff).

The Second Department has suggested that "a pattern of willful noncompliance with court-ordered deadlines" may also provide for extraordinary circumstances justifying such a dismissal. *U.S. Bank Nat. Ass'n v. Polanco*, 126 A.D.3d 883, 7 N.Y.S.3d 156 (2d Dep't 2015); *see Williams v. North Shore LIJ Health System*, 119 A.D.3d 935, 990 N.Y.S.2d 260 (2d Dep't 2014) (affirming Supreme Court's order dismissing complaint sua sponte based on plaintiff's failure

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to comply with multiple directives to file a bill of particulars setting forth alleged negligence of each of over 100 defendants in medical malpractice action); *cf. Citimortgage, Inc. v. Petragnani*, 137 A.D.3d 1688, 27 N.Y.S.3d 780 (4th Dep't 2016) (missing single court-ordered deadline by one week did not warrant sua sponte dismissal).

But given the paucity of examples of sua sponte dismissals that have been upheld, it is hard for a judge to dismiss a complaint sua sponte with much confidence. Should a statute or other authority expressly authorize a court to dismiss sua sponte, the court can have at it, but instances in which a court is so authorized are few. *See* 22 NYCRR 202.27 (authorizing a trial court to dismiss based on a plaintiff's failure to appear for or be ready to proceed at any duly scheduled court appearance); *see also Grant v. Rattoballi*, 57 A.D.3d 272, 869 N.Y.S.2d 53 (1st Dep't 2008); *see generally Tirado v. Miller*, 75 A.D.3d 153, 160, 901 N.Y.S.2d 358, 363-364 (2d Dep't 2010) ("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").

Putting aside the circumstances under which a court might be able to dismiss a complaint in the absence of a motion by a party, due process concerns abound when a court acts sua sponte, particularly when it acts to terminate a proceeding. In *Chun v. North American Mortgage Co.*, *supra*, the Court highlighted the due process territory on which a sua sponte dismissal intrudes, observing that the plaintiff is deprived of the venerable due process duo of notice and an opportunity to be heard. Thus, a court considering, sua sponte, the ultimate relief of dismissal should gauge whether the plaintiff had any prior notice that dismissal could occur, and whether the plaintiff might have anything to offer by way of legal argument or evidence that could persuade the court not to dismiss the action. On the notice score, a prior court order, correspondence from the court, or on-the-record statements made by the court during an appearance might suffice. If the court finds that the plaintiff lacked notice, that the plaintiff could present arguments or factual submissions that may persuade the court not to dismiss the action, or both, the court should consider notifying the parties that it is contemplating dismissal and inviting submissions by the parties. *See Bank of New York v. Castillo*, 120 A.D.3d 598, 991 N.Y.S.2d 446 (2d Dep't 2014) (when a court exercises the power to grant relief sua sponte, it must afford the parties a reasonable opportunity to be heard); *see also U.S. Bank, N.A. v. McCrory*, 137 A.D.3d 1517, 29 N.Y.S.3d 594 (3d Dep't 2016); *cf. Cadichon v. Facelle*, 18 N.Y.3d 230, 938 N.Y.S.2d 232, 961 N.E.2d 623 (2011) (discussing the process a court should afford the parties before dismissing a complaint under CPLR 3216 on the court's own motion).

C3211:9. CPLR 3211(a) Motion Contrasted With Summary Judgment.

Usually, a CPLR 3211(a) motion must be made before a defendant's answering time expires. It is therefore thought of as the pre-answer dismissal device. A summary judgment motion cannot be made until issue has been joined; that is to say until a responsive pleading, such as an answer, has been served. Thus, summary judgment is the post-answer dismissal device.

A motion to dismiss under CPLR 3211(a) must be predicated on one or more grounds enumerated in that subdivision, *see* Commentary C3211:5, while summary judgment may be sought on any basis (including a CPLR 3211[a] ground) that resolves part or all of the case. *See* Siegel, New York Practice § 278 (Connors 5th ed.).

An order granting a CPLR 3211(a) motion is not a disposition on the merits of the action (unless the motion was properly converted to a summary judgment motion). Rather, it is res judicata of whatever was determined. Siegel, New York Practice § 276. The res judicata effect of a granted CPLR 3211(a) motion is explored below. *See* Commentaries C3211:62-65. Conversely, an order granting summary judgment is usually entitled to full res judicata treatment. *See* Commentary C3212:21; Siegel, New York Practice § 287.

The phenomenon known as "searching the record," the power of a court to review the motion record before it and, if warranted, grant judgment to a non-moving party even in the absence of a request to do so, is available to a court adjudicating a summary judgment motion. *See* CPLR 3212(b); Commentary C3212:23. "Searching the record" is not

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permissible on a CPLR 3211(a) motion. *Torrance Construction, Inc. v. Jaques*, 127 A.D.3d 1261, 8 N.Y.S.3d 441 (3d Dep't 2015); *cf* Commentary C3211:42.

Paragraph 1

C3211:10. Defense Based on "Documentary Evidence."

CPLR 3211(a)(1) allows a defendant to seek dismissal of a complaint (or part of it) based on a defense "founded upon documentary evidence." The ground did not exist prior to the enactment of the CPLR. It was included as a backup provision, providing a dismissal mechanism in situations where a defendant has a document that defeats a cause of action but the defendant is unable to point to one of the more specific grounds listed in subdivision (a). 221 Siegel's Practice Review 2, *Second Department Shows Futility of Relying Exclusively on "Documentary Evidence" Standard of CPLR 3211(a)(1) When What Party Really Wants is Summary Judgment* (May 2010); *see Fontanetta v. John Doe 1*, 73 A.D.3d 78, 84, 898 N.Y.S.2d 569, 574 (2d Dep't 2010) ("According to th[e] [1957 First Preliminary Report of the Advisory Committee on Practice and Procedure], the purpose of CPLR 3211(a)(5) was to cover the most common affirmative defenses founded upon documentary evidence, specifically, estoppel, arbitration and award, and discharge in bankruptcy, whereas section 3211(a)(1) was enacted to 'cover all others that may arise as for example, a written modification or any defense based on the terms of a written contract' ") (citing 1957 NY Legis. Doc. no. 6[b] at 85).

A motion pursuant to CPLR 3211(a)(1) must be made within the defendant's time to respond to the complaint or raised in an answer, otherwise it is waived.

CPLR 3211 does not define the phrase "documentary evidence," but its ordinary meaning suggests that anything reduced to paper could qualify. "Documentary evidence" actually encompasses precious few documents, making CPLR 3211(a)(1) a decidedly narrow ground on which to seek dismissal. *See* Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32 (Nov./Dec. 2011). A paper qualifies as "documentary evidence" if--and only if--it satisfies the following criteria: (1) it is unambiguous; (2) it is of undeniable authenticity; and (3) its contents are essentially undeniable. *See Fontanetta v. John Doe 1*, *supra*. Most motion submissions cannot satisfy this standard. *See*, *e.g., Eisner v. Cusumano Construction, Inc.*, 132 A.D.3d 940, 18 N.Y.S.3d 683 (2d Dep't 2015) (affidavits and text messages); *JP Morgan Chase Bank, N.A. v. Balliraj*, 113 A.D.3d 821, 979 N.Y.S.2d 533 (2d Dep't 2014) (deposition testimony); *Mason v. First Central National Life Ins. Co. of N.Y.*, 86 A.D.3d 854, 927 N.Y.S.2d 694 (3d Dep't 2011) (medical records); *Integrated Construction Services, Inc., v. Scottsdale Ins. Co.*, 82 A.D.3d 1160, 920 N.Y.S.2d 166 (2d Dep't 2011) (letters). Notably, an affidavit cannot constitute "documentary evidence" because its contents can be controverted by other evidence--such as another affidavit. *See, e.g., J.A. Lee Electric, Inc. v. City of New York*, 119 A.D.3d 652, 990 N.Y.S.2d 223 (2d Dep't 2014); *Flowers v. 73rd Townhouse, LLC*, 99 A.D.3d 431, 951 N.Y.S.2d 393 (1st Dep't 2012); *Lopes v. Bain*, 82 A.D.3d 1553, 920 N.Y.S.2d 792 (3d Dep't 2011); *cf. Reiss v. Deutsche Bank National Trust Co.*, ___ Misc. 3d ___, ___ N.Y.S.3d ___, 2016 WL 4431025 (Sup. Ct., Westchester County 2016) (affidavit prepared by plaintiffs in connection with their application for loan modification could constitute "documentary evidence"; affidavit reflected out-of-court transaction). (However, an affidavit may have an important role to play on a CPLR 3211[a][1] motion, see below).

What type of evidence can attain the rank of "documentary"? Judicial records and documents reflecting out-of-court transactions, e.g., notes, mortgages, deeds and contracts, may. *Fontanetta v. John Doe 1*, *supra*; *see* Siegel, New York Practice § 259 (Connors 5th ed.); *see also Sunset Café, Inc. v. Mett's Surf & Sports Corp.*, 103 A.D.3d 707, 959 N.Y.S.2d 700 (2d Dep't 2013) (lease); *Nisari v. Ramjohn*, 85 A.D.3d 987, 927 N.Y.S.2d 358 (2d Dep't 2011) (insurance policy); *Cochard-Robinson v. Concepcion*, 60 A.D.3d 800, 875 N.Y.S.2d 224 (2d Dep't 2009) (contract); *Crepin v. Fogarty*, 59 A.D.3d 837, 874 N.Y.S.2d 278 (3d Dep't 2009) (deed); *150 Broadway N.Y. Assoc, L.P. v. Bodner*, 14 A.D.3d 1, 784 N.Y.S.2d 63 (1st Dep't 2004) (contract). So too can e-mails, maybe. *Compare Mendoza v. Akerman Senterfitt, LLP*, 128 A.D.3d 480, 10 N.Y.S.3d 18 (1st Dep't 2015); *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d

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47, 8 N.Y.S.3d 1 (1st Dep't 2015); *Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 A.D.3d 436, 992 N.Y.S.2d 7 (1st Dep't 2014); and *Amsterdam Hospitality Group, LLC* v. *Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 (1st Dep't 2015) *with JBGR, LLC v. Chicago Title Ins. Co.*, 128 A.D.3d 900, 11 N.Y.S.3d 83 (2d Dep't 2015); *25-01 Newkirk Ave., LLC v. Everest National Insurance Co.*, 127 A.D.3d 850, 7 N.Y.S.3d 325 (2d Dep't 2015); *Zellner v. Odyl, LLC*, 117 A.D.3d 1040, 986 N.Y.S.2d 592 (2d Dep't 2014).

If the evidence on which the defendant relies is not "documentary" the motion must be denied. *Fontanetta v. John Doe 1*, *supra*.

Above, we went on record that an affidavit prepared in connection with litigation cannot constitute "documentary evidence." Does that mean that an affidavit can play no role on a CPLR 3211(a)(1) motion? We think there is room, albeit limited, for the affidavit. One of the criteria a paper must satisfy before it gets stamped "documentary" is that it be undeniably authentic. Therefore, unless the plaintiff stipulates to or otherwise acknowledges the authenticity of a document, a defendant proffering it on a CPLR 3211(a)(1) motion should be able to tender evidence showing the document to be authentic. An affidavit (or, where appropriate, an affirmation [*see* CPLR 2106]) should be permissible for the important (but limited) purpose of authenticating the "documentary evidence." *Hefter v. Elderserve Health, Inc.*, 134 A.D.3d 673, 22 N.Y.S.3d 454 (2d Dep't 2015); *Muhlhahn v. Goldman*, 93 A.D.3d 418, 939 N.Y.S.2d 420 (1st Dep't 2012); *see VIT Acupuncture P.C. v. State Farm Automobile Ins. Co.*, 28 Misc.3d 1230(A), 958 N.Y.S.2d 64 (table), 2010 WL 3463735 (Civil Court of City New York, Kings County 2010). The affidavit would not serve as the "documentary evidence" on which the CPLR 3211(a)(1) motion is premised, but rather would demonstrate that the purported "documentary evidence" qualifies as such.

Assuming the movant has adduced "documentary evidence" in support of its CPLR 3211(a)(1) motion, what must that evidence show to warrant dismissal? Relief is appropriate where the evidence conclusively refutes the plaintiff's allegations or conclusively establishes a defense to the action. *See Spoleta Construction, LLC v. Aspen Ins. UK Ltd.*, 27 N.Y.3d 933, 30 N.Y.S.3d 598, 50 N.E.3d 222 (2016); *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002). In gauging whether the defendant's evidence accomplishes that feat, the familiar pro-pleader rules of decision must be applied: the complaint is to be afforded a liberal construction, the facts as alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974, 638 N.E.2d 511, 513 (1994).

In opposing a CPLR 3211(a)(1) motion, a plaintiff is free to submit evidence demonstrating that the defendant's evidence does not conclusively resolve the action (or challenged causes of action). Moreover, a plaintiff can invoke CPLR 3211(d) to forestall a decision on the merits of the motion if the plaintiff needs time to gather evidentiary materials necessary to frame its opposition. Under subdivision (d), a court can deny a subdivision (a) motion or adjourn it to allow the plaintiff an opportunity to procure affidavits or pursue disclosure. *See* Commentaries C3211:46-47.

A couple of miscellaneous matters. A valid forum selection clause dictating that an action be brought in a forum other than New York does not deprive a New York court of subject matter jurisdiction over the matter. *See* CPLR 3211(a)(2). Rather, a defendant to a New York action who believes that a forum selection clause requires the dispute to be litigated in the courts of another jurisdiction should raise the issue by motion under CPLR 3211(a)(1). Why is this the proper procedural path? Because a contractual forum selection clause may constitute "documentary evidence." *Lischinskaya v. Carnival Corp.*, 56 A.D.3d 116, 865 N.Y.S.2d 334 (2d Dep't 2008); *see Lowenbraun v. McKeon*, 98 A.D.3d 655, 950 N.Y.S.2d 381 (2d Dep't 2012). An agreement to arbitrate a dispute is not a defense to an action brought on that dispute; the proper remedy for the party seeking arbitration is to move to compel it. *Allied Building Inspectors International Union of Operating Engineers, Local Union No. 211, ALF-CIO v. Office of Labor Relations of the City of New York*, 45 N.Y.2d 735, 738, 408 N.Y.S.2d 476, 478-479, 380 N.E.2d 303, 305 (1978). Thus, an agreement to arbitrate cannot be the basis for a motion to dismiss under CPLR 3211(a)(1). *Curran v. Estate of Curran*, 87 A.D.3d 607, 928 N.Y.S.2d 463 (2d Dep't 2011).

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As to the interplay between CPLR 3211(a)(1) and (a)(7) (failure to state a cause of action), *see* Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32, 34-35 (Nov./Dec. 2011). In closing, a thought for the careful practioner. Only an attorney both familiar with the limited utility of CPLR 3211(a)(1) and armed with the right evidence should rely solely on the "documentary" evidence ground. The wise move for the attorney who wants to invoke paragraph 1 is to raise paragraph 7 too.

Paragraph 2

C3211:11. Lack of Subject Matter Jurisdiction.

Subject matter jurisdiction is a question of competence: does a court have the competence to entertain a given action? *Lacks v. Lacks*, 41 N.Y.2d 71, 390 N.Y.S.2d 875, 359 N.E.2d 384 (1976). That competence comes from the New York State Constitution and statutes; the constitution, a statute or both can provide a court with the authorization to hear and decide a particular type of controversy. A court may have broad subject matter jurisdiction--the New York State Supreme Court (*Thrasher v. U.S. Liability Ins. Co.*, 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503 [1967])--or very narrow jurisdiction--a local "Justice Court" (*see* Siegel, New York Practice § 22 [Connors 5th ed.]). A court lacks subject matter jurisdiction over an action if "the matter before the court [i]s not the kind of matter on which the court ha[s the] power to rule." *Manhattan Telecommunications Corp. v. H & A Locksmith, Inc.*, 21 N.Y.3d 200, 203, 969 N.Y.S.2d 424, 426, 991 N.E.2d 198, 200 (2013).

CPLR 3211(a)(2) provides the means by which a party can seek dismissal of an action for want of subject matter jurisdiction. So fundamental is this particular objection that it can be raised any time, CPLR 3211(e); Commentary C3211:49, and cannot be waived. *Lacks v. Lacks*, 41 N.Y.2d at 75, 390 N.Y.S.2d at 878, 359 N.E.2d at 387. If the court concludes that it does not have subject matter jurisdiction over a case, it can dismiss the action on its own initiative. *Robinson v. Oceanic Steam Navigation Co.*, 112 N.Y. 315, 19 N.E. 625 (1889).

Our State Supreme Court has almost limitless subject matter jurisdiction, the significant limitations being where the federal courts have exclusive jurisdiction over a matter and where the Court of Claims has exclusive jurisdiction. Siegel, New York Practice § 12. There are some other limitations that occasionally cause the issue of subject matter jurisdiction to arise. *See Hafif v. Rabbinical Council of Syrian & Near Eastern Jewish Communities in America*, 140 A.D.3d 1017, 34 N.Y.S.3d 160 (2d Dep't 2016) (courts lack subject matter jurisdiction over certain religious disputes); *Wells Fargo Bank, N.A. v. Chukchansi Economic Development Auth.*, 118 A.D.3d 550, 988 N.Y.S.2d 160 (1st Dep't 2014) (courts lack subject matter jurisdiction over the internal affairs of Indian tribes); *Hunt Construction Group, Inc. v. Oneida Indian Nation*, 53 A.D.3d 1048, 862 N.Y.S.2d 423 (4th Dep't 2008) (courts generally lack subject matter jurisdiction over damages suits against Indian tribes). Therefore, issues relating to subject matter jurisdiction are most likely to arise in New York's lower trial courts, e.g., New York City Civil Court, city courts outside of New York City, County Courts, etc. *See* Higgitt, *A Nullity or Not?--The Status of a Default Judgment Entered Absent Compliance with CPLR 3215(f)*, 73 Alb. L. Rev. 807, 824, n.75 (2010).

A plaintiff's lack of "standing" does not affect a New York State court's subject matter jurisdiction over the action; the issue of standing is treated on par with the issue of capacity. *See* Commentary C3211:13.

An enforceable forum selection clause does not deprive a New York Court of subject matter jurisdiction over an action brought here in contravention of the clause. *Lischinskaya v. Carnival Corp.*, 56 A.D.3d 116, 865 N.Y.S.2d 334 (2d Dep't 2008). A defendant looking to enforce a forum selection clause should employ CPLR 3211(a)(1). *See* Commentary C3211:10.

Paragraph 3

C3211:12. Plaintiff's Lack of Capacity.

"Capacity" concerns a plaintiff's power to appear before and bring an action in court. *Community Board 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644, 647, 639 N.E.2d 1, 4 (1994). "Legal capacity to sue, or lack thereof, often depends purely on the [plaintiff's] status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or ... a business corporation." *Security Pacific Nat. Bank v. Evans*, 31 A.D.3d 278, 279, 820 N.Y.S.2d 2, 3 (1st Dep't 2006). The inquiry here is not whether the plaintiff suffered an injury or was otherwise harmed by the defendant's alleged conduct or inaction--that gets into a plaintiff's "standing," which is a separate question (see below)--but rather whether the law recognizes the plaintiff as the proper bearer of the lawsuit.

Some situations where the capacity question may rear its head: where the plaintiff is an artificial entity (such as a corporation or an unincorporated association), *Community Board 7 of Borough of Manhattan v. Schaffer, supra*; where the plaintiff is a governmental entity created by a legislative enactment, *id.*; *see Excess Line Ass'n of New York (ELANY) v. Waldorf & Associates*, 130 A.D.3d 563, 13 N.Y.S.3d 464 (2d Dep't 2015); where the plaintiff is a municipality seeking to contest a State decision that affects the municipality in its governmental capacity or as a representative of its inhabitants, *Matter of Town of Verona v. Cuomo*, 136 A.D.3d 36, 22 N.Y.S.3d 241 (3d Dep't 2015); where the plaintiff filed for bankruptcy but failed to list its cause of action as an asset, *Whelan v. Longo*, 23 A.D.3d 459, 808 N.Y.S.2d 95 (2d Dep't 2005); *George Strokes Elec. and Plumbing Inc. v. Dye*, 240 A.D.2d 919, 659 N.Y.S.2d 129 (3d Dep't 1997); *see Collins v. Suraci*, 110 A.D.3d 1214, 973 N.Y.S.2d 828 (3d Dep't 2013); and where the plaintiff is an infant purporting to sue on his or her own behalf. Siegel, New York Practice § 261 (Connors 5th ed.).

Plaintiff's lack of capacity may be raised in a pre-answer motion or asserted in an answer; if neither step is taken, the defense is waived. CPLR 3211(e).

Capacity to sue--the right to come into court--and possession of a cause of action--the right to relief--are distinct concepts. *Rainbow Hospitality Management, Inc. v. Mesch Engineering, P.C.*, 270 A.D.2d 906, 907, 705 N.Y.S.2d 765, 766 (4th Dep't 2000); *see Edwards v. Siegel, Kelleher & Khan*, 26 A.D.3d 789, 811 N.Y.S.2d 828 (4th Dep't 2006). But the line between the two can sometimes be blurry. *See Community Board 7* or *Borough of Manhattan v. Schaffer*, 84 N.Y.2d at 155, 615 N.Y.S.2d at 647, 639 N.E.2d at 4 (1994); Siegel, New York Practice § 261. In *Rainbow Hospitality Management*, plaintiff sued defendants for damages. Defendants moved, during trial (*see* CPLR 4401), to dismiss the complaint, arguing that plaintiff had no right to relief because plaintiff did not exist when the conduct giving rise to the action occurred and sustained no injury as a result of that conduct. The Fourth Department rejected plaintiff's assertion that defendants' argument was premised on lack of capacity and therefore waived because defendants did not raise that ground in a pre-answer motion or in their answers, concluding instead that defendants' argument touched on the legal sufficiency of the complaint. *Rainbow Hospitality Management, Inc. v. Mesch Engineering, P.C.*, 270 A.D.2d at 907, 705 N.Y.S.2d at 766.

Why is the distinction between the two grounds so important? Because, as *Rainbow Hospitality Management* illustrates, an objection under CPLR 3211(a)(7) (failure to state a cause of action) can be raised any time in the litigation, while an objection under CPLR 3211(a)(3) (lack of capacity) must be raised in a pre-answer motion or in an answer otherwise it is waived. CPLR 3211(e). Fortunately, the practitioner faced with one of these close calls need not spend much time analyzing which paragraph actually applies; both grounds can be raised in the pre-answer motion or the answer.

Note that paragraph 3 deals only with the lack of capacity of the plaintiff. If the defendant's capacity is called into question because the defendant is an infant or operating under a disability, paragraph 5 is the ground for the motion. *See* Commentary C3211:18.

C3211:13. Lack of "Standing" as Going to "Capacity."

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As discussed above, CPLR 3211(a)(3) provides that a defendant can seek dismissal of the complaint on the ground that the plaintiff lacks the "capacity," i.e., the power, to appear before the court. That provision does not expressly allow for dismissal based on a plaintiff's lack of "standing." A plaintiff lacks standing if it does not have a sufficiently cognizable stake in the outcome of the litigation. *Community Board 7 of the Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 615 N.Y.S.2d 644, 639 N.E.2d 1 (1996). While capacity and standing are conceptually different, *Silver v. Pataki*, 96 N.Y.2d 532, 730 N.Y.S.2d 482, 755 N.E.2d 842 (2001), they are treated as synonyms for the purposes of applying paragraph 3. *Wells Fargo Bank Minnesota, N.A. v. Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.2d 247 (2d Dep't 2007). Therefore, a defendant can challenge a plaintiff's standing by moving to dismiss pre-answer or raising lack of standing in the answer. *Id.* Dismissal under CPLR 3211(a)(2) for want of subject matter jurisdiction does not lie for lack of standing. *See id.*; Commentary 3211:11.

The practice in federal court is different. There, standing relates to a court's subject matter jurisdiction. *See* Siegel, New York Practice § 611 (Connors 5th ed.).

If a plaintiff has standing at the time the action was commenced but transfers its interest in the subject matter of the suit to another while the action is pending, the plaintiff does not necessarily lose standing. CPLR 1018 provides that, "[u]pon the transfer of an interest, the action may be continued by or against the original parties unless the court directs the persons [or entities] to whom the interest is transferred to be substituted or joined in the action." *See Wells Fargo Bank, N.A. v. Hudson*, 98 A.D.3d 576, 949 N.Y.S.2d 703 (2d Dep't 2012).

Historically, standing has not been a source of significant litigation in New York State courts. But the proliferation of contested residential mortgage foreclosure actions has created a wellspring of appellate case law addressing standing. Why is standing such a hot topic in this area? The volume of transfers of notes and mortgages, the complexity of many mortgage-related transactions, and the sheer number of foreclosure actions, among other factors, have created an environment conducive to questions on standing. Some clarity on the standing issue in the mortgage foreclosure realm was provided by the Court of Appeals in *Aurora Loan Services, LLC v. Taylor*, 25 N.Y.3d 355, 12 N.Y.S.3d 612, 34 N.E.3d 363 (2015) (holding that the note, not the mortgage, is the instrument that conveys standing to a plaintiff).

Paragraph 4

C3211:14. "Other Action Pending," Generally.

CPLR 3211(a)(4) authorizes dismissal of an action on the ground that there is another one pending involving the same subject matter. Paragraph 4's purpose is to prevent the consequences of duplicative litigation (e.g., conflicting judgments, the parties bearing the expense of litigating multiple, similar lawsuits). Note that paragraph 4 authorizes but does not require dismissal of an action that is similar to another; the provision cautions that a "court need not dismiss upon th[e] ground [that a similar action is pending] but may make such order as justice requires." Thus, a court confronted with a motion to dismiss the action before it in favor of another pending action has discretion to fashion relief appropriate under the circumstances. *See* Commentary 3211:17.

Paragraph 4 is available where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." If the other action is pending in a foreign country, the defendant's remedy would be to seek a stay of the New York action under CPLR 2201, *see* Commentary 2201:10, or move to dismiss the New York action under the doctrine of forum non conveniens. *See* CPLR 327.

A summons and complaint (or an equivalent initiatory paper, such as a petition) must have been served in the other action, otherwise it is not "another action" within the meaning of CPLR 3211(a)(4). *Wharton v. Wharton*, 244 A.D.2d 404, 664 N.Y.S.2d 73 (2d Dep't 1997); *see John J. Campagna, Inc. v. Dune Alpin Farm Assoc.*, 81 A.D.2d 633, 438 N.Y.S.2d 132 (2d Dep't 1981). Where, for example, the prior action was commenced using a summons with notice, CPLR 305(b), and the complaint has not been served, a paragraph 4 motion does not lie. *Wharton v. Wharton, supra*.

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And dismissal under paragraph 4 generally is not appropriate unless the complaint has been served in the present action. Siegel, New York Practice § 262 (Connors 5th ed.). Why is service of pleadings in both actions so important? Because it is the pleadings that allow the court to gauge whether the actions involve the same parties and the same cause of action. *Id.*

If there is "another action" pending in a New York, federal or sister state court, the next question becomes whether that action and the present action (i.e. the New York action in which the paragraph 4 motion was made) involve the same parties and the same cause of action. *See* Commentary 3211:15. If the other action and the present action do involve the same parties and the same cause of action, an important issue is which action was commenced first. *See* Commentary 3211:16. There is a solid, but rebuttable, presumption that the action that was commenced first will be the one that will be allowed to proceed. Assuming the other action and the present action are sufficiently similar, the court has a range of options. *See* Commentary 3211:17.

CPLR 3211(a)(4) must be raised in a pre-answer motion or asserted in the answer. CPLR 3211(e). The court should not dismiss an action sua sponte under paragraph 4. *Frederick v. Meighan*, 75 A.D.3d 528, 905 N.Y.S.2d 635 (2d Dep't 2010).

There is no federal statutory analog to CPLR 3211(a)(4). Where dismissal is sought in federal court of a federal action in deference to an action pending in state court, guidance must be sought from the case law. *See Bank of America v. Sharim, Inc.*, 2010 WL 5072118 (S.D.N.Y. 2010); *see* also C. Wright, A. Miller & E. Cooper, et al., 17A Fed. Prac. & Proc. Juris. § 4247 (3d ed.).

3211:15. Same Parties, Same Cause of Action.

As mentioned above, paragraph 4 seeks to prevent unnecessary duplicative litigation. If the other action and the present one are not sufficiently similar, there is no need to interfere with either one. Therefore, the court must determine whether the other action and the present one involve the same parties for the same cause of action.

Initially, it is important to stress that the other action and the present one need not be identical; substantial similarity will do. The inquiry is whether the following elements of the actions are substantially similar: (1) the parties; (2) the causes of action; and (3) the relief.

With respect to the parties, there must be substantial identity. *Scottsdale Ins. Co. v. Indemnity Ins. Corp. RRG*, 110 A.D.3d 783, 974 N.Y.S.2d 476 (2d Dep't 2013); *White Light Productions, Inc. v. On the Scenes Productions, Inc.*, 231 A.D.2d 90, 660 N.Y.S.2d 568 (1st Dep't 1997); *see Credit-Based Asset Servicing and Securitization, LLC v. Grimmer*, 299 A.D.2d 887, 750 N.Y.S.2d 673 (4th Dep't 2002); *K.S. Finance Corp. v. Grand Palace Hotel at the Park*, 272 A.D.2d 204, 709 N.Y.S.2d 512 (1st Dep't 2000). The presence of additional parties in one of the actions does not preclude a finding that the other action and the present one are substantially similar. *White Lights Productions, Inc. v. On the Scene Productions, Inc., supra*.

Despite the absence of one common defendant in the actions, there still may be substantial identity of the parties. If, for instance, the plaintiff, in separate actions, seeks the same damages for the same alleged injuries relating to the same wrongs from close corporate affiliates. *Syncora Guarantee Inc. v. J.P. Morgan Securities, LLC*, 110 A.D.3d 87, 970 N.Y.S.2d 526 (1st Dep't 2013).

The causes of action in the other action and the causes of action in the present one are substantially similar if they arise out of the same wrong or series of wrongs. *Rinzler v. Rinzler*, 97 A.D.3d 215, 947 N.Y.S.2d 844 (3d Dep't 2012); *White Light Productions, Inc., v. On the Scene Productions, Inc., supra*. This is the critical element. *Syncora Guarantee Inc. v. J.P. Morgan Securities, LLC, supra; Scottsdale Insurance Co. v. Indemnity Insurance Corp. RRG, supra*. When reviewing the causes of action in a case, it is important to account for any counterclaims, cross claims, etc., that may

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have been interposed, as they count for the purpose of determining whether the causes of action in the two actions are substantially similar. *See Packes v. Cendent Mortgage Corp.*, 19 A.D.3d 386, 796 N.Y.S.2d 135 (2d Dep't 2005).

The relief sought in the other action and the present one must be the same or substantially the same. *White Light Productions, Inc. v. On the Scene Productions, Inc., supra*. That is not the case if the relief sought in one action is antagonistic or inconsistent with that sought in the other, or the purposes of the actions are entirely different. *Id.*, *see Marcus Dairy, Inc. v. Jacene Realty Corp.*, 193 A.D.2d 653, 597 N.Y.S.2d 465 (2d Dep't 1993).

If the parties, the causes of action, and the relief sought in the other action are substantially similar to those elements of the present action, it is on to consider which action was commenced first.

C3211:16. First-In-Time Rule.

Where there are two pending actions involving the same parties and the same causes of action, the court in which the first action was commenced is the one that ought to adjudicate the dispute. *City Trade & Industries, Ltd. v. New Central Jute Mills Co.*, 25 N.Y.2d 49, 302 N.Y.S.2d 557, 250 N.E.2d 52 (1969). This is the "first-in-time" rule.

In most jurisdictions, an action is commenced when the initiatory papers are filed with the appropriate clerk. Most courts in New York have such a commencement-by-filing protocol, *see* Commentary C304:1, and the federal courts look to the filing dates in determining which action came first. *See White Light Productions, Inc. v. On the Scene Productions, Inc.*, 231 A.D.2d 90, 96, 660 N.Y.S.2d 568 (1st Dep't 1997). The filing dates of the respective actions are therefore usually the information that will be used to establish priority between the actions. In the event the other action is pending in a sister state's court, check the law of that state to confirm that it too is a commencement-by-filing jurisdiction.

That an action was commenced first does not mean that it must be the one that is allowed to proceed. The presence of special circumstances permits a court to depart from the first-in-time rule. The following factors have been identified in the case law that may inform the court's discretionary determination of whether special circumstances exist.

One, whether the prior action was filed preemptively after the plaintiff in that action learned that the opposing party intended to commence a case. *L-3 Communications Corp v. SafeNet, Inc.*, 45 A.D.3d 1, 841 N.Y.S.2d 82 (1st Dep't 2007). The law seeks to discourage a race to the courthouse, as such an exercise creates "disincentives to responsible litigation by discouraging settlements due to fear of a preemptive strike and by providing a tactical advantage to defendants seeking a more favorable forum for litigation." *Id.*, 45 A.D.3d at 8, 841 N.Y.S.2d at 88. That the prior action was brought in the form of a declaratory judgment action may serve as a strong signal that it was commenced preemptively. *Id.*, 45 A.D.3d at 8-9, 841 N.Y.S.2d at 88-89; *see White Lights Productions, Inc. v. On the Scene Productions, Inc., supra*. That the first action was filed preemptively weighs heavily against application of the first-in-time rule and strongly in favor of finding special circumstances. *L-3 Communications Corp. v. Safenet, Inc.*, 45 A.D.3d at 9, 841 N.Y.S.2d at 89.

Two, whether the competing actions were commenced reasonably close in time. *Flintkote Co. v. American Mutual Liability Ins. Co.*, 103 A.D.2d 501, 505, 480 N.Y.S.2d 742, 745 (2d Dep't 1984), *aff'd for reasons stated* 67 N.Y.2d 857, 501 N.Y.S.2d 662, 492 N.E.2d 790 (1986); *L-3 Communications Corp., v. Safenet, Inc.*, 45 A.D.3d at 9, 841 N.Y.S.2d at 89. The closer in time the actions were commenced, the greater the likelihood the first-in-time rule will not be honored if other factors militate in favor of deferring to the subsequently-commenced action.

Three, whether New York has a significant nexus to the dispute. *L-3 Communications Corp. v. Safenet, Inc.*, 45 A.D.3d at 9, 841 N.Y.S.2d at 89; *see Fox Television Stations, Inc. v. Rainbow Broadcasting Limited Partnership*, 45 A.D.3d 399, 846 N.Y.S.2d 40 (1st Dep't 2007). The inquiry on this factor "is similar to that undertaken in applying the doctrine of forum non conveniens--whether the litigation and the parties have sufficient contact with [New York] to justify the

burdens imposed on our judicial system." *Flintkote Co. v. American Mutual Liability Ins., Co.*, 103 A.D.2d at 506, 480 N.Y.2d at 745-746, *aff'd for reasons stated, supra*. A New York-centric dispute suggests the New York court should keep the case; a case with tenuous New York connections should probably be dealt with by the other court. *AIG Financial Products Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495, 922 N.Y.S.2d 288 (1st Dep't 2011).

Four, whether one action is further along compared to the other, and, relatedly, whether one party has been more diligent in prosecuting the action it commenced.

Five, whether one action is more comprehensive than the other. *AIG Financial Products Corp. v. Penncara Energy, LLC, supra*.

After considering these factors and any other material facts in the case, the court can ascertain whether the action that was filed first should keep its priority or whether the later-filed action should take top billing.

Where the other pending action involves the same parties and the same causes of action, and has priority over the present action, the court must decided whether to dismiss the present action or afford some other form of relief.

C3211:17. Remedies.

A court has broad discretion in considering whether to dismiss an action under CPLR 3211(a)(4). *Whitney v. Whitney*, 57 N.Y.2d 731, 454 N.Y.S.2d 977, 440 N.E.2d 1324 (1982). While dismissal of the present action is a potential disposition, the court is invited to make "such order as justice requires." The remedies available in a given case depend on whether the other action is in the same or a different court.

Other Action in Other Court

When the other action and the present action are pending in the same court, e.g., New York State Supreme Court, the court hearing the present action can direct a disposition of (or otherwise directly affect) the other action. Where, however, the other action is pending in a federal or sister state court, the court in the present action must tread carefully; directly affecting the other action is rarely appropriate. As the court in *Matter of NYSE Euronext Shareholders/ICE Litigation*, put it: "No judge in one jurisdiction, having found it appropriate to retain a case, has the ability to direct a judge in another jurisdiction, who has found it appropriate to do the same, to dismiss or stay his or her case." 39 Misc.3d 619, 626, 965 N.Y.S.2d 278, 283 (Sup. Ct., New York County 2013).

Several remedies have been recognized in the situation where the other action is pending in a federal or sister state court.

• Stay of the present action (the New York action). This is a common disposition, largely because it is the safest course of action. The court in the New York action stays the action; the other action proceeds. The stay remedy has been used where the other action would resolve issues critical in the New York action, ultimately streamlining the New York litigation, *342 West 30th Street Corp., v. Bradbury*, 30 Misc.3d 132(A), 958 N.Y.S.2d 649 (table), 2011 WL 135257 (App Term, 1st Dep't 2011); *see AIG Financial Products Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495, 922 N.Y.S.2d 288 (1st Dep't 2011); the court in the New York action was concerned that the parties could not be afforded full relief in the other action, *Wells Fargo Bank, N.A. v. Pena*, 51 Misc.3d 541, 24 N.Y.S.3d 865 (Sup. Ct., Kings County 2016); *see SafeCard Services, Inc. v. American Express Travel Related Services Co., Inc.*, 203 A.D.2d 65, 65-66, 610 N.Y.S.2d 23, 23 (1st Dep't 1994) ("[o]ne alternative [measure] available to a court faced with a [paragraph 4] motion ... where it appears that the other action may be resolved in a manner which would not bar further proceedings in New York is to stay the New York action pending resolution of the other action"); and the court in the New York action found that the New York action should serve as a back-up to the other action. Allowing a stayed New York action to serve as a back-up is appropriate, among other situations, where the

defendant, who seeks dismissal of the New York action on the ground that another action is pending, has signaled that it will seek dismissal of the other action for some reasons unrelated to the merits of the dispute, e.g., that the other action is time-barred, that the court in the other action lacks personal jurisdiction over the defendant. *See Safeguard Services, Inc. v. American Express Travel Related Services, Co., supra*; Siegel, New York Practice § 262 (Connors 5th ed.). The stayed back-up action results in the New York court retaining jurisdiction and lending aid to the parties "if some unforeseen difficulty should arise in connection with the other action." *Flintkote Co. v. American Mutual Liability, Inc. Co.*, 103 A.D.2d 501, 507-508, 480 N.Y.S.2d 742, 746 (2d Dep't 1984), *aff'd for reasons stated* 67 N.Y.2d 857, 501 N.Y.S.2d 662, 492 N.E.2d 790 (1986).

• Coordination of litigation in different jurisdictions. If the court in the New York action determines that the action should proceed and the court in the other action determines that its action too should go forward, all is not lost. The two courts can coordinate the litigations, which "streamlines disclosure, minimizes conflicting rulings, and avoids burdensome and repetitive deposition appearances." Robert L. Haig, Commercial Litigation in New York State Court § 16:2 (4th ed.). A thoughtful discussion of this option can be found in *Matter of NYSE Euronext Shareholders/ICE Litigation, supra*. *See also* Commercial Litigation in New York State Courts §§ 16:1-16:2, 16:10-16:21.

• Dismissal of New York action.

• Enjoining a party from maintaining the other action. This is the nuclear option; it is rarely done as it directly interferences with the workings of another jurisdiction's courts. Examples are few. *Jay Franco and Sons Inc. v. G Studios, LLC*, 34 A.D.3d 297, 825 N.Y.S.2d 20 (1st Dep't 2006), is one. *Certain Underwriters at Lloyds, London v. Millennium Holdings, LLC*, 52 A.D.3d 295, 861 N.Y.S.2d 3 (1st Dep't 2008), is another. Only exceptional circumstances should lead a New York court to use this remedy. *See* 180 Siegel's Practice Review 3 (Dec. 2006), *Court Grants P Injunction to Stop D from Prosecuting Action in Sister State* (reviewing unusual facts underlying *Jay Franco* decision).

Other Action Pending in New York State Court

Where the other action is pending in a New York State court, the present court's options increase. If the actions are pending in the same court, say Supreme Court (our common example), and the actions involve identical parties, the court in the present action can directly affect the other action.

A common resolution (and a particularly effective one) is to order the two actions consolidated, which results in the merger of the separate actions into one. That action will have a single caption, will result in one verdict or decision, and will conclude in one judgment. Commentary C602:2. Consolidation is generally appropriate where two actions share common material questions of law or fact and no party would be prejudiced by the union of the actions. *See* CPLR 602(a). Having already concluded that the other action and the present action have the same parties and involve the same cause of action, *see* Commentary C3211:15, that general standard will likely be satisfied. *See Gutman v. Klein*, 26 A.D.3d 464, 811 N.Y.S.2d 413 (2d Dep't 2006).

Consolidation under the main consolidation statute, CPLR 602, ordinarily requires a motion by a party. Because of the phraseology of paragraph 4, the court has the power to order a consolidation on a CPLR 3211(a)(4) motion even if no party has asked for it. *See John J. Campagna, Inc. v. Dune Alpin Farm Assoc.*, 81 A.D.2d 633, 438 N.Y.S.2d 132 (2d Dep't 1981).

When consolidation is to be the result in an instance when one action is pending in Supreme Court and the other action is pending in a different New York court, it would have to be coupled with a removal under CPLR 602(b). The removal could be made only from a lower court to a higher one--only the Supreme and County Courts have removal

powers under CPLR 602(b)--and it would have to be shown that all of the parties to both actions have been notified. *See* Commentary C602:4.

An issue of the venue of the motion might be raised, although venue should not be a problem if all of the parties to both actions are the same. Assume that X is a party to the other action but not to the instant one. X can reasonably contend that even if she is notified, she may not be compelled to respond to a motion in a court to whose action she is not a party. And if she is a party to a Supreme Court action in county A but the motion is made in the action in the Supreme Court of county B, X can urge that CPLR 2212(a) protects her from the motion. The Court of Appeals has indicated that as long as notice of the consolidation application is given to all parties to all actions, consolidation can be made. *See Kent Development Co. Inc. v. Liccione*, 37 N.Y.2d 899, 340 N.E.2d 740, 378 N.Y.S.2d 377 (1975). The unfairness of directing a consolidation of actions without notifying all of the parties to all of them and giving them a chance to be heard is what has to be guarded against, indicates the Court in *Kent Development Co.* If some of the parties to the other action are not also parties to the present one, the court can direct one of the parties before it to give notice--to the as yet unnotified parties to the other action--that the court here is considering a consolidation, and that it is holding off decision until X date to afford all a hearing. That would give them a chance to address the matter, and the notice requirement should be satisfied with that. On that notice, every party can be heard on all of the issues that arise on a consolidation motion.

If the motion is granted, the questions arise of which county shall be the venue of the consolidated action and what the sequence shall be of the parties' rights to open and close to the jury. On those matters, *see* Siegel, New York Practice § 128 (Connors 5th ed.); Commentary C602:3.

When removal from a lower court to a higher one under CPLR 602(b) is directed, it is apparently sufficient that the motion in the higher court includes notice to all of the parties to the lower court suit even though one or more of the parties may not be parties to the higher court action. This must be so, or a removal under CPLR 602(b) would be defeated in every instance in which one of the parties in the lower court is not also a party in the higher one, a result inconsistent with the purpose of CPLR 602(b) and practice under it.

It would also be possible, of course, for the court in county X to condition consolidation on the approval of the court in the other county, county Y. And again, the party among the several parties to the X action who is also a party in Y (and who seeks the consolidation) could be directed to make a motion in Y for the conditioned approval, and on that motion all those parties in Y who are not also parties in X can be given due notice and should have no objections to motion venue under CPLR 2212(a).

The word “consolidation” used throughout this discussion should be deemed to embrace “joint trial” as an alternative. Both are authorized under CPLR 602(a) and should therefore be alternatives for the court to use under CPLR 3211(a)(4). For the technical differences between consolidation and joint trial, *see* Siegel, New York Practice § 127. And if the power to consolidate or jointly try, otherwise conferred by CPLR 602(a), is within the court's arsenal under CPLR 3211(a)(4), then so must be the removal power authorized by CPLR 602(b).

When related, unconsolidated actions are pending in the New York State courts in more than one judicial district, “coordination” of the litigation in those actions may be appropriate. *See* 22 NYCRR 202.69.

Paragraph 5

C3211:18. Affirmative Defenses Available on Subdivision (a) Motion.

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Paragraph 5 contains a grab bag of objections all of which are classified as "affirmative defenses" by CPLR 3018(b). Most of the affirmative defenses listed in CPLR 3018(b) can support a CPLR 3211(a)(5) motion, but not all. *See* Commentary C3211:19.

The affirmative defenses available under paragraph 5 are as follows:

- arbitration and award;
- collateral estoppel;
- discharge in bankruptcy;
- infancy or other disability of the moving party;
- payment;
- release;
- res judicata;
- statute of limitations; and,
- statute of frauds.

A defendant who wishes to assert one or more of these affirmative defenses must raise the desired defenses in a pre-answer motion or the answer. CPLR 3211(e); *see Wan Li Situ v. MTA Bus Co.*, 130 A.D.3d 807, 14 N.Y.S.3d 89 (2d Dep't 2015). The failure to take either of those steps can lead to a waiver, but, as we discuss in a later section, the defendant can avoid the waiver by moving to amend the answer. *See* C3211:58.

Generally speaking, in order to establish that dismissal under a given paragraph 5 affirmative defense is warranted, the defendant must show that, as a matter of law, the defense on which it is relying bars the plaintiff's action (or the challenged portion of it). What specifically a defendant must show to discharge that burden will depend on the particular affirmative defense invoked.

The party opposing the motion (usually a plaintiff) is aided by the rules of decision applicable to a motion to dismiss under CPLR 3211(a)(5). Those rules require a court to "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Faison v. Lewis*, 25 N.Y.3d 220, 224, 10 N.Y.S.3d 185, 187, 32 N.E.3d 400, 402 (2015). These same rules apply to most other subdivision (a) grounds, most notably paragraphs 1 and 7. *See* Commentaries C3211:10, C3211:21. *Faison* highlights how important those rules are in practice.

In *Faison*, A and B inherited real property as tenants in common. By a quit claim deed, B conveyed her interest to C. C subsequently recorded a purported corrective deed, dated December 11, 2000, that included both A and B as grantors, thus conveying the entire fee to C. C then borrowed money from a bank, providing the bank with a mortgage encumbering the property. In August 2010, plaintiff, the administrator of A's estate, brought an action against, among other defendants, B, C and the bank to declare the "corrected" deed and the mortgage null and void. Plaintiff's theory: A's signature on the "corrected" deed was forged, making that deed and the mortgage void. For their part, B and C asserted that the "corrected" deed was valid. The bank moved to dismiss the complaint as against it under CPLR

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3211(a)(5), arguing that the action was barred by the statute of limitations applicable to fraud actions. *See* CPLR 213(8).

The trial court granted the motion, and, as is relevant to our discussion, the Second Department affirmed.

The Court of Appeals reversed. It stated that a forged deed is void ab initio--a legal nullity at its inception--as is any encumbrance on the property based on the forged instrument. Because a forged deed and any encumbrance based on it are legal nullities, the Court concluded that "a claim against a forged deed is not subject to a statute of limitations defense." *Faison v. Lewis*, 25 N.Y.3d at 226, 10 N.Y.S.3d at 189, 32 N.E.3d at 404. Thus, plaintiff's suit survived the bank's CPLR 3211(a)(5) motion to dismiss. The Court indulged the assumption that the deed was forged because it applied those pro-pleader rules listed above (i.e., accept the plaintiff's version of the facts as true, accord the plaintiff the benefit of favorable inferences). That B and C asserted that the "corrected" deed was valid was of no moment at this procedural juncture.

Whether a particular defense has been established is dependent on the facts of the case and the law underlying the defense. Those are matters beyond these Commentaries but certain procedural points relevant to individual grounds should be highlighted.

The defense of arbitration and award is available only where a dispute has proceeded to arbitration and an award determining the dispute has been made. *See Langemyr v. Campbell*, 23 A.D.2d 371, 261 N.Y.S.2d 500 (2d Dep't 1965). Not just any old award will do; "an arbitration award may not serve as the foundation of the defense ... unless that award is subject to confirmation pursuant to CPLR article 75." *Marracino v. Alexander*, 73 A.D.3d 22, 23, 897 N.Y.S.2d 555, 556 (4th Dep't 2010). The requirement is not that the award actually be confirmed, a process permitted by CPLR 7510, but rather that the award be "subject to confirmation." Whether an award is capable or incapable of confirmation is a question for the statutes in CPLR article 75 and the case law interpreting them. *See* Commentaries to CPLR 7510 and 7511.

If a defendant is sued in court on a claim it believes is arbitrable and wants the matter sent to arbitration, defendant's remedy is a motion to compel arbitration under CPLR 7503. Siegel, New York Practice § 263 (Connors 5th ed.).

The doctrines of res judicata and collateral estoppel can apply to arbitration awards. *See* Siegel New York Practice § 456. Thus, where an arbitration award is at issue, there may be some overlap between the arbitration and award ground in paragraph 5, and the res judicata and collateral estoppel grounds. Any concern on counsel's part regarding the identity of the proper ground can be allayed by raising them all.

Collateral estoppel--issue preclusion--is a popular paragraph 5 ground. The doctrine is based on the notion that its not fair to permit a party to relitigate an issue decided against the party, and its purpose is to reduce litigation and conserve scarce court resources. *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63, 67 (1985). On a CPLR 3211(a)(5) motion grounded on collateral estoppel, the movant must establish that the identical issue was necessarily decided in the prior action and that the previously decided issue is determinative in the present action. *Mahler v. Campagna*, 60 A.D.3d 1009, 876 N.Y.S.2d 143 (2d Dep't 2009). If the movant satisfies that burden, the plaintiff must demonstrate the absence of a full and fair opportunity to contest the prior determination. *Id.* Any doubts regarding the preclusive effect of a prior ruling or determination should be resolved in favor of the party against whom the estoppel would operate, *Wal-Mart Stores, Inc. v. United States Fidelity and Guaranty Co.*, 11 A.D.3d 300, 784 N.Y.S.2d 25 (1st Dep't 2004).

The "infancy or other disability" ground relates to the defendant's disability. It is a lack-of-capacity type defense; the defendant does not have the capacity, i.e., the power, to be a party to the lawsuit. Where the claim is that the plaintiff

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lacks the capacity to bring suit because of infancy or some other disability, the proper dismissal ground is paragraph 3. *See* Commentary 3211:12.

With respect to the release ground, a release is a species of contract and therefore governed by the principles of law applicable to contracts. *Aetna Casualty and Surety Co. v. Jackowe*, 96 A.D.2d 37, 468 N.Y.S.2d 153 (2d Dep't 1983). Critical questions regarding the formation, construction and enforceability of a release can be answered only by reference to those principles. For a thorough overview of contract law, generally, and the law related to releases, specifically, *see* 2B N.Y. P.J.I.2d 4:1 (2017).

Res judicata--claim preclusion--dictates that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 688, 429 N.E.2d 1158, 1159 (1981). The doctrine of res judicata is designed to ensure finality, reduce litigation and promote judicial economy. *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94, 810 N.Y.S.2d 96, 843 N.E.2d 723 (2005). A party seeking dismissal on the res judicata ground must demonstrate the existence of a prior judgment on the merits. *Miller Manufacturing Co. v. Zeiler*, 45 N.Y.2d 956, 411 N.Y.S.2d 558, 383 N.E.2d 1152 (1978).

Where the defendant moves to dismiss on the ground that the action is time-barred, the defendant must make a *prima facie* showing that the period within which to commence a timely lawsuit has expired. If the defendant makes that showing, the burden shifts to the plaintiff to raise a question of fact as to whether the action was actually commenced within the applicable statute of limitations, the statute of limitations has been tolled, or an exception to the limitations period is applicable. *Quinn v. McCabe, Collins, McGeough & Fowler, LLP*, 138 A.D.3d 1085, 30 N.Y.S.3d 288 (2d Dep't 2016); *see Hoosac Valley Farmers Exchange v. AG Assets, Inc.*, 168 A.D.2d 822, 563 N.Y.S.2d 954 (3d Dep't 1990).

The last ground listed in paragraph 5 is the statute of frauds. The statute requires that certain agreements be reduced to a writing that reflects the particulars of the transaction, e.g., identifies the parties, states the essential terms of the agreement, and is signed by the party to be charged. *Durso v. Baisch*, 34 A.D.3d 646, 830 N.Y.S.2d 327 (2d Dep't 2007). The Pattern Jury Instructions, civil, contains a lengthy review of the statute of frauds. 2B N.Y. P.J.I.2d 4:1(VI)(D) (2017).

C3211:19. Comparison of Affirmative Defenses of CPLR 3018(b) with Dismissal Grounds of CPLR 3211(a)(5).

CPLR 3018(b) defines "affirmative defense" and lists the main defenses. All of the listed defenses are contained in paragraph 5 except for three: the culpable conduct of the plaintiff under CPLR article 14-A, facts showing illegality, and fraud. The affirmative defenses listed in paragraph 5 can be raised by pre-answer motion or in the answer; the three omitted defenses lack the pre-answer motion option. Or do they?

CPLR 3211(a)(7), which allows for dismissal based on the plaintiff's failure to state a cause of action, can be employed to direct the defense of illegality at the complaint, at least where the illegality appears on the face of the complaint. *National Recovery Systems v. Mazzei*, 123 Misc.2d 780, 475 N.Y.S.2d 208 (Sup. Ct., Suffolk County 1984); *see McCall v. Frampton*, 99 Misc.2d 159, 415 N.Y.S.2d 752 (Sup. Ct., Westchester County 1979). Given the manner in which CPLR 3211(a)(7) has been interpreted by many courts, a defendant wishing to challenge a cause of action on the ground of illegality may be able to submit evidence in support of its paragraph 7 motion and obtain dismissal even where the face of the complaint is unblemished by illegality. *See* Commentaries C3211:23. CPLR 3211(a)(7) is available too as a means for a defendant to seek dismissal of a cause of action on the affirmative defense of fraud, provided the fraud can be summarily established on the pre-answer motion. *See* Commentary C3018:20; *see also* Siegel, New York Practice § 263 (Connors 5th ed.). Given the elements of fraud and the heightened burden of the proof on a claim of it, *see* 2A N.Y. P.J.I.2d 3:20 (2017), resolution of an affirmative defense of fraud at the pre-answer stage of an action should be a rare event.

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That leaves the defense of the plaintiff's culpable conduct. Can that defense be packaged as a CPLR 3211(a)(7) motion? Probably not.

That affirmative defense is based on the "culpable conduct [of the plaintiff] claimed in diminution of damages as set forth in [CPLR article 14-A]." CPLR 3018(b). CPLR article 14-A is our comparative fault law; it abrogated the common law doctrine of contributory fault that barred a plaintiff from recovering damages if she was responsible to any degree for her injuries. Commentary C1411:1. Under CPLR 1411, the statute providing the comparative fault principle, "the culpable conduct attributable to the [plaintiff], including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the [plaintiff] bears to the culpable conduct which caused the damages." When triggered, the statute calls for an apportionment of fault between the plaintiff and the defendant. *See* 1A N.Y. P.J.I.3d 2:36; 1B N.Y. P.J.I.3d 2:275. Dismissal based on a plaintiff's comparative fault is therefore not authorized under CPLR 3211(a)(7) or any other procedural device (e.g., summary judgment).

CPLR article 14-A notwithstanding, there are situations in which a plaintiff's conduct may bar her recovery. The lists is short: where a tort plaintiff's conduct is the sole proximate cause of her injuries; where a plaintiff's injuries are the direct result of the commission of serious criminal or illegal conduct; where a tort plaintiff is precluded from recovering by virtue of the doctrine of primary assumption of risk; and where a plaintiff expressly assumed the risk of the injuries for which she is suing. Commentaries C1411:3. The first three situations are not good candidates for CPLR 3211(a) treatment. Application of the legal principles barring recovery in those situations is dependent upon the facts of the particular case and the fact-sensitive question of foreseeability. The last situation, however, may provide occasion for a CPLR 3211(a) dismissal. Where the defendant wants to seek dismissal based on the plaintiff's express assumption of risk, the defendant could invoke paragraph 1 (if the assumption of risk was acknowledged in a document), 5 (on the basis of the affirmative defense of release), and 7 (failure to state a cause of action). Notice we did not choose one ground, but all that reasonably may apply.

Paragraph 6

C3211:20. Non-Interposable Counterclaim.

CPLR 3019(a) provides that "[a] counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable." The law therefore allows a defendant to assert any cause of action it has against the plaintiff; the counterclaim need not bear any relation to the plaintiff's cause of action.

As an affirmative claim, a counterclaim can be challenged by a plaintiff on any relevant ground listed in subdivision (a). *See* Commentary C3211:4. Paragraph 6 provides one more dismissal tool to a plaintiff who is subject to a counterclaim. Under paragraph 6, the plaintiff may seek dismissal of the counterclaim on the basis that it may not be interposed in the action. A motion under this paragraph must be raised in a pre-answer motion or taken by answer, otherwise it is waived.

What is the meaning of this counterclaim-may-not-properly-be-interposed ground? Didn't we say above that a defendant may assert as a counterclaim any cause of action it has against a plaintiff? The defendant can do so, provided the counterclaim is against the plaintiff in the capacity in which she sued the defendant. That is to say, "[w]hen a plaintiff sues in a particular capacity, that is generally the only capacity in which the plaintiff can be counterclaimed by the defendant." Commentary C3019:3, at 393 (main volume). This is the pre-CPLR "capacity" rule and, CPLR 3019(a)'s broad language notwithstanding, it lives today and is given force by CPLR 3211(a)(6). *See* Commentary C3019:3; Siegel, New York Practice § 264 (Connors 5th ed.); *see also Ehrlich v. American Moninger Greenhouse Manufacturing Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

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Under the "capacity" rule, a paragraph 6 dismissal would seem to be appropriate in the following scenarios:

- The plaintiff is the executor of a decedent's estate and brought suit in that capacity, and the defendant asserted a counterclaim against the plaintiff in her personal capacity.

- The plaintiff is a trustee and brought suit in that capacity, and the defendant asserted a counterclaim against the plaintiff in her personal capacity.

- The plaintiff, who happens to be the guardian of another's person and property, sued the defendant in plaintiff's personal capacity, and the defendant asserted a counterclaim against the plaintiff as guardian.

CPLR 3211(a)(6) has also been employed where a defendant interposed a counterclaim in violation of a provision of a contract between the parties that barred counterclaims. *New York Merchants Protective Co. v. Raia*, 5 Misc.3d 1011(A), 798 N.Y.S.2d 711 (table), 2004 WL 2532294 (Dist. Ct., Nassau County 2004).

Dismissal in *New York Merchants Protective Co.* may have been appropriate too under CPLR 3211(a)(1) and (7). If the plaintiff has any doubt regarding which ground to use to challenge a counterclaim, she should raise paragraph 6 and any other plausible grounds.

Note that "there is no authority under the CPLR to dismiss an otherwise valid counterclaim merely because it is not convenient to have it present in the case. Such authority did exist under prior law, but the worst that can befall such a counterclaim under the CPLR is a severance, sending it off as a separate action." Siegel, New York Practice § 264 (internal footnote omitted).

Paragraph 7

C3211:21. Failure to State a Cause of Action, Generally.

Paragraph 7 is one of the most commonly used dismissal grounds under CPLR 3211(a) and one of the most important procedural statutes in litigation. CPLR 3211(a)(7) provides that a defendant may seek judgment dismissing the complaint on the ground that it fails to state a cause of action. The defendant is free to attack the entire complaint or target one or more of the specific causes of action. The motion for failure to state a cause of action is no stranger in New York practice; it is an incarnation of the common law demurrer with a modern name and, as discussed below, a bit more potency. *See* Commentary C3211:23.

There are certain fundamental rules of decision associated with the CPLR 3211(a)(7) motion. These rules (applicable to most CPLR 3211 motions) should be reviewed--if not already committed to memory--before a motion to dismiss for failure to state a cause of action is made or opposed. Here they are: the pleadings must be given a liberal construction, the allegations accepted as true, and the plaintiff accorded every possible favorable inference. *Chanko v. Am. Broad. Companies Inc.*, 27 N.Y.3d 46, 52, 29 N.Y.S.3d 879, 883, 49 N.E.3d 1171, 1175 (2016).

The party opposing a CPLR 3211(a)(7) motion may want to request an opportunity to gather evidence before the court determines the motion, *see* Commentary C3211:46, a chance to replead, *see* Commentary C3211:60, or both.

For the edification of federal practitioners, CPLR 3211(a)(7) is analogous to the dismissal ground contained in Rule 12(b)(6) of the Federal Rules of Civil Procedure. The federal terminology is "failure to state a claim upon which relief can be granted." The most apparent difference is the federal use of the word "claim" vis-a-vis the New York phrase "cause of action." Although it is sometimes asserted that there is a difference between the two phrases, *see*, *e.g., Garcia v. Hilton Hotels Intern.*, 97 F.Supp. 5 (D.C. Puerto Rico 1951), it is difficult at best to devise an explanation of what the

difference is. For practical purposes, federal practitioners will run into few pitfalls if they apply their understanding of the federal "claim" to the New York phraseology of "cause of action". And vice versa. (Note, however, that in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), a federal pleading is subject to greater scrutiny on a rule 12(b)(6) motion than a New York State court pleading encounters on a CPLR 3211(a)(7) motion. *See* Robert L. Haig, Commercial Litigation in New York State Courts, § 12.28 [4th ed.]).

CPLR 3211(a)(7) poses a number of questions. These will be treated seriatim.

Allegations Sufficient for Pleading in Supreme Court May Not Suffice for Court of Claims Pleading

In a major decision on pleadings in the Court of Claims, *Lepkowski v. State*, 1 N.Y.3d 201, 770 N.Y.S.2d 696, 802 N.E.2d 1094 (2003), the Court of Appeals gave a strict construction to the pleading requirements of § 11(b) of the Court of Claims Act.

It does not take much to satisfy as a pleading in the Supreme Court. In a deliberate endeavor to escape the rigidities of common law pleadings, the CPLR long ago relaxed things. *See* CPLR 3013 and 3014.

Sections 8, 10, and 11 of the Court of Claims Act are a different world, made much more demanding because of the State's sovereign immunity and the need for the State to waive that immunity before suit may be brought against it. The State has long since waived the immunity, in § 8 of the act, but, stressed the Court of Appeals in *Lepkowski*, with the proviso that "the claimant complies with the limitations" imposed by, among other things, §§ 10 and 11 of the act. *See* the general discussion of the requirements for pleadings in the Commentaries following CPLR 3013 and 3014, and the more specific discussion of Court of Claims pleadings in Commentary C3013:15A; *see also Kolnacki v. State*, 8 N.Y.3d 277, 832 N.Y.S.2d 481, 864 N.E.2d 611 (2007).

C3211:22. Does Paragraph 7 Replace Common Law Demurrer?

Under the common law demurrer, the defendant conceded the truth of every factual allegation made by the plaintiff but contended that, even so, the complaint stated no cause of action cognizable under the law. The defendant could not submit evidence to contest the plaintiff's factual allegations. (A remedy in some instances was to answer and then move for summary judgment under the predecessor of CPLR 3212, an alternative still available under the CPLR.) Thus, the function of the demurrer was narrow: test the facial sufficiency of a pleading.

Like the common law demurrer, a CPLR 3211(a)(7) motion can be used to test the facial sufficiency of a pleading. Thus, the paragraph 7 motion is useful in disposing of actions in which the plaintiff has not stated a claim cognizable at law, and actions in which the plaintiff has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. *See Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 980 N.Y.S.2d 21 (1st Dep't 2014).

A plaintiff confronted with a motion addressed to the adequacy of her pleading has the option to submit an affidavit or other evidence in opposition to the motion to augment the allegations in the pleading or otherwise rehabilitate it. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976). The plaintiff should avail herself of that opportunity, especially if she perceives any weaknesses within the four corners of her pleading.

Where a defendant has challenged the facial sufficiency of a complaint, the court's inquiry is limited to determining whether, applying the familiar rules of decision applicable to CPLR 3211(a) motions (*see* Commentary C3211:21), the allegations and any evidence submitted by the plaintiff have stated a claim cognizable at law. "In the context of CPLR 3211(a)(7), the word 'stated' means pleaded: Do the allegations, liberally construed and viewed in the light most favorable to the plaintiff, plead a cognizable claim?" Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--*

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Pitfalls and Pointers, 83 New York State Bar Journal 32, 33 (Nov./Dec. 2011) (internal footnote omitted). Whenever the plaintiff's allegations and evidence, taken as true, do state a cause of action, it is plain that a paragraph 7 motion unsupported by affidavits or other extrinsic proof will fail.

When the CPLR 3211(a)(7) movant omits affidavits and other proof and limits her challenge to the facial allegations of the pleading, she must be aware of the great liberalization that pleadings have undergone under the CPLR. Technicality has been largely removed. If from the four corners of the pleading, regardless of its form and draftsmanship, factual allegations can be discerned which, taken together, manifest any claim cognizable under the law, the pleading does state a cause of action and the motion will fail. These conclusions derive from a study of the Advisory Committee's intentions, which were implemented by the courts. *See Foley v. D'Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964). The practitioner would do well to note this before attempting to defeat a cause of action under paragraph 7 on the basis that it is deficient on its face. Even if the theory it purports to be based on is wrong, the existence of any other theory that would qualify the allegations as a "cause of action" will suffice to defeat the motion.

C3211:23. Attacking a Claim Valid on Its Face.

As discussed above, one function of CPLR 3211(a)(7) is to permit a defendant to seek dismissal of a complaint on the ground that it does not state--that is, plead--a cause of action. But is that its only function? Can a defendant use evidence on a CPLR 3211(a)(7) motion to attack a well-pleaded cause of action and obtain dismissal based on that evidence?

After many decades on the civil procedure scene, one would think that the role of this critical litigation device would be well-defined. But it is not. Here is the relevant history, as traced in a prior treatment of the subject. *See* Higgitt, *High Court Signals a Potential Change in Practice With CPLR 3211(a)(7)*, Aug. 5, 2013 N.Y.L.J. at 4.

CPLR 3211(a)(7) was part of the original CPLR, which became effective on September 1, 1963. Paragraph 7's language has remained the same over the years: "A party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that: … the pleading fails to state a cause of action".

The Court of Appeals' first major decision on CPLR 3211(a)(7) came in *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976). While stressing that the principal function of an (a)(7) motion is to ascertain whether a complaint states, i.e., pleads, a cognizable cause of action, the Court observed that "affidavits submitted by the defendant [on a (a)(7) motion] will seldom if ever warrant [dismissal] *unless ... the affidavits establish conclusively that plaintiff has no cause of action*" (*id.* at 636 [emphasis added]). Although the *Rovello* Court noted that "defendants' affidavits present[ed] a seemingly strong defense," it concluded that the subject complaint did state a cause of action and directed that the motion to dismiss be denied. *Rovello*, though, opened the door--albeit only in narrow circumstances--for dismissals under CPLR 3211(a)(7) based on evidence.

The Court's next pronouncement on the subject came approximately one year later in *Guggenheimer v. Ginzberg* (43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]). The *Guggenheimer* Court stated that:

[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading 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 pleader 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 (*id.* at 275, 401 N.Y.S.2d at 185, 372 N.E.2d at 20-21).

The Court found that the essential facts in the complaint before it were not "negated beyond substantial question by the affidavits submitted ... so that it might be ruled that the pleader does not have the causes of action" (*id.*). The "establish[es] conclusively" test articulated in *Rovello* just 14 months prior was not mentioned. *Guggenheimer's* "no significant dispute/negate beyond substantial question" test appears broader than *Rovello's* "establish[es]

conclusively" test, permitting a defendant to obtain dismissal with convincing--but not conclusive--evidence. *See also Godfrey v. Spano*, 13 N.Y.3d 358, 892 N.Y.S.2d 272, 920 N.E.2d 328 (2009) and *Lawrence v. Graubard Miller*, 11 N.Y.3d 588, 873 N.Y.S.2d 517, 901 N.E.2d 1268 (2008), both of which appear to endorse the *Rovello* standard.

In light of the mixed signals sent by *Rovello* and *Guggenheimer*, the Appellate Division has grappled with the appropriate standard to apply on a CPLR 3211(a)(7) motion that is supported by evidence. Some courts have said the only question on a motion to dismiss for failure to state a cause of action is whether the complaint pleads a cause of action. *See*, *e.g., Henbest & Morrisey Inc. v. W.H. Ins. Agency Inc.*, 259 A.D.2d 829, 686 N.Y.S.2d 207 (3d Dep't 1999). Other courts have said that a CPLR 3211(a)(7) motion serves a broader function: to challenge a complaint that states a cause of action with evidence undercutting the plaintiff's allegations. Phrased differently, dismissal under CPLR 3211(a)(7) may be appropriate when, on the facts adduced by the defendant, the plaintiff does not have a cause of action. But courts of this view are divided into two camps: one asks whether the defendant's evidence conclusively establishes that the plaintiff does not, in fact, have a cause of action (the *Rovello* standard), the other asks whether the defendant's evidence negates beyond substantial question an essential fact on which the plaintiff's action rests (the *Guggenheimer* standard).

In 2013, the Court of Appeals decided *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N.Y.3d 342, 961 N.Y.S.2d 364, 985 N.E.2d 128 (2013), an opinion that had the potential to end this long-running debate. In relevant part, the Court considered whether a health club was entitled to dismissal under CPLR 3211(a)(7) of a common law negligence cause of action asserted by the estate of a club patron who died after experiencing cardiac arrest on the club's premises. The gist of that cause of action was that the health club breached its duty of care to persons struck down by cardiac arrest while on the club's premises by failing to employ or properly employ life-saving measures to the decedent. The health club moved to dismiss that cause of action under CPLR 3211(a)(7). In support of that motion, the health club submitted the affidavit of an employee who rendered aid to the decedent. The employee described his training and the actions he and other club personnel took to assist the decedent. The motion was denied by the trial court and the Second Department affirmed.

The Court of Appeals affirmed the Appellate Division's order, writing, in pertinent part, 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....

"Here, the complaint asserts that Bally did not 'employ or properly employ life-saving measures regarding [the decedent]' 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 [the plaintiff] has at least pleaded a viable cause of action at common law." 20 N.Y.3d at 351, 961 N.Y.S.2d at 370, 985 N.E.2d at 134 (internal citation omitted).

One view is that *Miglino* did not change the law under CPLR 3211(a)(7), and a defendant is still free to submit evidence in support of a motion to dismiss in an effort to establish that, on the facts, the plaintiff does not have a cause of action. Another view of *Miglino* is that the Court of Appeals no longer permits a defendant to obtain dismissal under CPLR 3211(a)(7) based on evidence the defendant submits in support of the motion. The reasoning for the second view is as follows: the defendant in *Miglino* sought dismissal under CPLR 3211(a)(7) and relied on evidence; the Court of Appeals acknowledged that the defendant submitted evidence, but stressed that the only inquiry at the

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CPLR 3211 stage was whether the complaint states a cause of action; the Court affirmed the denial of the motion to dismiss because the plaintiff "at least pleaded a viable cause of action"; therefore, the Court must have concluded that dismissal under CPLR 3211(a)(7) based on a defendant's evidence is not permitted. *See* Higgitt, *High Court Signals a Potential Change in Practice With CPLR 3211(a)(7)*, *supra*; *see also* Connors, *Courts Reconsider Rule Permitting Use of Affidavits on CPLR 3211(a)(7) Motion*, N.Y.L.J., Jan. 20, 2015 at 3 (reviewing CPLR 3211[a][7], *Rovello*, and *Miglino*, and concluding that "the courts should not permit consideration of defendant's factual affidavits on a CPLR 3211[a][7] preanswer motion to dismiss unless the court elects to treat the motion as one for summary judgment under CPLR 3211[c].").

A construction of paragraph 7 that limits its role to a pleading motion is consistent with the legislative history of the CPLR (Higgitt, *CPLR 3211[a][7]: Demurrer or Merits-Testing Device?*, 73 Alb.L.Rev. 99 at 102), and the plain language of that paragraph ("the pleading fails to state a cause of action"). That construction also prevents paragraph 7 from becoming a "super" ground for dismissal that crowds-out the others. (The "documentary evidence" ground in CPLR 3211[a][1] has little to no role to play if the movant can rely on evidence to support her motion to dismiss for failure to state a cause of action. Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32 at 34, n.30.) We note too that while CPLR 3211(a)(7) authorizes dismissal of a cause of action for failure to state a cause of action, subdivision (b) allows for dismissal of a defense if it is not stated *or has no merit*. The Legislature seemed to make a deliberate determination to allow for a merits-based dismissal in one situation (subdivision [b]) but not in the other ([a][7]). And, absent conversion of a CPLR 3211(a) motion into one for summary judgment (*see* subdivision [c]), shouldn't the parties be allowed to assume that the focus of the court's inquiry is on the sufficiency of the pleading and not on the merits? *See Four Seasons Hotels v. Vinnik*, 127 A.D.2d 310, 515 N.Y.S.2d 1 (1st Dep't 1987).

But we digress, for all four Departments have concluded that *Miglino* did not change the law, with the Fourth Department expressly considering--and rejecting--the contention "that *Miglino* fundamentally changed the parameters of CPLR 3211(a)(7) and effectively barred the consideration of any evidentiary submissions outside of the four corners of the complaint." *Liberty Affordable Housing, Inc. v. Maple Court Apartments*, 125 A.D.3d 85, 88, 998 N.Y.S.2d 543, 545 (2015); *see*, *e.g.*, *Clarke v. Laidlaw Transit, Inc.*, 125 A.D.3d 920, 5 N.Y.S.3d 138 (2d Dep't 2015); *Marston v. General Electric Co.*, 121 A.D.3d 1457, 995 N.Y.S.2d 646 (3d Dep't 2014); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 980 N.Y.S.2d 21 (1st Dep't 2014). The *Liberty Affordable Housing* Court reasoned that "*Miglino* is properly understood as a straightforward application of *Rovello's* long-standing framework"; the cause of action for common law negligence in *Miglino* was not in a posture to be resolved by the health club's evidence because that evidence was insufficiently conclusive, not because it was categorically inadmissible. 125 A.D.3d at 91, 998 N.Y.S.2d at 547.

C3211:24. Result in Multi-Claim Case.

When the complaint states several causes of action, the movant must address a CPLR 3211(a) motion to the specific cause of action objected to. This is as true of paragraph 7 as it is of any other ground. If all of the alleged causes of action are defective, and the movant can show as much, the motion can of course succeed against them all. If less than all are defective, however, the movant should single out the defective ones and address the motion to them.

Note that "a motion to dismiss for failure to state a cause of action will be denied in its entirety where the complaint asserts several causes of action, at least one of which is legally sufficient and where the motion is aimed at the pleading as a whole without particularizing the specific causes of action sought to be dismissed." *Long Island Diagnostic Imaging, P.C. v. Stony Brook Diagnostic Associates*, 215 A.D.2d 450, 452, 626 N.Y.S.2d 828, 829 (2d Dep't 1995); *see Great Northern Associates, Inc. v. Continental Casualty Co.*, 192 A.D.2d 976, 596 N.Y.S.2d 938, 940 (3d Dep't 1993). But when "a motion to dismiss for failure to state a cause of action particularizes each of the claims in the complaint, even though it is nominally addressed to the complaint as a whole, the court should treat that motion as applying to each individual cause of action alleged." *Gamiel v. Curtis & Riess-Curtis, P.C.*, 16 A.D.3d 140, 141, 791

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N.Y.S.2d 78, 79 (1st Dep't 2005). This allows the court to sustain the good causes of action and dismiss the bad ones, narrowing the issues in the case and streamlining the litigation.

When only a single cause of action is stated, the opening language of CPLR 3211(a) might suggest that the motion is available only as against the entire claim and not merely to a part of it. The motion is available as to any severable part of a single claim, however, whether it relates only to the relief clause or to some part of the theory or theories sued on.

C3211:25. Demanding Wrong Relief Inconsequential.

As long as the allegations taken from the complaint as a whole manifest that the plaintiff has a cause of action on which some kind of relief may be granted, it is of no moment on a paragraph 7 motion that the wrong relief was asked for. *See O'Reilly v. Cahill*, 50 Misc.2d 629, 271 N.Y.S.2d 29 (Sup. Ct., New York County 1966), *rev'd on other grounds* 28 A.D.2d 527, 280 N.Y.S.2d 338 (1st Dep't 1967). The remedy of the plaintiff who has a claim but has asked for relief unresponsive to it is to move under CPLR 3025(b) for leave to amend the relief clause. If the time for amending as of course, i.e., without leave of court, is still open under CPLR 3025(a), the plaintiff may amend without the need of a motion.

C3211:26. Time to Make Paragraph 7 Motion.

Paragraph 7 is one of the three CPLR 3211(a) paragraphs (the other two being paragraphs 2 and 10) that will support a CPLR 3211 dismissal motion made at any time. (*See* Commentary C3211:49.) For that reason, and because a movant is allowed to submit evidence in support of her motion, there are four different classes of CPLR (a)(7) motions: (1) a pre-answer motion unsupported by evidence, (2) a pre-answer motion supported by evidence, (3) a post-answer motion unsupported by evidence, and (4) a post-answer motion supported by evidence. The courts have applied the same rules of decision to an (a)(7) motion regardless of whether it was made pre-or post-answer. *See Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 955 N.Y.S.2d 384 (2d Dep't 2012); *see also Chenago Contracting, Inc. v. Hughes Associates*, *Landscape Architects PLLC*, 128 A.D.3d 1150, 8 N.Y.S.3d 724 (3d Dep't 2015).

As a matter of practice, of course, it is advisable for the movant who depends on paragraph 7 to make the motion before answering for the simple reason that if it prevails there will be no need to answer. If the answer has already been served when the motion is made, however, the answer is among the papers that the court can consider on the motion. *See Hamilton Printing Co. v. Ernest Payne Corp.*, 26 A.D.2d 876, 273 N.Y.S.2d 929 (3d Dep't 1966).

When the motion is made after answer and is based not on the face of the pleading but on extrinsic proof, the movant would often do better to move for summary judgment under CPLR 3212. A disposition under that provision will ordinarily carry the full effect of res judicata, while a CPLR 3211(a)(7) disposition may or may not. (*See* Commentary C3211:63.)

The practitioner who without good reason postpones a paragraph 7 motion may be courting unnecessary trouble. Technically, the movant can make the motion even as late as when the trial opens, but the suspicions of the trial judge are bound to be aroused. Why has a motion that could have put an early end to the litigation been delayed until the trial, with all parties put to the burden of pretrial preparation in the interim? Although the motion still lies at that time and would have to be entertained, the delay may, perhaps only unconsciously, influence the trial judge's disposition of it. The movant should have ready--whether called upon to use them or not--good reasons for the delay, such as that the proof needed for the motion became available only recently.

C3211:27. Paragraph 7 as Catch-All Ground.

In the comparison made between what CPLR 3018(b) labels as affirmative defenses on the one hand and what CPLR 3211(a) affords as grounds for a motion to dismiss on the other, it is pointed out that paragraph 7 can sometimes be

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used to make available as a motion ground an affirmative defense not explicitly contained in the CPLR 3211(a) list. *See* Commentary C3211:19. "Illegality" is a prime example. The movant who can show the defect to be something that affects the merits of the cause of action, as illegality would, can make the defect a basis for a motion to dismiss under paragraph 7.

It has also been shown that paragraph 7 may overlap (supersede may, in some instances, be a better word) other paragraphs of CPLR 3211(a), in which case the objection can be based on both the other paragraph and paragraph 7 together. *See*, *e.g.*, Commentaries C3211:12 and 18. Paragraph 7 would not be superfluous in such an instance, for the reason that a motion under paragraph 7 may be made at any time, CPLR 3211(e), while the grounds in most of the other paragraphs must be exploited by a motion before the answer is served. Additionally, all types of evidence are permitted on a motion to dismiss for failure to state a cause of action. These benefits may prove helpful in a given case-at least in the eyes of the movant.

As to the interplay between CPLR 3211(a)(7) and (a)(1) (dismissal based on "documentary evidence"), *see* Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32, 34-35 (Nov./Dec. 2011).

Paragraph 8

C3211:28. Lack of Personal Jurisdiction.

Subject matter jurisdiction, covered above (*see* Commentary C3211:11), asks whether a particular court has the authority to hear and resolve a particular type of action. Personal jurisdiction asks whether the court, under the particular facts of the case, has the power to render a judgment binding on the defendant herself. Personal jurisdiction is one of three forms of jurisdiction over persons, property and status, the other two being in rem and quasi in rem (more on these two forms of jurisdiction below). *See* Commentary C301:1. Personal (or in personam) jurisdiction over a defendant allows the court to adjudicate the defendant's liability or obligation to the plaintiff, and adjudge that the defendant is personally liable or responsible for the relief awarded in the action. *Id.*

Personal jurisdiction has three elements: (1) a basis for the exercise of jurisdiction over the defendant (i.e., general jurisdiction over the defendant or specific [a/k/a long arm] jurisdiction over her); (2) notice to the defendant of the action; and (3) proper commencement of the action. *See* Siegel, New York Practice §§ 58, 63 (Connors 5th ed.). All must be present for a court to obtain personal jurisdiction over a defendant. (Although a defendant may waive an objection to a defect relating to personal jurisdiction.).

CPLR 3211(a)(8) is the device that allows a defendant to seek dismissal of an action on the ground that the court lacks personal jurisdiction over her. She can use paragraph 8 to raise any defect relating to personal jurisdiction. The defendant may claim that no basis exists to call her before a New York court--that is to say, the defendant is not subject to the jurisdiction of the New York courts, generally, and is not subject to their jurisdiction for the purposes of the particular action in which she was named a defendant. *See* Commentaries C301:2-10; C302:1-15; Siegel, New York Practice §§ 66, 80-89. The defendant may assert that she was not served with the initiatory papers, that they were served defectively, or that they were served in an unauthorized manner. The defendant may complain that the action was not properly commenced.

Because of the waiver provisions of subdivision (e), a defendant must carefully consider when and how to raise defenses related to lack of personal jurisdiction. *See* Commentary C3211:55.

Paragraph 8 should not be confused with paragraph 9, which addresses those two other forms of jurisdiction over persons, property and status: in rem and quasi in rem. Any uncertainty on the part of the defendant regarding the

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category of jurisdiction on which the plaintiff is relying should be resolved by invoking both paragraphs and leaving it to the court to determine which category ultimately applies. *See* Commentary C3211:31.

Under paragraph 8, where the defendant duly raises a lack of personal jurisdiction defense, the plaintiff bears the burden of proof on the issue of whether such jurisdiction exists. *Shore Pharmaceutical Providers, Inc. v. Oakwood Care Center, Inc.*, 65 A.D.3d 623, 885 N.Y.S.2d 88 (2d Dep't 2009).

The plaintiff may need discovery on jurisdiction-related issues, particularly regarding whether a basis exists for the New York court to impose its jurisdiction on the defendant. Questions on this front sometimes arise when a plaintiff claims that a defendant is amenable to suit in New York under our longarm jurisdiction statute (CPLR 302). The plaintiff can request that the court afford her an opportunity to conduct jurisdictional discovery before determining the motion to dismiss. *See* Commentary C3211:46.

C3211:29. Jurisdictional Basis Depending on Complaint.

Certain unique problems can arise in a case when the summons was served without an accompanying complaint, which is permissible under CPLR 305(b) and 3012, and the defendant moves to dismiss under paragraph 8 before the complaint is served. If service was purportedly made within New York and the defect relates to the mechanics of service, the motion should lie immediately and can be disposed of promptly. (In that instance the motion would be to dismiss "the action," since one cannot move to dismiss a non-existent complaint.) But when the summons is served outside the State and the defendant contends not that the method of service was defective, but rather that the court lacks a basis for extraterritorial jurisdiction, it may be impossible for the court to determine the question until the complaint is served.

If the extraterritorial jurisdictional basis relied on is the fact that the defendant is a New York domiciliary, *see* CPLR 313, affidavits should be adequate to determine the domiciliary status and the paragraph 8 motion should lie before service of the complaint. But if the basis is longarm jurisdiction under CPLR 302, the issue of whether the basis exists depends on geographical factors connected with the cause of action, and the cause of action cannot be seen until the complaint is served. For this reason, the motion to dismiss for lack of personal jurisdiction in such a case should await service of the complaint. *Fraley v. Desilu Productions, Inc.*, 23 A.D.2d 79, 258 N.Y.S.2d 294 (1st Dep't 1965) (denying motion to dismiss made before service of complaint, without prejudice to renewal after service).

The moral is that a defendant served outside New York with a summons but not the complaint ought to limit her next step to demanding a copy of the complaint. Nothing is lost by so doing: a defendant who demands a complaint after being served with the summons has 20 days after the complaint is finally served in which to answer or move against it. *See* CPLR 3012(b).

Paragraph 9

C3211:30. Lack of Rem Jurisdiction.

In rem and quasi in rem jurisdiction are predicated on the presence of property (or some other res) in the State. The plaintiff in an action founded on in rem jurisdiction is asserting an interest in a particular thing. *Majique Fashions, Ltd. v. Warwick & Co., Ltd.*, 67 A.D.2d 321, 326, 414 N.Y.S.2d 916, 919 (1st Dep't 1979) ("In rem jurisdiction ... involves an action in which a plaintiff is after a particular thing, rather than seeking a general money judgment, that is, [s]he wants possession of the particular item of property, or to establish h[er] ownership or other interest in it, or to exclude the defendant from an interest in it."). The plaintiff in a quasi in rem action wants a money judgment but cannot get personal jurisdiction over the defendant. So, the plaintiff looks to the defendant's in-State property. By employing the provisional remedy of attachment, the plaintiff can pursue her cause of action against the defendant and, if the plaintiff prevails in the action, the attached property will be applied toward the judgment. Commentary C314:4. The

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utility of quasi in rem jurisdiction is not what it once was, but that form of rem jurisdiction is still available under the right set of circumstances. *See* *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Limited*, 62 N.Y.2d 65, 476 N.Y.S.2d 64, 464 N.E.2d 432 (1984).

Paragraph 9 affords a ground for dismissal when service has been made under CPLR 314 or 315, the provisions governing in rem and quasi in rem actions. Whenever it is clear that the plaintiff is not claiming personal jurisdiction, but is bringing the action solely on a rem foundation, and the defendant can show that even rem jurisdiction does not exist--whether for lack of service or the fact that the res is not in New York or for any other reason that divests rem jurisdiction--the defendant's weapon is the motion to dismiss under CPLR 3211(a)(9).

Reliance on paragraph 9 exclusively is usually possible only when the plaintiff is not even making an argument that there is personal jurisdiction--when personal jurisdiction, in other words, is not in the picture at all--and when the defendant believes she can also show that not even the claimed rem jurisdiction exists. In any other situation it may be inappropriate for the defendant to rely solely on paragraph 9. If the defendant has any doubt whatever about the category of jurisdiction plaintiff claims to exist and defendant can show the absence of either category of jurisdiction, or of both, she had best caption the motion under both paragraphs 8 and 9 and let the court decide whether any jurisdiction exists and, if so, which kind it is. *See* Commentary C3211:31.

C3211:31. Confusion as to Kind of Jurisdiction Asserted.

When the defendant knows precisely what category of jurisdiction the plaintiff claims, and the defendant contends that the claimed basis does not exist, the defendant can caption the motion under either paragraph 8 or paragraph 9, whichever is applicable. The defendant can do this, in any event, when it is clear that the basis the plaintiff claims is the only possible one and that the existence of the unclaimed one is not even remotely possible. In any other instance, the defendant may face a dilemma. If the defendant has any doubt whatever about the kind of jurisdiction the plaintiff is asserting, the defendant should caption the motion to dismiss under both paragraphs 8 and 9 and ask the court to determine clearly which, if any, jurisdictional ground exists.

If the defendant claims neither basis exists, she would clearly invoke both grounds and move to dismiss the case entirely. *See* *Kalman v. Neuman*, 80 A.D.2d 116, 438 N.Y.S.2d 109 (2d Dep't 1981). If the defendant admits that one exists but contends that the other does not, she would move to dismiss on the ground describing the latter.

If the jurisdiction is only in rem, the defendant may be able to withdraw from the litigation without personam consequences. If it is only quasi in rem, the defendant may be able to stay on and defend without personam consequences. (For the distinctions between these categories of rem jurisdiction, *see* Siegel, New York Practice § 101 [Connors 5th ed.]) All these conclusions derive from CPLR 320(c). *See* Commentary C3211:39. What they manifest for our present purpose is that the defendant must be certain that the order disposing of the jurisdictional motion states specifically what kind of jurisdiction exists, if any does. *See* Siegel, New York Practice § 267. The defendant will have to depend on that determination to govern her future participation in the case.

Paragraph 10

C3211:32. Absence of a Person Who Should be A Party.

Paragraph 10 allows for dismissal of an action when the court determines that it "should not proceed in the absence of a person who should be a party." The statute does not talk about the absence of an "indispensable party"; that was the phrase used prior to the CPLR. The old "indispensable party" doctrine could be harsh. Under it, if an unjoined and unjoinable person was "indispensable," the action would be dismissed. *See generally* *Carruthers v. Jack Waite Mining Co.*, 306 N.Y. 136, 116 N.E.2d 286 (1953); Siegel, New York Practices § 131 (Connors 5th ed.). Paragraph 10 distances itself from the old law, abandoning both the words "indispensable party" and the principle that the absence of a person

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important in the scheme of the action must result in dismissal. *See Red Hook/Gowanus Chamber of Commerce v. New York City Board of Standards and Appeals*, 5 N.Y.3d 452, 805 N.Y.S.2d 525, 839 N.E.2d 878 (2005). Indeed, under the CPLR, dismissal for failure to join a necessary party is the last resort. Siegel, New York Practice § 133.

CPLR 3211(a)(10) can only be understood and applied if read in conjunction with CPLR article 10. Of particular significance is CPLR 1001. Subdivision (a) of that statute instructs that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." (To avoid the now taboo concept of the "indispensable party," we'll call the important non-party the "necessary party"). Subdivision (b) tells us what is to happen if a necessary party has not been included in the caption. The easy part: if the necessary party is subject to the court's jurisdiction, the court must direct that the necessary party be joined as a party. *Dime Savings Bank of N.Y. v. Johneas*, 172 A.D.2d 1082, 569 N.Y.S2d 260 (4th Dep't 1991). If the necessary party cannot be joined and will not voluntarily appear in the action, the court must engage in a balancing of numerous factors to ascertain whether justice requires that the action proceed without her.

These are the CPLR 1001(b) factors:

"1. Whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;

"2. The prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

"3. Whether and by whom prejudice might have been avoided or may in the future be avoided;

"4. The feasibility of a protective provision by order of the court or in the judgment; and

"5. Whether an effective judgment may be rendered in the absence of the person who is not joined."

No one factor is determinative and each of them must be considered by the court. *Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 N.Y.3d 543, 950 N.Y.S.2d 293, 973 N.E.2d 703 (2012); *Red Hook/Gowaus Chamber of Commerce v. New York City Board of Standards and Appeals, supra*. Also, the court can consider that dismissal is the last resort, and that the purposes of the dismissal remedy are to prevent multiple, inconsistent judgments relating to the same controversy, and to protect the non-party from embarrassment from a judgment purporting to bind her rights or interests. *See Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003).

The framework of the analysis of a motion to dismiss under CPLR 3211(a)(10) is as follows:

Initially, inquiry must be made into whether the non-party is a necessary one under CPLR 1001(a). If she isn't, the motion can be denied; if she is, the court must consider whether the non-party is subject to the court's jurisdiction. If she is, the court can order her joinder; if not, the court must consider and weigh the five factors listed in CPLR 1001(b) to ascertain whether justice requires that the action proceed without the non-party.

The path to dismissal is difficult, just the way the drafters of the CPLR intended it. *See* Siegel, New York Practice § 133.

A fine example of the consideration and balancing of the factors can be viewed in *L-3 Communications Corp. v. Safenet, Inc.*, 45 A.D.3d 1, 841 N.Y.S.2d 82 (1st Dep't 2007).

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What if it is not clear to the court whether the necessary party is subject to the court's jurisdiction? The court can deny the paragraph 10 motion without prejudice and grant the plaintiff leave to join the necessary party within a certain period of time. *Williams v. Somers*, 91 A.D.2d 545, 457 N.Y.S.2d 19 (1st Dep't 1982). If the plaintiff is unable to do so, she should move to be excused from joining the necessary party under CPLR 1001(b), and that motion should be supported by an affidavit demonstrating why the necessary party isn't subject to the court's jurisdiction. *Id.* The without-prejudice dismissal of the CPLR 3211(a)(10) motion would permit the defendant to make another motion to dismiss under that ground if the plaintiff fails to comply with the prior order.

As to the timing of a paragraph 10 motion, it is a member of that exclusive club of subdivision (a) grounds (along with paragraphs 2 and 7) that can be made at any time. CPLR 3211(e); *City of New York v. Long Island Airports Limousine Service Corp.*, 48 N.Y.2d 469, 475, 423 N.Y.S.2d 651, 654, 399 N.E.2d 538, 541 (1979) ("[a] court may always consider whether there has been a failure to join a necessary party"). Does that mean that a defendant's delay in making a CPLR 3211(a)(10) motion must go without consequence? Maybe the delay, if sufficiently lengthy, will be considered by the court in the course of its review and balancing of the CPLR 1001(b) factors, particularly with respect to factor number three. Commentary C1001:2. But delay, no matter its length, will not result in a waiver of the defendant's right to make the paragraph 10 motion. *D.M.I. Painting, Inc. v. Eastern Long Island Hospital*, 74 A.D.2d 838, 839, 425 N.Y.S.2d 633, 635 (2d Dep't 1980) ("failure of the [defendant] to move until the eve of trial is deplorable but does not constitute a waiver").

CPLR 3211(a)(10) does not expressly allow for conditions to be imposed in connection with a dismissal for failure to join a necessary party. But CPLR 1001(b)'s factor four makes plain that reasonable conditions are authorized. *See* Siegel, New York Practice § 268. For some examples of appropriate conditions, *see id.* at § 133.

Paragraph 11

C3211:33. Dismissal in Favor of Uncompensated Official of Not-for-Profit Organization.

CPLR 3211(a)(11) provides a narrow class of individuals with a very special, very specific dismissal device. That ground applies to directors, officers and trustees who serve without compensation in not-for-profit entities. Under Not-For-Profit Corporation Law (N-PCL) § 720-a, an uncompensated director, officer or trustee enjoys qualified immunity from most lawsuits; the immunity is stripped only if the conduct of the individual constituted gross negligence or was intended to cause harm. Paragraph 11's aim is to reduce protracted litigation against certain persons engaged in non-paid charitable activities. *Rabushka v. Marks*, 229 A.D.2d 899, 646 N.Y.S.2d 392 (3d Dep't 1996). How does it do that? By providing an expedited procedure, a mini-summary judgment of sorts, for the testing of the defendant's claim of immunity under N-PCL § 720-a. *Krackeler Scientific, Inc. v. Ordway Research Institute, Inc.*, 97 A.D.3d 1083, 949 N.Y.S.2d 286 (3d Dep't 2012). Here's how CPLR 3211(a)(11) works.

First, the court must ascertain whether the defendant moving for relief under paragraph 11 is entitled to the qualified immunity provided by N-PCL § 720-a. *Kamchi v. Weissman*, 125 A.D.3d 142, 1 N.Y.S.3d 169 (2d Dep't 2014). That statute is explicit: the uncompensated director, officer or trustee must serve an entity described in § 501(c)(3) of the United States Internal Revenue Code (26 U.S.C. 501[c][3]). *See Bernbach v. Bonnie Briar Country Club*, 144 A.D.2d 610, 534 N.Y.S.2d 695 (2d Dep't 1988). CPLR 3211(a)(11) facilitates the defendant's proof by accepting as presumptive evidence of the entity's 26 U.S.C. 501(c)(3) status certain Internal Revenue Service letters and publications. The affidavit of the chief financial officer of the entity attesting to the defendant's status as an uncompensated director, officer or trustee of the entity is presumptive evidence of such status. CPLR 3211(a)(11). Those presumptions can be rebutted by the plaintiff.

If the defendant's evidence on the motion establishes, *prima facie*, both that the entity with which the defendant is affiliated is a not-for-profit organization under 26 U.S.C. 501(c)(3), and that the defendant is an uncompensated director, officer or trustee thereof, the court must next consider whether there is a "reasonable probability" that

the defendant's alleged conduct constituted gross negligence or intentional harm. If there is no such "reasonable probability" the action must be dismissed.

The burden of proof on the "reasonable probability" element would appear to rest on the plaintiff. *Rabushka v. Marks, supra*; *see Brown v. Albany Citizens Council on Alcoholism, Inc.*, 199 A.D.2d 904, 605 N.Y.S.2d 577 (3d Dep't 1993). Thus, once the defendant makes a prima facie showing of entitlement to the qualified immunity of N-PCL § 720-a, the ball moves to the plaintiff's court to "come forward with evidentiary proof showing a fair likelihood that ... she will be able to prove that the defendant was grossly negligent or intended to cause the resulting harm." *Rabushka*, 229 A.D.2d at 900, 646 N.Y.S.2d at 395. A plaintiff in that position cannot rely on the favorable rules of decision applicable to most other CPLR 3211(a) grounds, and the plaintiff is compelled to lay bare her proof that the defendant's conduct was grossly negligent or intended to cause harm. *Kamchi v. Weissman*, 125 A.D.3d at 161, 1 N.Y.S.3d at 184; *Krackeler Scientific, Inc. v. Ordway Research Institute, Inc.*, 97 A.D.3d at 1084, 949 N.Y.S.2d at 287.

A plaintiff must submit evidence in admissible form showing a fair likelihood that she will be able to prove that defendant was grossly negligent or intended to cause harm. A detailed affidavit by one with personal knowledge of the relevant facts may do the trick. *Rabushka v. Marks, supra*; *Brown v. Albany Citizens Council on Alcoholism, Inc., supra*. A detailed pleading verified by one with familiarly with the facts may also suffice. *Cf. Krackeler Scientific, Inc v. Ordway Research Institute, Inc., supra*. The key is detailed factual averments by a knowledgeable witness or equivalent evidence. *See Kamchi v. Weissman*, 125 A.D.3d at 161-162, 1 N.Y.S.3d at 184 ("given the nature of the specific allegations as well as certain undisputed circumstances ... we conclude that there is a reasonable probability that the plaintiffs can establish that the defendants' actions constituted gross negligence or were intended to cause the resulting harm.").

In light of the unique purpose of CPLR 3211(a)(11) and the treatment it has received from the courts, it would appear that CPLR 3211(d), which allows a party opposing a CPLR 3211(a) or (b) motion to seek to forestall a decision on the motion for the purpose of gathering evidence, has limited, if any application on a paragraph 11 motion.

CPLR 3211(a)(11) sets up a summary judgment-like procedure relating to the immunity issue. Therefore, the court need not convert the paragraph 11 motion into one for summary judgment (*see* CPLR 3211[c]), provided the court confines its summary judgment-type review to the question of the defendant's immunity.

Interestingly, neither CPLR 3211(a)(11) nor CPLR 3211(e) indicate whether a motion under paragraph 11 must be made before service of an answer. Does that mean that it can be made at any time (like a motion under paragraph 2, 7 or 10)? The Third Department has considered the question and concluded that a CPLR 3211(a)(11) motion must be made before service of the answer. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). The court observed, however, that a defendant who fails to make a pre-answer motion to dismiss under paragraph 11 can move for summary judgment on that ground, provided it was raised in the answer. *Id.*

The unique dismissal ground provided by paragraph 11 is available to individuals entitled to qualified immunity under N-PCL § 720-a, as well as individuals entitled to qualified immunity under Arts and Cultural Affairs Law § 20.09.

Subdivision (b)

C3211:34. Motion to Dismiss Defense, Generally.

Subdivision (a) addresses a motion to dismiss an affirmative claim--a cause of action, a counterclaim, a cross claim, etc. Subdivision (b) provides a device to the pleader of an affirmative claim to seek dismissal of a defense interposed against the claim.

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The mission of subdivision (b) is captured in one simple sentence: "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." Any matter in a pleading that manifests a "defense" can be the target of a subdivision (b) motion. While a defendant seeking to dismiss a cause of action must find a specific subdivision (a) ground on which to rest the motion, *see* Commentary C3211:5, a plaintiff using subdivision (b) can raise any cognizable ground against a defense. Thus, the plaintiff can rely on any basis in law or fact that warrants dismissal of a defense. Another important feature of a subdivision (b) motion: it can be made at any time. *See* Commentary C3211:48.

CPLR 3211(e) allows the defense of failure to state a cause of action to be made the subject of a pre-answer motion, asserted in an answer or raised at some later time. If a defendant avails itself of option number two and interposes the CPLR 3211(a)(7) defense in its answer, can the plaintiff move to dismiss that defense under subdivision (b)? No, because such a motion would amount to an attempt by the plaintiff to test the sufficiency of her own claim. *Butler v. Catinella*, 58 A.D.3d 145, 150, 868 N.Y.S.2d 101, 105 (2d Dep't 2008). The CPLR 3211(a)(7) defense is therefore impervious to a CPLR 3211(b) challenge. *Id.*; *see Riland v. Frederick S. Todman & Co.*, 56 A.D.2d 350, 393 N.Y.S.2d 4 (1st Dep't 1977).

C3211:35. Standards on a CPLR 3211(b) Motion.

A plaintiff seeking dismissal of a defense has the burden of demonstrating that the defense is without merit as a matter of law. When faced with a CPLR 3211(b) motion, a court must liberally construe the pleadings in favor of the defendant and afford the defendant the benefit of every reasonable inference. *Bank of New York v. Penalver*, 125 A.D.3d 796, 1 N.Y.S.3d 825 (2d Dep't 2015); *see 534 E. 11th Street Housing Development Fund Corp. v. Hendrick*, 90 A.D.3d 541, 935 N.Y.S.2d 23 (1st Dep't 2011). Any doubt as to the availability of the defense or as to whether it should be dismissed should be resolved in favor of the defendant. *See Nahrebeski v. Molnar*, 286 A.D.2d 891, 730 N.Y.S.2d 646 (4th Dep't 2001); *see 534 E. 11th Street Housing Development Corp. v. Hendrick*, 90 A.D.3d at 542, 935 N.Y.S.2d at 24 ("A defense should not be stricken where there are questions of fact requiring trial."). The standards applicable to a CPLR 3211(b) motion to dismiss a defense are therefore akin to the rules of decision applicable to motions to dismiss a cause of action under CPLR 3211(a)(1), (5) and (7). *See* Commentaries C3211:10, 18, and 21.

C3211:36. Motion Not Limited to Defense Defective on its Face.

Subdivision (b) may be used to seek dismissal of a defense that is defective on its face. Such a legal-sufficiency-of-the-pleading challenge would not require the plaintiff to submit evidence in support of the motion. CPLR 3211(b) is also available to lodge a merits-based attack against a defense. The plaintiff is free to submit evidence of any kind (as long as it is in admissible form), *see* Commentary C3211:40, to undercut any facts on which the defense is founded. If the plaintiff's evidence demonstrates that the defense is without merit as a matter of law, *see* Commentary C3211:35, and the defendant does not submit any evidence rehabilitating the defense, dismissal is appropriate. *See Leonard v. Leonard*, 31 A.D.2d 620, 296 N.Y.S.2d 375 (1st Dep't 1968). (The defendant may avoid dismissal if she needs time to gather evidence, *see* Commentary C3211:46).

CPLR 3211(b) and 3211(a)(7) are analogous, each allowing for both a facial sufficiency and a merits-based challenge to a pleading. *See* Commentary C3211:23. CPLR 3211(b) explicitly authorizes dismissal of a defense on either basis ("A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit."). CPLR 3211(a)(7), on the other hand, appears at first blush to support only a facial sufficiency dismissal. Judicial construction of (a)(7), however, has expanded the role of that dismissal ground. *See* Commentary C3211:23.

C3211:37. Motion to Dismiss Defense May Lead to "Searching the Record."

"Searching the record" is a process whereby the court, called on by a moving party to grant that party relief on a cause of action, looks at the motion record to ascertain whether some other party is entitled to judgment on that

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claim. It is a familiar concept in summary judgment practice, where searching the record is expressly authorized. *See* CPLR 3212(b) ("[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."). The power to search the record is not conferred directly by CPLR 3211(b), but is available by implication. CPLR 3211(c) permits a court, on notice to the parties, to convert a CPLR 3211 motion into one for summary judgment. *See* Commentary C3211:42. Upon a CPLR 3211 motion's conversion to one for summary judgment, the option to search the record provided by CPLR 3212(b) becomes available to the court. (We say "option" because the determination of whether to search the record is a discretionary one. *See Raine v. Gleason*, 194 A.D.2d 395, 598 N.Y.S.2d 504 [1st Dep't 1993]).

A plaintiff considering whether to move under subdivision (b) must therefore think long and hard before doing so. The CPLR 3211(b) motion, made with the expectation that it will lead to a paring down of the answer and the elimination of a defense to the plaintiff's action, allows the court, in its discretion, to consider whether the defense being challenged by the plaintiff actually warrants dismissal of the complaint.

Note that a court's power to search the record is confined to those claims, defenses and issues that are the subject of the underlying motion. *Dunham v. Hilco Construction Co., Inc.*, 89 N.Y.2d 425, 429-430, 654 N.Y.S.2d 335, 337, 676 N.E.2d 1178, 1180 (1996); Commentary C3212:23; *see Mann v. Rusk*, 14 A.D.3d 909, 788 N.Y.S.2d 686 (3d Dep't 2005). For that reason, a motion to dismiss a counterclaim under CPLR 3211(a) does not search the record and allow a court to dismiss a defense. *Key Bank of Northern New York, N.A. v. Lake Placid Co.*, 103 A.D.2d 19, 28, 479 N.Y.S.2d 862, 869 (3d Dep't 1984); *see Croce v. Alicakos*, 45 A.D.2d 970, 359 N.Y.S.2d 581 (2d Dep't 1974).

C3211:38. Move to Dismiss Jurisdictional Defense Promptly.

As is more fully developed in the discussion of subdivision (e), *see* Commentary C3211:52, a subdivision (a) dismissal ground need not be taken by motion. The defendant can instead use the ground as a defense in the answer. As to most of the subdivision (a) grounds, the defendant's use of the ground as a defense rather than on a motion to dismiss will not contain any special dangers for the plaintiff. If the ground, for example, is that the cause of action is barred by res judicata or release, etc., the impact of the defendant's tactic is only to postpone a determination of the issue to the trial or, perhaps, to a later motion for summary judgment. In these instances, where the determination will effectively bar the plaintiff from beginning the action again, at least in a New York court, it is of relatively less moment to the plaintiff that the determination is made later rather than sooner.

In some instances, however, a postponement of an adjudication of the defense's validity can have serious consequences for the plaintiff. This is the case when the defendant's objection is that the court lacks in personam (CPLR 3211[a][8]) or rem (CPLR 3211[a][9]) jurisdiction. *See* Commentaries C3211:28 and 30. It concerns the statute of limitations.

CPLR 205(a) permits a plaintiff whose cause of action has been dismissed on some threshold ground--without reaching the merits--to begin a new action on the same claim within six months after the dismissal, notwithstanding that the original period of limitations applicable to the claim has already expired. There are some important exceptions in CPLR 205(a), however, one of which is a dismissal for lack of personal jurisdiction over the defendant. *See* Siegel, New York Practice § 52 (Connors 5th ed.). This means that if a dismissal for lack of personal jurisdiction is postponed until after the original statute of limitations has expired, the dismissed plaintiff will find herself barred by the statute of limitations and without the six months that CPLR 205(a) might otherwise offer for a new action.

When the defendant takes the jurisdictional objection by way of defense in the answer rather than by motion, time is running and with it the date on which the statute of limitations will expire draws near. One remedy of the plaintiff is to move promptly to dismiss the jurisdictional defense under CPLR 3211(b), which will bring it to early adjudication. The plaintiff must also recognize, however, that the court on such a motion has the power to deny it without passing on its merits (*see* Commentary C3211:47), thus deferring the issue until the main trial. The plaintiff should spare

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no reasonable effort in pointing out to the court the limitations consequences that may attend such a postponement, urging the court to decide the motion on its merits rather than exercise its discretion to defer it.

A plaintiff may also take the precautionary step--and often prefers to if the jurisdictional defense has any chance whatever of succeeding--of commencing the same action all over again, this time being more careful to assure that jurisdictional requirements have been satisfied. If the alleged jurisdictional defect relates to service of the process or the manner in which the action was commenced, *see* Commentary C3211:28, the plaintiff can initiate the new action in the same court, taking care this time to ensure that all i's are dotted and t's crossed. Should the jurisdictional issue arise because there is a question as to whether there is a Constitutionally sufficient basis upon which to subject the defendant to the New York court's jurisdiction, *see, id.*, the plaintiff should consider bringing a back-up action in a forum that has basis jurisdiction over the defendant.

If an issue of fact exists and prevents the summary determination of a motion to dismiss the jurisdictional defense, the moving plaintiff should remind the court of its power to order immediate trial of the issue. *See* Commentary C3211:44.

C3211:39. Peculiarities in "Rem" Cases Caused by Operation of CPLR 320(c)(2).

When the plaintiff sues only on an in rem (as opposed to a quasi in rem) foundation, the consequences of the defendant's appearance in the action are governed by the difficult provisions of CPLR 320(c)(2). The plaintiff may have to follow a convoluted course to preserve her rights under CPLR 3211(b).

CPLR 320(c)(2) provides that where the in rem defendant "proceeds with the defense after asserting the [in rem jurisdictional] objection," she forfeits all further objection and submits to the in personam jurisdiction of the court. There should be no difficulty when the defendant moves to dismiss on the in rem jurisdictional ground, i.e., under CPLR 3211(a)(9). If she prevails on the motion, the case is dismissed. If she does not prevail on it, she has a clear opportunity to withdraw from the litigation, leaving behind only an "in rem default," which assures that no resulting judgment can operate against her in personam. This is an advantage that CPLR 320(c)(2) gives her.

The difficulty arises when the defendant does not use the in rem jurisdictional objection under CPLR 3211(a)(9) on a motion to dismiss, but rather incorporates it as a defense in the answer, which the defendant may do under CPLR 3211(e). In that instance both sides are going to have difficulty in determining what constitutes "proceeding with the defense" sufficient to submit the defendant to personal jurisdiction under the language of CPLR 320(c)(2). Take an example:

There is no in personam jurisdiction in the case. There is only in rem jurisdiction. Assume that the defendant answers with defenses under both categories of jurisdiction. The plaintiff can move under 3211(b) to strike out the objection to in rem jurisdiction, which motion--because in rem jurisdiction does exist (and so the court finds)--would be granted. The plaintiff would not succeed, however, in getting the defense to in personam jurisdiction stricken, because there was no in personam jurisdiction to start with, meaning that the defense is a good one. And by merely including a defense of lack of personal jurisdiction in the answer--in this situation in which there was in rem jurisdiction at the outset--the defendant does not, under CPLR 320(c)(2), thereby submit to personal jurisdiction. Under CPLR 320(c)(2), the defendant does not waive the objection to personal jurisdiction unless she proceeds with the defense of the action "after asserting the objection to jurisdiction."

If, therefore, the plaintiff promptly moves to strike out the defendant's defense of lack of personal jurisdiction just as soon as the defendant serves the answer containing it, the court will have to deny the motion.

But suppose that the defendant, after the sustaining of the rem jurisdiction, goes forward and defends the action on the merits. Under the terms of CPLR 320(c)(2), the defendant thereby submits to the personam jurisdiction of the court. Continuing to defend on the merits after the sustaining of rem jurisdiction constitutes a submission to personam

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jurisdiction even though there was none to begin with. Hence the plaintiff can now move to strike out the in personam jurisdictional defense, a defense that was sustained earlier. Whenever a defense of lack of personal jurisdiction is contained in the original answer in an in rem case, thus presenting the possibility that the defendant will go forward on the merits (after answering) and thereby submit to personal jurisdiction, the plaintiff can move to strike out the defense whenever--at that post-answer time--the defendant does go forward.

In regard to what constitutes proceeding "with the defense" after asserting a jurisdictional objection, especially where the defense is asserted in the answer rather than used on a motion to dismiss, the courts have maintained a rather consistent silence. Since the very service of an answer containing the defense is an "assertion" of it, one can argue that anything the defendant does in the action after serving the answer submits her to personal jurisdiction. That would be an unfair result, but if the defendant experiences any difficulty with it she can blame herself for not using the motion procedure of CPLR 3211(a), which would have afforded her an early adjudication of the defense and enabled her to decide intelligently under CPLR 320(c)(2) whether or not to proceed in the action. The courts obviously do not like this aspect of CPLR 320, whose dictates become confused when the alternative of pleading the defense in the answer is used, as allowed by CPLR 3211(e)

It has been held that a demand for a bill of particulars served along with the answer is not a going forward under CPLR 320(c)(2) such as will forfeit an objection to personal jurisdiction. *Solarino v. Noble*, 55 Misc.2d 429, 286 N.Y.S.2d 71 (Sup. Ct., New York County 1967). The best advice to the defendant, to whom the potential consequences of these confusing requirements are greater than they are to the plaintiff, is to use the 3211(a) (8 and 9) motion rather than the answer to make the jurisdictional objections.

The occasions for the kind of problem noted above were reduced by a 1969 amendment of CPLR 320(c). In the quasi in rem case in which jurisdiction is based solely on an attachment of the defendant's property, the amendment allows the defendant to defend in full without in personam consequences. *See* CPLR 320(c)(1). Thus, the problems under discussion should arise today only when the jurisdiction is in rem rather than quasi in rem, i.e., where CPLR 320(c)(2) governs. In rem examples would be foreclosure of a mortgage on local real property, replevin of a local chattel, or a matrimonial action, etc., in which there is initially no personal jurisdiction of the defendant.

Purely "in rem" jurisdiction is a casualty of the CPLR's 1963 adoption. The expansion of the bases for extraterritorial personal jurisdiction adopted under the longarm statute, CPLR 302, supplies personal jurisdiction in most of the situations that would previously have had only rem jurisdiction to rely on. Hence the infrequent need to attend to these in rem complications today.

Subdivision (c)

C3211:40. Evidence Permitted on CPLR 3211 Motion.

The first sentence of CPLR 3211(c) provides that, "[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment." Therefore, any evidence in admissible form may be submitted in support of or opposition to a CPLR 3211(a) or (b) motion. *See* Commentary C3212:15. That means the affidavit is available. So too are deposition transcripts, all types and forms of records, and admissions. You name it, if it is in admissible form, it is welcome on the CPLR 3211 motion.

There is, however, one situation in which the type of evidence available to the CPLR 3211(a) movant is limited (and drastically at that). That is where the defendant moves to dismiss a cause of action under the "documentary evidence" ground. CPLR 3211(a)(1). As discussed above, *see* Commentary C3211:10, a defendant relying on that ground must tender a paper with certain characteristics; the document must be unambiguous and of undeniable authenticity, and its contents must be essentially undeniable. Most evidence cannot satisfy those criteria. That is why it is recommended

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that the CPLR 3211(a) movant invoke the documentary evidence ground along with one or more other potentially relevant grounds (such as failure to state cause of action [CPLR 3211(a)(7)]).

A CPLR 3211(a)(7) movant can rely on any evidence in support of her motion to dismiss for failure to state a cause of action. That principle finds significant case law support. But there is some authority to the contrary that would prevent a defendant from obtaining dismissal of a well-pleaded complaint under paragraph 7 based on evidence. *See* Commentary C3211:23.

Regardless of whether the evidence submitted in support of a CPLR 3211 motion can or does support dismissal, the evidence can serve a very valuable function: it can help the court to ascertain whether to convert the CPLR 3211 motion into one for summary judgment. *See* Commentary C3211:42.

C3211:41. Evidence required on CPLR 3211 Motion--Pleadings.

CPLR 3212(b) requires the summary judgment movant to submit with her motion a complete set of the pleadings in the action. *See* Commentary C3212:15. There is no similar requirement in CPLR 3211 for motions to dismiss. But, by virtue of the application of CPLR 2214(c), which requires the moving party to furnish to the court all papers necessary for the court's consideration of a motion, the CPLR 3211 movant must submit a copy of the pleading that is being attacked. *See Alizio v. Perpignano*, 225 A.D.2d 723, 640 N.Y.S.2d 191 (2d Dep't 1996); Siegel, New York Practice §§ 246, 257 (Connors 5th ed.). To be safe, the movant should submit all of the pleadings interposed in the action (assuming there is more than one pleading at the time the motion is made, which will be the case, among other situations, with any post-answer subdivision [a] motion and any subdivision [b] motion). A court may, in its discretion, overlook the movant's failure to submit a pleading--where, for instance, the court obtains it from another source (*Asinoff v. Asinoff*, 39 Misc.3d 1207[A], 2013 WL 1406215 [Sup. Ct., Kings County 2013])--or permit the movant to submit it belatedly. *See* CPLR 2001 ("At any stage of an action ... the court may permit a mistake, omission, defect or irregularity ... to be corrected ..., or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded."). But why test a court's tolerance for sloppy practice? Submit the pleading (or pleadings if there's more than one) and keep the court's attention on the merits of the motion.

We tip our cap to Professor Connors, who has brought to the fore this potential trap for the unwary CPLR 3211 movant. *See* Siegel, New York Practice §§ 246, 257.

C3211:42. Converting CPLR 3211 Motion into One for Summary Judgment.

Normally, summary judgment is not available until after issue has been joined. *See* CPLR 3212(a). The second sentence of CPLR 3211(c), however, provides that, "[w]hether or not issue has been joined, the court, after adequate notice to the parties, may treat the [subdivision (a) or (b)] motion as a motion for summary judgment." This conversion from a motion to dismiss to a motion for summary judgment will entitle any order granting accelerated-judgment to res judicata treatment. *See* Commentary C3211:64. Also, it enables the court to "search the record," CPLR 3212(b), and grant relief to a non-moving party. *See* Commentary C3211:37.

Any subdivision (a) or (b) motion has the potential to trigger a subdivision (c) conversion; the court's power to treat a motion to dismiss as one for summary judgment does not depend on the CPLR 3211 ground on which the motion was made. The usual suspect, though, responsible for triggering a conversion is CPLR 3211(a)(7). Paragraph 5 of subdivision (a), which provides for dismissal based on certain enumerated affirmative defenses, *see* Commentary C3211:18, and subdivision (b), the dismissal-of-defenses provision, *see* Commentary C3211:34, are in on the action too.

Why do these types of CPLR 3211 motions generate a disproportionate number of subdivision (c) conversions? Because they are the ones most likely to produce a factual record that resembles the one developed on an outright,

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post-joinder of issue motion for summary judgment. It is a developed factual record that suggests to the court that there are no material issues of fact in the matter, which, in turn, may lead to the court to convert the motion. *See Born to Build LLC v. Saleh*, 36 Misc.3d 590, 950 N.Y.S.2d 236 (Sup. Ct., Nassau County 2012). After all, if the record is complete (or could be made so upon the conversion), the action can be put to rest expeditiously, sparing the parties needless expense, providing finality to them sooner rather than later, and allowing the court to concentrate its efforts on other matters.

Conversion does not lie to "resurrect" an untimely motion to dismiss under CPLR 3211(a) or to otherwise "cover" for an attorney's mistake that led to the waiver of a defendant's right to invoke a subdivision (a) ground. *Born to Build LLC v. Saleh*, 36 Misc.3d at 593, 950 N.Y.S.2d at 238. (New members of the Bar, as well as experienced practitioners who have developed bad habits in motion practice, should read the *Born to Build* decision; it serves as a stark reminder of the importance of minding good procedure). A CPLR 3211(a) movant must therefore identify the grounds in that subdivision that may apply to the action and, if they are subject to waiver, duly raise them in either a pre-answer motion to dismiss or the answer.

C3211:43. Notice of the Conversion.

The court determines whether conversion is to occur, although the parties are free to ask or encourage the court to convert the motion. The court must provide the parties with adequate notice of its intention to invoke subdivision (c). The point of this requirement is to provide the parties with an opportunity to make an appropriate record before the court decides the motion. *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288 (1988). The notice of conversion must clearly and unambiguously alert the parties that the court intends to treat the motion as one for summary judgment. *See 20 Pine Street Homeowners Assoc. v. 20 Pine Street LLC*, 109 A.D.3d 733, 971 N.Y.S.2d 289 (1st Dep't 2013). This is important. The parties cannot be made to guess whether they are facing a merits-based summary judgment determination.

Notice of the conversion must come from the court when the action is in the pre-joinder-of-issue phase. But what if a post-answer CPLR 3211(a) motion invokes a ground that, under CPLR 3211(e), should have been raised by pre-answer motion or in the answer? Such a motion would be, in effect, one for summary judgment because no post-answer CPLR 3211(a) motion lies on a ground that may be waived. The list of grounds that may be waived is long--paragraphs 1, 3, 4, 5, 6, 8, 9, and 11. Must the court give notice of its intention to "convert" the motion in that instance or can it disregard the mislabeling of the motion and just treat it as a summary judgment motion? The Court of Appeals' decision in *Rich v. Lefkovits*, 56 N.Y.2d 276, 452 N.Y.S.2d 1, 437 N.E.2d 260 (1982), suggests that the court should give the notice.

In *Rich*, the CPLR 3211(a) motion was based on paragraph 8, lack of personal jurisdiction (a ground subject to waiver), and the motion was made long after the joinder of issue. The trial court considered the motion under CPLR 3211 and granted it. The First Department affirmed. The Court of Appeals reversed the order of the Appellate Division and remanded the matter to the trial court to provide the parties with notice of a CPLR 3211(c) conversion. The Court found that the trial court erred in not converting the motion into one for summary judgment because that was the only procedural device available under the circumstances, the defendant having waived the right to make a CPLR 3211(a) motion by not moving pre-answer. *See* Commentary C3211:55. The Court stated that "[r]equiring that a motion addressed to lack of personal jurisdiction made after answer pleading that lack as an affirmative defense be made by motion specifying that it is made under CPLR 3212 or, if made under 3211, that the parties be given notice that the court will consider it as a 3212 motion[,] reduces the possibility of gamesmanship, while at the same time permitting the court to deal with the issue in the most efficient manner ..." 56 N.Y.2d at 282, 452 N.Y.S.2d at 4-5, 437 N.E.2d at 263-264. The Court observed that, based on the record before it, it could not be said that the plaintiff was not prejudiced by the failure of the trial court to convert the motion. The motion should have been one for summary judgment, conversion was therefore required, and had conversion occurred the plaintiff would have been provided with notice and the opportunity to lay bare his proof on the jurisdictional issue raised on the motion.

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In light of *Rich*, if a party mislabels what ought to be a CPLR 3212 motion as one pursuant to CPLR 3211(a), the court should notify the parties that the motion will be converted, invite submissions and convert the motion. *See JP Morgan Chase Bank v. Johnson*, 129 A.D.3d 914, 10 N.Y.S.3d 446 (2d Dep't 2015). Where, however, the mislabeling has not caused prejudice to the non-moving party (maybe because the motion papers made it clear that what the defendant was really seeking was summary judgment), courts have overlooked the mistake and treated the motion as one for summary judgment without giving the non-moving parties any additional notice. *See Schultz v. Estate of Sloan*, 20 A.D.3d 520, 799 N.Y.S.2d 246 (2d Dep't 2005); *Hertz Corp. v. Luken*, 126 A.D.2d 446, 510 N.Y.S.2d 590 (1st Dep't 1987); *see also Guzov v. Manor Lodge Holding Corp.*, 13 A.D.3d 482, 787 N.Y.S.2d 84 (2d Dep't 2004).

There are three exceptions to the requirement that the court give notice to the parties of its intention to convert a CPLR 3211(a) or (b) motion into one for summary judgment. If one of the exceptions is applicable, the court can simply treat the CPLR 3211 motion as one for summary judgment and the absence of notice of a subdivision (c) conversion will be overlooked. The exceptions are as follows: (1) where subdivision (c) treatment is requested by all of the parties; (2) where the motion raises a pure question of law addressed by all of the parties; and (3) where the parties, by laying bare their respective proofs, deliberately chart a summary judgment course. *Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 955 N.Y.S.2d 1 (2d Dep't 2012); *see Mihlovan v. Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288 (1988); *see also Richard A. Hellander, M.D., P.C. v. Metlife Auto & Home Ins. Co.*, 48 Misc. 3d 59, 15 N.Y.S.3d 537 (App. Term, 2d Dep't 2015) (charting summary judgment course). If the procedural posture of the case is equivocal and a party does not appreciate the need to submit all of her evidence and arguments in connection with the motion, the third exception will not apply. *See generally Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756, 874 N.E.2d 720 (2007).

In the event that the trial court treats the CPLR 3211 motion as one for summary judgment without giving the parties clear notice of its intention to do so (and none of the exceptions to the notice requirement applies), an appellate court will apply the standards applicable to a motion to dismiss. *Jones v. Rochdale Village, Inc.*, 96 A.D.3d 1014, 948 N.Y.S.2d 80 (2d Dep't 2012); *Sta-Brite Services, Inc. v. Sutton*, 17 A.D.3d 570, 794 N.Y.S.2d 70 (2d Dep't 2005).

One last note on conversion. A motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]) can be made at any time. *See* Commentary 3211:49. The movant employing a paragraph 7 motion can seek dismissal of a complaint on the basis that it is facially deficient or on the basis that the cause of action stated is resolved conclusively by evidence. *See* Commentary C3211:23. Evidence submitted on the CPLR 3211(a)(7) motion might suggest to the court that summary judgment treatment is appropriate. *See* Commentary C3211:42.

A CPLR 3211(a)(7) motion made long after the joinder of issue and supported by evidence is a particularly attractive candidate for conversion to summary judgment.

When a CPLR 3211(c) conversion takes place, the motion to dismiss becomes one for summary judgment. A summary judgment motion (unlike a CPLR 3211[a][7] motion) must be made within a certain period of time. (CPLR 3212[a] provides, in relevant part, that "the court may set a date after which no [summary judgment] motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.")

The Court of Appeals has made plain that summary judgment motion deadlines must be taken seriously: if a summary judgment motion is untimely, the motion must be denied unless the movant provides a satisfactory explanation for the untimeliness. *Brill v. City of New York*, 2 N.Y.3d 648, 652, 781 N.Y.S.2d 261, 264, 814 N.E. 2d 431, 434 (2004). Neither the merits of the motion nor the absence of prejudice to the non-moving party is relevant in ascertaining whether good cause exists to consider a late motion. *Id.*; *see* Commentary C3212:12.

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Thus, when a conversion is effected on a CPLR 3211(a)(7) motion that was made after the deadline for summary judgment motions, the movant must demonstrate "good cause"--a satisfactory explanation for the untimely summary judgment motion--otherwise the motion should be denied. *See Neil v. New York City Housing Auth.*, 15 Misc.3d 1115(A), 2007 WL 1005525, at *6 (Sup. Ct., Kings County 2007); Connors, *CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions*, 71 Brook. L. Rev. 1529, 1577--1578 (Summer 2006). If the timeliness provision of CPLR 3212(a) did not apply to a CPLR 3211(a)(7) motion converted to one for summary judgment under CPLR 3211(c), parties would be encouraged to turn to paragraph 7 where the deadline for making a summary judgment motion has passed and the *Brill* holding would be undermined significantly. *See Neil v. New York City Housing Auth.*, 15 Misc.3d 1115(A), 2007 WL 1005525, at *6, Connors, *CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions*, *supra*, at 1577-1578.

C3211:44. Immediate Trial of Issue of Fact.

The last sentence of subdivision (c) states that "[t]he court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion." "The motion" is one made under subdivision (a) or (b). The power to direct a hearing in connection with a CPLR 3211 motion would exist if the last sentence was omitted: CPLR 2218 allows a court to direct a hearing to resolve a fact issue on a motion.

With one notable exception treated below, immediate trials in aid of the determination of CPLR 3211 motions are not common. They are reserved for situations in which the resolution of a disputed issue of fact can resolve the entire case or a significant part of it. That is the effect of the "when appropriate for the expeditious disposition of the controversy" clause. If an action or most of it can be resolved early in the life of the case after an immediate trial, the parties may be spared significant expenses and burdens associated with prolonged litigation.

The immediate trial has particular utility on a motion to dismiss for want of personal jurisdiction under CPLR 3211(a)(8) because that dismissal ground must be raised on a pre-answer motion to dismiss or in an answer, *see* Commentary C3211:55, and it has the potential to resolve the action. Furthermore, the plaintiff may have a strong incentive to get an early determination of the personal jurisdiction question. If the statute of limitations is still alive on the plaintiff's claim, a new action can be commenced and the alleged defect depriving the court of personal jurisdiction may be cured. The plaintiff will want to know if she must avail herself of that option. (We suggest that the new action be brought anyway as backup. *See* Commentary C3211:38). The synergy of the plaintiff's need (and, sometimes, strong desire) to raise the personal jurisdiction issue in the infancy of the action and the ability of a personal jurisdiction defect to bring an action to an end, makes issues of fact on motions to dismiss for want of personal jurisdiction great candidates for subdivision (c) immediate trial treatment.

Personal jurisdiction comprises three elements: a basis for the exercise of jurisdiction over the defendant, notice to the defendant of the action, and proper commencement of the action. *See* Commentary C3211:28. An immediate trial can be used to consider factual questions related to any one of those elements. *See*, *e.g.*, *Vandermark v. Jotomo Corp.*, 42 A.D.3d 931, 839 N.Y.S.2d 670 (4th Dep't 2007) (immediate trial directed on issue of whether defendant's creation and maintenance of web site constituted transaction of business under CPLR 302[a][1] sufficient to confer longarm jurisdiction over that defendant). It is the notice element, though, that generates the most immediate trials. The issue on the notice score is whether the defendant was served properly with the initiatory papers. So common are "trials" on the issue of proper service that they have developed their own name in civil procedure idiom: the traverse hearing.

The subdivision (c) immediate trial has also proven itself useful in addressing fact questions related to whether an action was time-barred, *see Bronx-Lebanon Hospital Center v. Daines*, 101 A.D.3d 1431, 956 N.Y.S.2d 660 (3d Dep't 2012); *Ryan v. Borg*, 88 A.D.2d 637, 450 N.Y.S.2d 767 (2d Dep't 1982); *Back O'Beyond, Inc. v. Telephonic Enterprises, Inc.*, 76 A.D.2d 897, 429 N.Y.S.2d 250 (2d Dep't 1980); whether an action-barring release was procured through fraud or duress, *see Anger v. Ford Motor Co., Dealer Dev.*, 80 A.D.2d 736, 437 N.Y.S.2d 165 (4th Dep't

1981); *Purta v. Cisz*, 42 A.D.2d 594, 344 N.Y.S.2d 737 (2d Dep't 1973); and whether a tort plaintiff was an employee of the defendant at the time of the accident giving rise to the action (a finding that would trigger the exclusivity provisions of the Workers' Compensation Law). *See Duboff v. Board of Higher Ed. of City of New York*, 34 A.D.2d 824, 312 N.Y.S.2d 726 (2d Dep't 1970).

What is meant by an "immediate" trial? The word "immediate" indicates that the subdivision (c) trial should be given a preference. *See* Siegel, New York Practice § 271 (Connors 5th ed.). Just how potent the preference proves to be is a matter for the judge taking into account the other matters on her calendar. *Id.*

Who should decide the issue presented on a subdivision (c) immediate trial, the judge or a jury? That subject is addressed below in Commentary C3211:45.

C3211:45. Jury Trial of Motion Issue?

In allowing the immediate trial of an issue of fact arising on a CPLR 3211 motion, CPLR 3211(c) does not say whether the trial must be by jury. Here CPLR 2218 might be turned to for guidance, but it, too, has little to offer: it directs trial by jury if the issue is "triable of right" by jury, thus begging the question.

This issue turns on three things:

(1) whether the case is one in which the merits would be triable of right by jury;

(2) whether a jury has been demanded; and

(3) the nature of the ground on which the motion is based.

If no part of the action itself--such as where it is one in equity for an injunction--would be triable by jury, no issue of fact being tried on a CPLR 3211 motion in the case need be tried by jury.

If the case is triable by jury--such as an ordinary money action--and trial by jury has been duly demanded or the time in which to demand it is still open (*see* CPLR 4102), item (2) on the above list is satisfied, leaving only item (3) to be negotiated.

If the ground of the motion is such that resolution of the fact issue in favor of the movant will dismiss the case and preclude suit from being brought upon the cause again in New York, a jury trial will be required if either side insists on it. *See* CPLR 2218. Grounds that fall under this category would be release, res judicata, payment, statute of limitations, etc. If the grant of the motion dismissing the case would not prevent suit from being brought again, jury trial of the issue of fact would not be required. Examples of these grounds would be lack of jurisdiction (personal, rem, or subject matter), temporary disability of a party, other action pending (CPLR 3211[a][4]), failure to join a party, etc.

Even on these latter grounds, however, a situation can arise in which a trial by jury should be granted. If it appears that a dismissal for lack of personal jurisdiction, for example, will take place at a time that would prevent the plaintiff from suing anew because of the statute of limitations, *see* Commentary C3211:38 above, the impact of the dismissal would be permanently to oust the plaintiff from the New York courts and the issue of fact on the jurisdictional motion should therefore be tried by jury.

In *Cerrato v. Thurcon Constr. Corp.*, 92 A.D.2d 89, 459 N.Y.S.2d 765 (1983), the First Department so held, but not without dissent. The court divided 3-2 on the issue, the dissent writing that the mode of trial should not depend on the stage at which an issue is raised, but rather on the nature of the issue itself. In essence the dissent says that whether there is a right to reach the merits is an issue for the court rather than a jury to determine.

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The Second Department appeared to be of a different view on an analogous issue in *Yannon v. RCA Corp.*, 131 A.D.2d 843, 517 N.Y.S.2d 205 (1987). The issue in *Yannon* was whether the action was timely. It was if the plaintiff was insane, because the insanity would have meant that the statute of limitations was tolled under CPLR 208; but the case would have been dead if the plaintiff was sane. The immediate issue, then, was the sanity. Even though the whole case depended on it, the court held that the issue is triable by the court, not by a jury. (It then went on to hold that the plaintiff did suffer from the disability, that there was a toll under CPLR 208, and that the action was therefore timely.)

Subdivision (d)

C3211:46. Resisting Party's Need of More Evidence.

When a motion is made under CPLR 3211, it is generally assumed that the moving party has already amassed all of the evidence needed to support the motion. But it may be that the opposing party has not yet done so, or has tried but been unable to. Subdivision (d) covers that situation.

CPLR 3211(d) provides that "[s]hould it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his [or her] responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." Thus, the burden on the opposing party is to convince the court in the opposing affidavits that facts "may exist" that would defeat the motion; mere hope that discovery will yield helpful information will not forestall a determination of the CPLR 3211 motion. *See Cracolici v. Shah*, 127 A.D.3d 413, 4 N.Y.S.3d 506 (1st Dep't 2015). The opposing party need not convince the court that facts essential to oppose the motion actually exist because that obviously cannot be known until further investigation is had. The party seeking the benefit of subdivision (d) should specify the facts that need to be developed and explain why those facts are material to the opposition. *See Warshaw Burnstein Cohen Schlesinger & Kuh, LLP v. Longmire*, 106 A.D.3d 536, 965 N.Y.S.2d 458 (1st Dep't 2013). The court should also be shown the sources through which the opposing party believes the needed evidence can be secured. While not expressly required by the statute, the opposing party should, of course, make a specific request for subdivision (d) relief. *See SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 777 N.Y.S.2d 62 (1st Dep't 2004).

If the evidence can be secured simply by getting additional affidavits, the opposing party should explain why those affidavits were not gotten in time to resist the motion. If that is reasonably explained and it is just a matter of giving the opposing party more time in which to get them, the motion can be adjourned for the requisite time.

It may also happen, of course, that the affidavit will not be available because the witness who knows the facts will not volunteer them or because the needed facts are in the knowledge of an adverse party. Here the deposition procedure may suffice, and the court has explicit power under subdivision (d) to adjourn or continue the motion so as to afford the opposing party an opportunity to seek a deposition or use any other disclosure device against the person or party who holds a possible key to the facts.

Another alternative for the court in such a situation is merely to deny the motion and allow the moving party to put the objection into its pleading, thereby in effect deferring the issue until the trial or, perhaps, the making of a motion for summary judgment under CPLR 3212 (which would be made after the opposing party has had a sufficient time to amass other evidence). This is the subject of Commentary C3211:47.

Another situation is where the movant herself holds the key to the facts. *See Cantor v. Levine*, 115 A.D.2d 453, 495 N.Y.S.2d 690 (2d Dep't 1985). It may be unfair to grant the CPLR 3211 motion in a situation in which the opposing party must depend entirely on the moving party's testimony to support her own position. If that's the case, the opposing party should advise the court that the nature of the case requires her to depend on cross-examination of the movant at

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the trial. An illustration of this would be the situation in which the plaintiff is a personal representative suing for the wrongful death of a decedent and where the death resulted from an accident which only the defendant (the movant) survived. If the defendant is the only one who can testify to what occurred at the scene, the plaintiff should have a chance to cross-examine the movant in front of the fact-trier. An early dismissal motion by the defendant in those circumstances, such as under CPLR 3211(a)(7), would not ordinarily be granted.

Plaintiff's Need of Jurisdictional Evidence in "Longarm" Case

A conceptual difficulty frequently arises when the plaintiff relies on the "longarm" statute (CPLR 302) for extraterritorial jurisdiction against the defendant, who moves to dismiss for lack of personal jurisdiction contending that CPLR 302 is not applicable. Whether the statute applies depends on whether the New York contacts required by CPLR 302 are present in the particular case. Since the court's jurisdiction over the defendant turns on that issue, a potential cart-before-the-horse argument arises. Its most sensitive appearance is when the longarm defendant moves to dismiss under CPLR 3211(a)(8) and the plaintiff in responding papers claims the need of disclosure under CPLR 3211(d).

The defendant's position at that moment is that the plaintiff must at least establish a prima facie basis for jurisdiction under CPLR 302 before the court can put the defendant to the burden of making disclosure, even if the disclosure is sought only as to the jurisdictional facts. That is, the defendant argues that the court does not even have the jurisdiction to order the disclosure unless and until the plaintiff factually, through affidavits or otherwise, establishes at least a prima facie set of facts invoking the longarm statute.

In *Peterson v. Spartan Industries*, 33 N.Y.2d 463, 354 N.Y.S.2d 905, 310 N.E.2d 513 (1974), the Court of Appeals held that the plaintiff in that situation does not have to make a prima facie showing of jurisdiction. The plaintiff "need only demonstrate that facts 'may exist' whereby to defeat the [dismissal] motion. It need not be demonstrated that they do exist. This obviously must await discovery." 33 N.Y.2d at 466, 354 N.Y.S.2d at 908, 310 N.E.2d at 515.

The Court said that to impose on the plaintiff the burden of establishing prima facie jurisdiction "may impose undue obstacles ... particularly ... under the 'long arm' statute." 33 N.Y.2d at 467, 354 N.Y.S.2d at 908, 310 N.E.2d at 515. The plaintiff in the *Peterson* case did show some local contacts on the part of the defendant. The Court found that with these "the plaintiffs have made a sufficient start, and shown their position not to be frivolous" on the question of jurisdiction.

With the "sufficient start" inquiry, the Court appeared to be pronouncing a kind of good faith test. Unless the court can be convinced, from what facts have been shown, that the plaintiff is guilty of bad faith in arguing that longarm jurisdiction exists, the plaintiff will get the benefit of the doubt and the defendant will be required to furnish further information that may reflect on jurisdiction. *See West Mountain Corp. v. Seasons of Leisure International, Inc.*, 82 A.D.2d 931, 440 N.Y.S.2d 729 (3d Dep't 1981).

Where the court determines that jurisdictional discovery will be permitted, it should deny the motion to dismiss without prejudice to renewal of the motion upon the completion of the jurisdictional discovery. *Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dep't 2013). Alternatively, the court could order a continuance of the motion, providing an opportunity for the discovery, then decide the motion. *See Jacobson v. Princess Hotels International, Inc.*, 101 A.D.2d 757, 475 N.Y.S.2d 846 (1st Dep't 1984).

C3211:47. Denying Motion with Leave to Plead the Objection.

An alternative course for the court to follow in a situation in which the opposing party does not yet have the evidence needed to resist a CPLR 3211 motion is to deny it with leave to the movant to plead it in the responsive pleading, if any. Where the defendant has moved to dismiss a cause of action under CPLR 3211(a), the denial would be without

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prejudice to the defendant to plead the objection as a defense in the answer. If the plaintiff has moved to dismiss a defense under CPLR 3211(b), and the defense is contained in an answer that requires no responsive pleading (*see* CPLR 3011), the denial would merely have to specify that it is not on the merits of the motion or that it is without prejudice to the movant to litigate the issue at the trial, or by subsequent motion under CPLR 3212 (summary judgment), etc.

If the issue raised on a CPLR 3211 motion, whether made under subdivision (a) or (b), can be resolved on the paper proof submitted on the motion, it of course should be. If its resolution depends on a fact of which the opposing party must still secure evidence and the evidence can be secured by pretrial methods, as discussed in Commentary C3211:46, the remedy is an adjournment or continuance to enable the opposing party to get affidavits or to use the disclosure devices.

If an issue of fact connected with the motion cannot be resolved by paper proof already appearing in the motion papers or available for addition to them by an adjournment or continuance, a hearing may be necessary. The court may order that it take place promptly. *See* Commentary C3211:44.

With all of these alternatives available to the court, it would seem that a denial of the motion without passing on its merits, thereby leaving the matter for resolution by later summary judgment motion under CPLR 3212 or at the trial, should be used only where the nature of the particular case makes it especially appropriate. If the ground of the CPLR 3211 motion is such that an early resolution of the fact issue can result in a dismissal of the case or a final judgment in favor of either side, the issue is one that should not ordinarily be deferred until the trial.

If the issue arising on the motion is inextricably intertwined with the basic merits of the case itself, on the other hand, a strong argument appears for deferring its resolution to the trial proper. In such an instance an early trial of the issue under the court's power to direct immediate trial pursuant to subdivision (c) of CPLR 3211 can in effect become an early trial of the entire case, i.e., a back-door preference. That was not the purpose of subdivision (c), which may be said to contemplate an instance in which the fact issue arising on the motion is relatively sharp, can be isolated from the action's main issues, and can on a narrow point dispose of the whole case. *See* Commentary C3211:44.

Even where the issue is intertwined with the merits of the entire claim, strong countervailing reasons can appear to justify an immediate trial of the motion's fact issue. An example of this is where the plaintiff bases jurisdiction on the longarm statute (CPLR 302), the defendant pleads as a defense lack of jurisdiction, and the plaintiff moves to dismiss the defense under CPLR 3211(b). Even if resolution of the issue will not itself dispose of the case on the merits, as in the example where it relates only to jurisdiction, but the deferment of it until the trial can itself result in a disposition which will prevent the merits from ever being reached, the issue should not be deferred. An example would be where the statute of limitations expires in the interim so that a later dismissal for lack of jurisdiction will disable the plaintiff from suing anew. The issue in that situation should be ordered to immediate trial under CPLR 3211(c). *See* Commentaries C3211:38 and C3211:44.

Subdivision (e)

C3211:48. Time for Making CPLR 3211 Motion.

CPLR 3211(e) requires that a motion to dismiss a cause of action under CPLR 3211(a) be made before service of the responsive pleading "is required." The responsive pleading includes not just the answer to the complaint, but also an answer to a cross-claim, a reply to a counterclaim, an answer to a third-party claim, etc., depending on what pleading contains the cause of action being attacked. But for purposes of discussion we will assume the common situation in which the attacked cause of action is in the complaint and the motion to dismiss it is made by the defendant.

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When the defendant must respond to a cause of action contained in the complaint that accompanied a summons, the responding time is 20 or 30 days, depending on the place and method of service. If the defendant is responding to a cause of action contained in a subsequent pleading, the responding time is a straight 20 days. These are the rules spelled out by the interplay of CPLR 320 and 3012. (The subsequent complaint can be an amended or supplemental one, or even the original one if the plaintiff has started the action with a CPLR 305[b] notice instead of a complaint and the complaint is served only after the defendant has served a demand for it.)

These periods, which dictate how long the defendant has to respond, therefore dictate as well how long she has to move to dismiss under CPLR 3211 in lieu of pleading.

It is generally contemplated, and it is surely the better practice, that the movant make the CPLR 3211 motion before pleading. If disposed to move pre-answer, the defendant should therefore move to dismiss before serving an answer. *See Wahrhaftig v. Space Design Group, Inc.*, 29 A.D.2d 699, 700, 286 N.Y.S.2d 442, 443 (3d Dep't 1968) (as a result of defendants' "failure to proceed by motion before service of the responsive pleading they must be deemed to have elected to proceed solely by means of the affirmative defense pleaded in the amended answer.") (internal quotation marks omitted); *see also Incorporated Village of Laurel Hollow v. Laverne, Inc.*, 43 Misc.2d 248, 250 N.Y.S.2d 951 (Sup. Ct., Nassau County 1964), *mod'd* 24 A.D.2d 615, 262 N.Y.S.2d 622 (2d Dep't 1965).

A defendant who has carelessly interposed an answer containing as a defense a ground on which she now wants to move to dismiss under CPLR 3211 can of course move under CPLR 3212 instead, and perhaps should do that. A ground that would have supported a CPLR 3211 motion before the service of the answer will ordinarily support a summary judgment motion after the service of the answer. *See* Commentary C3212:20.

If a motion is based on CPLR 3211 but is made after the service of the answer, the court can treat the motion as one for summary judgment, a power expressly conferred on it by CPLR 3211(c). *See* Commentary C3211:42. That would avoid the barrier otherwise presented by subdivision (e), and allow the court to get to the issues raised on the motion.

The time limit under discussion does not apply to all CPLR 3211 motions. There are three exceptions, as discussed in Commentary C3211:49.

C3211:49. Time Limitation Inapplicable to Certain Grounds.

If the motion is to dismiss a defense under subdivision (b), there is no time limit on it. The time limitations of CPLR 3211(e) operate only on the motion to dismiss a cause of action under subdivision (a). And there are three grounds even under CPLR 3211(a) that are excepted from the time requirement. A motion predicated on paragraph 2, 7, or 10 of subdivision (a) may be made at any time--the objections of lack of subject matter jurisdiction, failure to state a cause of action, and failure to join a necessary party--and may be made notwithstanding the service of an answer and even though the objection was not even included in the answer as a defense. *See* Commentary C3211:54.

C3211:50. Effect of Extensions of Responding Time.

Since the time in which to make a motion under CPLR 3211(a) is keyed by CPLR 3211(e) to the responding time, it will generally be true that anything that extends the responding time will also extend the time in which to move under CPLR 3211(a). A motion by the defendant to correct the complaint under CPLR 3024 will constitute such an extension, for example. *See* CPLR 3024(c). The CPLR 3211 motion itself has this effect under CPLR 3211(f). *See* Commentary C3211:67.

If the plaintiff amends the complaint, whether as of course under CPLR 3025(a) or by leave of court under CPLR 3025(b), the answering time and hence the responding time will run anew as to the amended complaint. *See* CPLR 3025(d). The same is true of a supplemental complaint under those provisions, and the same conclusions reached as

to the complaint will of course govern as to a cause of action contained in other pleadings, such as a cross-claim or counterclaim in an amended answer.

If a stipulation is made extending the time to respond, a frequent occurrence in practice, it should automatically extend the time in which to move under CPLR 3211(a). *See* *Bob v. Cohen*, 105 A.D.3d 530, 967 N.Y.S.2d 690 (1st Dep't 2013); *see also* *Rich v. Lefkovits*, 56 N.Y.2d 276, 280-281, 452 N.Y.S.2d 1, 3, 437 N.E.2d 260, 262 (1982). The stipulation can be more restrictive, however: it can provide that the extension is given only with respect to pleading and that it does not extend the time to move under CPLR 3211. A stipulation negating an extension of time to move should ordinarily be upheld. The would-be movant who has a CPLR 3211(a) objection, which could otherwise have been taken on a CPLR 3211 motion to dismiss, is not undone by this: she can serve a responsive pleading including the objection as a defense and then use a summary judgment motion under CPLR 3212 based on it.

The court clearly has power to extend the time to answer. *See* CPLR 3012(d). But the courts are perhaps not as free with an extension of time for a motion. In *Smith v. Pach*, 30 A.D.2d 707, 292 N.Y.S.2d 333 (2d Dep't 1968), the court extended the time to answer but specifically refused to permit a motion within the extended time, holding that "[g]ood cause for an extension of time to move was not shown." Perhaps the reason for this is that a refusal to extend the pleading time will result in a default judgment against the would-be pleader, while a refusal to allow more time to make a CPLR 3211 motion will not (as long as the defendant does serve a timely answer, of course).

Nothing discussed here should be confused with CPLR 3211(f), which automatically extends the time to serve a responsive pleading when the would-be responder moves to dismiss under CPLR 3211 as a first step in lieu of serving an answer, and the motion is denied. *See* Commentary C3211:67.

Defendant's Waiver of Defense as Quid Pro Quo for Extension of Time to Answer

It is always a wise thing for the plaintiff, when asked for an extension of the answering time by the defendant, to inquire into whether the defendant is planning to interpose a jurisdictional objection. Indeed, it may be tactically indispensable to do so if the case was brought with only a short time left on the statute of limitations, for the reason that if the case should be dismissed for lack of jurisdiction after the statute has expired, CPLR 205(a) will not offer the case its six months for a new action and the case will be dead. When the plaintiff discerns that the defendant has such an objection, and its resolution may occur too late for the plaintiff to start over, the plaintiff should try to get from the defendant, as a quid pro quo for the time extension, a waiver of jurisdictional objections. See on this subject the three-part series in the New York State Law Digest on the various ingredients that go into this tactical occasion (New York State Law Digest Nos. 274-6, entitled "The Urgency of Timing the Adjudication of Jurisdictional Objections").

A defendant who has agreed to the stipulation should check it out very carefully when it is reduced to writing to make sure that only jurisdictional objections are waived. A defendant who stipulated to waive "all affirmative defenses" found that she even waived the defense of the statute of limitations. *See* *Stefaniw v. Cerrone*, 130 A.D.2d 483, 515 N.Y.S.2d 66 (2d Dep't 1987).

The *Stefaniw* situation was more unusual still, because it was the defendant who drafted the stipulation, honoring the plaintiff's request that the defendant waive all affirmative defenses. The defendant apparently overlooked what a big bag that is. It would not be amiss, of course, for the plaintiff to insist also on a waiver of a statute of limitations defense, too. But the defendant's offer of such a waiver, if there is any possible merit at all to the limitations defense (which might put a permanent end to the plaintiff's case), and for the quid pro quo of nothing more than a little more time to answer, is a quid that goes far beyond the quo. (Or is it a quo that goes far beyond the quid?) An all-around bad contract, anyway. Waiving "all" affirmative defenses is worse still, when one considers just what that takes in.

The major affirmative defenses are listed in CPLR 3018(b). A simple scanning of that provision reveals how many substantive rights a defendant may give up with a waiver of "all" defenses. Does the defendant intend to waive, for

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example, defenses such as res judicata or fraud, or, indeed, the fact that the defendant has already paid the obligation? (Payment and release are also on the list.) And in a personal injury case even comparative fault on the plaintiff's part is officially an affirmative defense. *Stefaniw* wasn't a personal injury case, but if it was, would it have been the defendant's intention to waive so casually the defense of the plaintiff's comparative fault?

A defendant who stipulates to waive "all affirmative defenses" might just as generously offer the plaintiff summary judgment instead. A defendant who offers the plaintiff summary judgment will be surprised by how generous the plaintiff will be with an extension of the defendant's time to answer.

C3211:51. Single-Motion Rule.

There shall be but one motion to dismiss under subdivision (a). (There is no limitation stated on the number of motions that can be made to dismiss defenses under CPLR 3211[b]). And if there are several causes of action stated, this provision means that the movant must gather together all of her subdivision (a) objections, or such of them as she wants to take by motion, for use on that single CPLR 3211 opportunity. This requirement has both procedural and administrative missions. It is designed to protect the pleader from being harassed by repeated CPLR 3211(a) motions and to spare the court's motion calendars the burden of a CPLR 3211 motion more than once in the same case.

It would appear that a second CPLR 3211 motion would be allowable if based on the want of subject matter jurisdiction under paragraph 2 of CPLR 3211(a), for the simple reason that this objection is an unwaivable one and can be raised at any time. And for CPLR 3211 purposes, the objections of paragraphs 7 (failure to state a cause of action) and 10 (failure to join a party) are in the same category as paragraph 2. *See* subdivision (e) of CPLR 3211. Subdivision (e) specifies that a motion on a ground specified in paragraph 2, 7, or 10 of subdivision (a) may be made at any time. Because of this common treatment of the three paragraphs, it might be thought that a second motion under CPLR 3211 could also be made if based on paragraph 7 or 10 of CPLR 3211(a). It was at one time so held, *e.g., Higby Enterprises, Inc. v. City of Utica*, 54 Misc.2d 405, 282 N.Y.S.2d 583 (Sup. Ct., Oneida County 1967), *aff'd* 30 A.D.2d 1052, 295 N.Y.S.2d 428 (4th Dep't 1968), but the Court of Appeals held otherwise in *McLearn v. Cowen & Co.*, 60 N.Y.2d 686, 468 N.Y.S.2d 461, 455 N.E.2d 1256 (1983).

It should be stressed, however, that omitting the paragraph 7 ground (failure to state a cause of action) from the initial CPLR 3211 motion will not waive it; subdivision (e) allows the paragraph 7 motion to be made at any time. It is just a matter of determining what mechanical device to use for the paragraph 7 objection when the CPLR 3211 motion has been used up. The device should be the summary judgment motion of CPLR 3212. The best counsel to the defendant, of course, is to join, in any CPLR 3211 motion made on any ground, a paragraph 7 objection as well, if the defendant has one.

When the CPLR 3211 motion is made prematurely and is denied for that reason--as where it is made to dismiss for lack of jurisdiction under CPLR 3211(a)(8) after the service of a summons without a complaint and the court cannot determine the motion until the complaint is served--the motion can be denied without prejudice to its renewal. *See Fraley v. Desilu Productions, Inc.*, 23 A.D.2d 79, 258 N.Y.S.2d 294 (1st Dep't 1965). Because the court seemed unsure in *Fraley* about whether the CPLR 3211 motion in that situation could be duplicated, it took the precaution of suggesting that what the defendant might do in the alternative is wait for the complaint, serve an answer, and then move for summary judgment under CPLR 3212, using the same objection (lack of jurisdiction) to ground it. Of course the objection would have had to be preserved by being included as a defense in the answer.

If the first CPLR 3211 motion made by a defendant is addressed to the complaint, a second one afterwards made against a cross-claim in a co-defendant's answer is permissible. The indication is that it will not be barred by the single-motion rule, whose purpose, which is to protect the pleader from repeated motions, is not undermined when the pleadings are those of different parties. *Nassau Roofing & Sheet Metal Co. Inc., v. Celotex Corp.*, 74 A.D.2d 679, 424 N.Y.S.2d 786 (3d Dep't 1980).

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May a defendant, who made a CPLR 3211(a) motion against the initial complaint, move against an amended complaint on a CPLR 3211(a) ground, or did the prior motion against the earlier complaint "use up" the single motion? A second motion should lie, provided the claims that the defendant wishes to challenge were not set forth in the prior complaint. *See Kocourek v. Booz Allen Hamilton, Inc.*, 114 A.D.3d 567, 981 N.Y.S.2d 392 (1st Dep't 2014); *cf. Swift v. New York Medical College*, 48 A.D.3d 671, 850 N.Y.S.2d 906 (2d Dep't 2008) (service of amended complaint containing no new causes of action, but merely restating and renumbering certain causes of action, did not provide defendant with basis for circumventing single motion rule). The test is whether the defendant, on the prior CPLR 3211(a) motion, had the opportunity to address the claims she wishes to attack on the subsequent motion. *Barbarito v. Zahavi*, 107 A.D.3d 416, 968 N.Y.S.2d 422 (1st Dep't 2013). If she did, the new motion should be barred by the single motion rule; if she didn't the new motion is permitted.

When the omitted objection is to personal or rem jurisdiction, based on paragraph 8 or 9 of subdivision (a), different considerations may arise, discussed in Commentary C3211:55.

The general rule that only one CPLR 3211(a) motion may be allowed to a defendant does not bar a later made motion to dismiss on the ground of forum non conveniens under CPLR 327. *Harp v. Malyn*, 166 A.D.2d 848, 563 N.Y.S.2d 181 (3d Dep't 1990); *see F G II, Inc. v. Saks Inc.*, 46 A.D.3d 305, 847 N.Y.S.2d 185 (1st Dep't 2007).

If the defendant makes a CPLR 3211 motion, and the plaintiff alleges new facts in her answering papers, the defendant may, without violating the single-motion rule, include in reply papers additional dismissal grounds not covered in the defendant's initial motion. In that context it is all deemed part of a single motion. *Held v. Kaufman*, 91 N.Y.2d 425, 694 N.E.2d 430, 671 N.Y.S.2d 429 (1998).

C3211:52. Pleading Objection Instead of Moving on It.

As to all of the grounds listed in subdivision (a), CPLR 3211(e) gives the responding party an option. She can either move to dismiss on the stated ground or grounds, or instead plead them as defenses in her answer. This is true of all of the subdivision (a) grounds, without exception, and as long as the party uses all of her available grounds in the one form or the other, i.e., either uses them all to ground a CPLR 3211 motion or uses them all as defenses in the answer, she will not be held to waive any of them. It is where she divides them up and elects to take some of the objections by motion while saving others to use in the answer (if the motion is denied) that the risk of a waiver arises.

The treatment of waiver should be separately addressed to three distinct groups of objections contained on the subdivision (a) list: those contained in

a. paragraphs 1, 3, 4, 5, and 6;

b. paragraphs 2, 7, and 10; and

c. paragraphs 8 and 9.

The ensuing Commentaries treat these three categories separately. But an admonition to the practitioner at this point is warranted: the real trouble centers about the jurisdictional objections contained in paragraphs 8 and 9 of CPLR 3211(a). It is in regard to those objections that a "dividing-up" of objections for use partly by motion and partly by answer contains the waiver prospect.

While the defendant most commonly directs her jurisdictional objections against the plaintiff, the defendant must also pay some attention to the specific modes of preserving a jurisdictional objection against co-defendants who have cross-claimed. In *Bides v. Abraham & Strauss Division of Federated Dept. Stores, Inc.*, 33 A.D.2d 569, 305

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N.Y.S.2d 336 (2d Dep't 1969), the danger to a co-defendant who has been cross-claimed against, in failing to make an independent objection (regarding the cross-claim) to the court's jurisdiction, resulted in a forfeiture of the objection although, ironically, the objection was successful against the plaintiff's main claim. The whole problem arose because the defendant who objected to jurisdiction took the objection as a defense in the answer rather than moving to dismiss based on it.

The plaintiff sued A and B. A pleaded lack of jurisdiction in the answer and, the matter thereby being deferred to the trial, A prevailed on it at the trial and plaintiff's claim against A was thereupon dismissed. But defendant B had cross-claimed A, and in A's answer to the cross-claim A did not assert or repeat the jurisdictional objection. As against B, therefore, A was held to have waived the jurisdictional objection.

A bizarre result. Since the jurisdiction the plaintiff originally secures against defendants is also generally assumed to constitute the jurisdictional foundation on which a cross-claim also rests, A's doing in the *Bides* case does not seem unreasonable. The court apparently chose to regard A's appearance, without repeating the jurisdictional objection against B, as superseding the original jurisdiction--the jurisdiction acquired by the plaintiff against A initially.

It was not unreasonable for A to do what was done in *Bides*. Since CPLR 3211(e) permits any defendant to take a jurisdictional objection by way of motion or answer, and a motion to dismiss successfully made against the plaintiff would presumably dismiss B's cross-claim as well, A should have been able to assume that the later disposition of a jurisdictional objection taken by way of answer would have the same effect.

Reasonable assumption or not, A is yet another litigant whose case has sounded a warning note for others. The warning is that any objection to personal jurisdiction that a given defendant, X, may have had is best be asserted independently as against each person in the litigation who has made a claim against X. On facts like those of *Bides*, A should, in the answer to the cross-claim, allege as a defense that the lack of jurisdiction A claims as against the plaintiff is claimed also against B. That should preserve the objection if taken by way of answer instead of by way of motion.

Note that only a properly pleaded defense will preserve a defendant's right to seek relief on it at some later point in the litigation, i.e., on summary judgment or at trial. If the purported defense is not pleaded with sufficient particularity, a court may conclude that it has been waived.

In *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 8 N.Y.S.3d 143 (1st Dep't 2015), the defendant attempted to raise the statute of limitations defense in its answer. Overly embracing the maxim that brevity is a virtue, the defendant pleaded that defense, along with 15 others, in "a boilerplate, catchall paragraph"; in that same paragraph the defendant reserved the right to plead any other potential affirmative defense. After some disclosure, the defendant moved for summary judgment on several grounds, including that the action was time-barred. In opposition to the statute of limitations ground, the plaintiff argued that the defense was waived because it had not been adequately pleaded. The trial court agreed.

The First Department also agreed, finding that the "[d]efendant failed to properly plead the statute of limitations, because its inclusion of the defense within a laundry list of predominantly inapplicable defenses did not provide [the] plaintiff with the requisite notice." *Id.* at 79; 8 N.Y.S.3d at 146. The Court concluded that the plaintiff was prejudiced by the defendant's failure to properly plead the statute of limitations defense: the plaintiff was induced by the contents of the answer to forego disclosure relevant to the statute of limitations issue, disclosure that may have yielded evidence to use to oppose the motion.

What was the consequence of the defendant's failure to properly plead the defense? Although the Court could have treated the defense as waived, *see* CPLR 3211(e); Commentary C3211:53, it declined to so because, under the circumstances, that punishment would not fit the defendant's offense. "Instead, the prejudice c[ould] be cured by

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allowing [the] defendant to amend its pleading and then allowing [the] plaintiff to conduct disc[losure] on the statute of limitations issue." 129 A.D.3d at 81, 8 N.Y.S.3d at 148 (internal citation omitted).

For a thorough treatment of *Scholastic*, including useful tips for a defendant regarding the pleading of affirmative defenses, *see* Connors, *Back to Basics: Careful Pleading Under CPLR Article 30*, N.Y.L.J., May 18, 2015.

C3211:53. Waiving Objection Contained in Paragraphs 1, 3, 4, 5, or 6 of 3211(a).

The only time a defendant, will waive an objection under paragraphs 1, 3, 4, 5, or 6 of CPLR 3211(a) is where the defendant raises it neither by motion to dismiss under CPLR 3211 nor as a defense in the answer. If the defendant raises it in the one form or the other, it is preserved. *See*, *e.g., Wan Li Situ v. MTA Bus Company*, 103 A.D.3d 807, 14 N.Y.S.3d 89 (2d Dep't 2015). And the defendant can divide these objections up, taking some by motion and saving others for use as pleaded defenses if the motion fails. *See*, *e.g., Kinberg v. Schwartzapfel, Novick, Truhowsky, Marcus, PC*, 136 A.D.3d 431, 24 N.Y.S.3d 614 (1st Dep't 2016); *Hertz Corp. v. Luken*, 126 A.D.2d 446, 510 N.Y.S.2d 590 (1st Dep't 1987).

If the defendant omits to take any of these objections in either form, the defendant waives it, although the defendant may seek to assert it in an amended pleading, a subject discussed in Commentary C3211:58.

C3211:54. Waiving Objection Contained in Paragraphs 2, 7, or 10 of 3211(a).

The objections contained in paragraphs 2, 7, and 10 of CPLR 3211(a) are the least likely to be waived by careless pretrial procedure. Any or all of the three objections can be taken either by CPLR 3211 motion or by way of defense in the responsive pleading. And they can be divided, one or more used on a CPLR 3211 motion and the rest saved for use in the pleading if the motion fails. If taken by neither a CPLR 3211 motion nor by way of defense in the responsive pleading, they are still not necessarily waived. Paragraphs 2, 7 and 10 can be raised at any time and made the subject of a summary judgment motion or invoked at trial. *See* Commentary C3211:49.

C3211:55. Waiving Objection Contained in Paragraphs 8 or 9 of 3211(a).

This is one of the busiest of the CPLR 3211(e) categories. It covers a lot of ground. Division is made into subcaptions to facilitate treatment.

In General

The objections to lack of personal (paragraph 8) or rem (paragraph 9) jurisdiction under CPLR 3211(a) are singled out for special treatment by CPLR 3211(e).

If the defendant has available either of these objections she may take them by motion under CPLR 3211 before answering or by way of defense in the answer. It is no longer required that the defendant make the jurisdictional objection by motion in a special appearance, as was required by § 237-a of the old Civil Practice Act (superseded by the CPLR in 1963). The special appearance has been abolished and it now suffices for the defendant to object to personal or rem jurisdiction either by motion to dismiss under CPLR 3211 or in the answer.

But if the defendant does have either of these objections available, she is not to waste the court's or the plaintiff's time on any CPLR 3211 motion on any ground at all unless on that motion she joins the jurisdictional ground. *See Competello v. Giordano*, 51 N.Y.2d 904, 434 N.Y.S.2d 976, 415 N.E.2d (1980). If the defendant makes no CPLR 3211 motion on any ground, she may then safely include the jurisdictional defense in the answer without fear that she has waived it. (The objection of improper service faces a separate time limit after assertion in the answer, however, as will be noted in a separate caption below.) But if she makes any CPLR 3211 motion, regardless of ground, she

must include the jurisdictional objection in the motion or she waives it. She may not, if the CPLR 3211 motion made on other grounds is denied, then turn around and serve an answer containing the jurisdictional objection. *Montcalm Publishing Corp. v. Pustorino*, 125 A.D.2d 188, 508 N.Y.S.2d 455 (1st Dep't 1986) ("A defendant may not, upon denial of the motion under CPLR 3211 which omits a jurisdictional defense, serve an answer containing the jurisdictional defense.").

Of course, as with the objections contained in paragraphs 1, 3, 4, 5, and 6, the omission to make the paragraph 8 or 9 objection either by motion or answer will waive it. *See* Commentary C3211:53 above, and also Commentary C3211:58, regarding amendment of the answer to add the objection.

Motion Without Jurisdictional Objection Waives It Even If Motion Aborts

The making of a CPLR 3211(a) motion without including the personal jurisdiction objection will destroy the objection immediately. *Addesso v. Shemtob*, 70 N.Y.2d 689, 518 N.Y.S.2d 793, 512 N.E.2d 314 (1987); *see Competello v. Giordano, supra*; *cf. Gliklad v. Cherney*, 97 A.D.3d 401, 948 N.Y.S.2d 48 (1st Dep't 2012). In *Addesso*, the defendant moved under CPLR 3211(a)(7) to dismiss the complaint for failure to state a claim. The plaintiff amended the complaint while the motion was pending and apparently stated the claim right. The defendant then served an answer to the amended complaint and in it included the jurisdictional objection not previously raised. It was held to be too late. The Court said the objection was waived by the making of the motion against the original complaint without including the jurisdictional objection. (See the discussion of *Addesso* case in the lead note in New York State Law Digest No. 335.)

If no motion is made, and an answer is then served without including the jurisdictional objection, it was held in *Solarino v. Noble*, 55 Misc.2d 429, 286 N.Y.S.2d 71 (1967), that an amendment of the answer made as of course under CPLR 3025(a) can include the objection as a matter of right and avoid the waiver. The Court of Appeals agreed with the *Solarino* court's assessment. *Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 185, 800 N.Y.S.3d 116, 116, 833 N.E.2d 259, 259 (2005) ("[A] defendant who omits from an answer a defense based on lack of personal jurisdiction has not waived the defense if the defendant corrects the omission before the time to amend the answer without leave of court has expired."). This point is pursued further in Commentary C3211:58.

Jurisdictional Defense Not Waived by Defending on Merits

CPLR 3211(e) clearly permits the defendant either of two modes in which to interpose an objection to personal jurisdiction: as a motion to dismiss under CPLR 3211(a)(8) or as a defense in the answer. If the answer method is used, the defendant must obviously be permitted to put every other defense she has into that answer, including her denials. By using the answer method, in other words, the defendant is signaling that she is willing to wait until some later point--perhaps the trial itself--for resolution of the issue, and that's the defendant's right under CPLR 3211. *See Calloway v. National Services Industries, Inc.*, 93 A.D.2d 734, 461 N.Y.S.2d 280 (1st Dep't), *aff'd* 60 N.Y.2d 906, 470 N.Y.S.2d 583, 458 N.E.2d 1260 (1983). (The right is qualified when the jurisdictional objection is addressed to improper service, as noted in a separate Commentary below.) Meanwhile, the defendant must also be allowed to prepare for the trial in respect of the merits.

Remember that the matter of when the jurisdictional objection should be determined is not lodged exclusively in the defendant's hands. If the defendant uses the answer method, the plaintiff has in CPLR 3211(b)--the motion to strike a defense--a tool for bringing the matter to an early adjudication.

Motion for Judgment May Eclipse and Thus Forfeit Jurisdictional Defense Asserted in Answer

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If the case is not disposed of before trial, and reaches the trial stage, it is fair enough to conclude that the jurisdictional defense can be adjudicated at that time, having been duly preserved all the while in the answer. (An exception is the jurisdictional defense based on improper service, which has a 60-day time restriction under CPLR 3211[e], for which see the Commentary below.) But suppose that the case goes to judgment on the merits before then; that one of the parties moves for summary judgment on the merits during the pretrial stage, for example, and that the motion is granted.

If the defendant is the successful movant, she will gladly forfeit the jurisdictional defense that she interposed. But assume that the plaintiff is the successful movant. If the defendant has not been able to defeat the summary judgment motion, and has also failed to inject the jurisdictional objection into the motion, the defendant will likely be held to have forfeited the objection despite its inclusion in the original answer. (*See* the lead note in Issue 33 of Siegel's Practice Review, also treating the differences between New York and federal practice on the issue of how long a jurisdictional objection asserted by way of defense in the answer may be allowed to survive in the action.)

Jurisdictional Defense Based on Improper Service Must Be Brought to Adjudication by Defendant Within 60 Days

Zeroing in on only one category of objection to personal jurisdiction--the objection of improper service--an amendment of CPLR 3211(e) that took effect in 1997 requires a relatively prompt adjudication of the objection even when taken by answer. Within 60 days after serving the answer containing the objection, the defendant must "move for judgment on that ground."

Since the service of an answer cuts off the defendant's right to make a CPLR 3211 motion (except on certain grounds not relevant here), the defendant's application for adjudication of the defense apparently contemplates a motion for summary judgment.

If the defendant fails to make the motion within the allotted 60 days, the objection is waived and the court's personal jurisdiction assumed. *Wiebusch v. Bethany Memorial Reform Church*, 9 A.D.3d 315, 781 N.Y.S.2d 6 (1st Dep't 2004), highlights just how seriously the 60-day rule is taken by the courts. In *Wiebusch*, the defendant made the motion to dismiss for want of proper service beyond the 60 days. The court held that it could deny the motion on its own initiative; that the plaintiff need not move to strike the defense nor even oppose the defendant's motion by citing the tardiness issue. It's still a good idea for the plaintiff to take either step. It isn't every court that's going to notice and dispose of the defect on its own motion. *See generally Misicki v. Caradonna*, 12 N.Y.3d 511, 519, 882 N.Y.S.2d 375, 381, 909 N.E.2d 1213, 1218 (2009) (courts "are not in the business of blindsiding litigants, who expect [courts] to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made").

Note that only the specific ground of improper service is involved here. Other objections that go to personal jurisdiction--like want of a jurisdictional basis for extraterritorial service, defective contents of the summons, failure to include either a complaint or default notice with the summons, etc.--are defects of personal jurisdiction but are not among those that have to be made the basis for a dismissal motion within 60 days after being pleaded. They can be postponed of adjudication until much later, when the statute of limitations has expired and when a dismissal of the action can indeed be fatal because CPLR 205(a) does not offer its six months for a new action when the earlier one was dismissed for lack of personal jurisdiction. (Unless, of course, the plaintiff presses the defendant's lack of personal jurisdiction affirmative defense by way of a CPLR 3211[b] motion.)

When the defendant makes a motion to bring the improper service defense to adjudication, and the plaintiff opposes it, the plaintiff must include in the opposing papers a copy of proof of service, even if proof of service has already been filed in the case.

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Generally, the tenant in a summary proceeding is not subject to this 60-day time limit. The assertion of a jurisdictional objection in an answer in the summary proceeding thus remains valid despite the expiration of the 60 days. This is the accomplishment of CPLR 3211(e)'s citation of subdivisions 1 and 2 of RPAPL 711, which cover the most numerous of the summary proceedings: those based on holding over after the expiration of the lease term and those based on the nonpayment of rent.

The 60-day waiver provision of CPLR 3211(e) does not apply in the Court of Claims because the failure to comply with the service requirements in the Court of Claims Act touches on that special court's subject matter jurisdiction over an action. *See Zoeckler v. State*, 109 A.D.3d 1133, 971 N.Y.S.2d 760 (4th Dep't 2013); *see also Diaz v. State*, 174 Misc.2d 63, 662 N.Y.S.2d 719 (Ct.Cl. 1997).

A coordinate amendment of CPLR 3214(b) was made in the same 1997 law that amended CPLR 3211(e). CPLR 3214(b) automatically stays all outstanding disclosure proceedings when the defendant makes a motion under CPLR 3211 (motion to dismiss), CPLR 3212 (motion for summary judgment), or CPLR 3213 (motion for summary judgment in lieu of complaint). Under the amendment of CPLR 3214(b), if the motion is based on the improper service ground addressed in CPLR 3211(e), the motion does not automatically suspend disclosure.

Only Showing of "Undue Hardship" Can Extend the 60 Days

The court can extend the 60 days, but only on the ground of "undue hardship." This provision has had a lot of attention, usually with bad news for the defendant. The phrase has been given a strict construction.

The lighter showing exacted under a "good cause" or "in the interests of justice" standard, applicable under diverse other procedural statutes, does not suffice under the "undue hardship" criterion of CPLR 3211(e). So concludes *Abitol v. Schiff*, 180 Misc.2d 949, 691 N.Y.S.2d 753 (Sup.Ct., Queens County, 1999, treated in Issue 84 of Siegel's Practice Review), *modified on other grounds* 276 A.D.2d 571, 714 N.Y.S.2d 880 (2d Dep't 2000). The court cites, and rejects for CPLR 3211(e) application, the more liberal measures of CPLR 306-b (extension of time to serve summons and complaint), CPLR 2004 (extension of time for taking procedural steps in general), and CPLR 3212(a) (extension of time to make motion for summary judgment). The defendant in *Abitol* did not make any showing of "undue hardship" to excuse the delay, and the jurisdictional objection was held waived.

In this light, certainly the general--and liberal--time extending power of the court under CPLR 2004 is superseded for CPLR 3211(e) purposes by the "undue hardship" provision.

A connected question arose in *Zucco v. Antin*, 257 A.D.2d 421, 682 N.Y.S.2d 354 (1st Dep't 1999): whether the 60-day period will start to run anew from an amended answer. The court said no: even if the original answer had the objection, the failure to bring it to judgment within 60 days from service of the original answer waives it; an amended answer will not offer a new 60-day period.

Does Removal to Federal Court Effect Waiver of Objection to Personal Jurisdiction?

In *Cain v. Commercial Publishing Co.*, 232 U.S. 124, 34 S.Ct. 284 (1914), the U.S. Supreme Court held that the removal of an action from state court to federal court does not waive an objection to personal jurisdiction, and many a defendant's lawyer will confirm that one of the considerations in whether to remove a case may be to have the federal rather than the state court rule even on a mere objection to personal jurisdiction that the defendant has raised in the state court. The Appellate Division has more recently held, however, that an objection of improper service--which is of course a category of personal jurisdiction--does get waived by the defendant's removing the case to federal court. *Quinn v. Booth Memorial Hosp.*, 239 A.D.2d 266, 657 N.Y.S.2d 680 (1st Dep't 1997).

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The removal in *Quinn* was held to be a general appearance, at least to the extent that when the case was afterwards remanded, the waiver was held to apply by the New York court. As noted above, however, one of the purposes of the removal may have been to have the federal court rule on the objection. Perhaps the defendant in *Quinn* was somehow remiss in preserving the jurisdictional objection before the removal. One counseling point for a defendant bent on removal is to at least assert the objection in the state court before the removal, even if in no other form than as a defense in a promptly served answer--always mindful, of course, of the 30-day time limit on removal from state to federal court under 28 U.S.C.A. 1446(b).

If the ground of the jurisdictional objection is improper service and the defendant has chosen to assert it as a defense in the answer--and the answer has already been served at the time of removal--the defendant must also attend to New York's 60-day time limit on bringing the objection to judgment. To be on the safe side, the defendant should promptly, after removal, make a motion for judgment in the federal court based on the jurisdictional objection, being certain that the motion in the federal court also falls within the 60-day period following the service of the answer in the state court. By doing that, the defendant can avoid having to rely on a federal court determination of whether the CPLR 3211(e) 60-day time limit would have to be applied by the federal judge.

And if the defendant chooses to remove the case before answering, the defendant would do well to make a prompt motion to dismiss in the federal court after the removal, under Rule 12(b) of the Federal Rules of Civil Procedure, based on the improper service objection.

By so proceeding, the defendant should be able to preserve the objection through the process of removal to federal court, and even through the process of removal and remand, should the case be sent back. It is in any event hard to think that a defendant intent on removing a case should be held, despite all procedural precautions, to forfeit an objection to the court's personal jurisdiction by the mere fact of the removal. *See Benefits by Design Corp. v. Contractor Management Services, LLC*, 75 A.D.3d 826, 905 N.Y.S.2d 340 (3d Dep't 2010).

Answer by Unserved Defendant Is Not Jurisdictional Waiver

In authorizing a defendant to object to personal jurisdiction either with a motion to dismiss under CPLR 3211(a)(8) or with a defense in the answer, the CPLR has in mind a defendant on whom service of process has at least been attempted. But suppose that there has been no service at all. Will the defendant's service of an answer in that situation--duly setting forth a jurisdictional objection--preserve it? It will, holds the Second Department in *Colbert v. International Security Bureau, Inc.*, 79 A.D.2d 448, 437 N.Y.S.2d 360 (2d Dep't 1981).

A situation like this arises, as it did in *Colbert*, when there are several named defendants in the case, of which X is only one. The rest have been served, so that there is a pending action in which, X learns, she is also a named defendant, and yet there has been no summons served on her. X may nevertheless have an objection to jurisdiction, not for want of service, obviously, but based on some other ground, such as the absence of a jurisdictional basis for extraterritorial jurisdiction.

The plaintiff contended in *Colbert* that because no service was attempted on X, X's service of an answer constituted a voluntary appearance and submission to jurisdiction; that the modes of a CPLR 3211 motion or a defense in the answer are available only to defendants upon whom service was at least attempted. The court rejected those arguments. X need not stand by idly, knowing that an action is pending in which she is a named party and can be served at any time, the court says. As long as X is named, X may, if she contends that there is no jurisdiction over her, take the initiative of having the court so hold. She has the right to appear in the action and state the jurisdictional objection, and since one of the ways the CPLR allows for the assertion of the objection is an answer, X may serve an answer and the answer can include the jurisdictional objection as well as plead whatever else is appropriate to an answer.

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If the plaintiff does not want to serve X, and does not want X serving papers and making objections, the plaintiff should approach X with the offer to stipulate to drop X from the action entirely.

Jurisdictional Objection Arising Later Is Assertable Later

It may sometimes happen that at the outset of the litigation, at the juncture at which a jurisdictional objection is most appropriate, the jurisdictional objection does not yet exist. Since CPLR 3211(e) requires that an objection to jurisdiction--we refer here to personal or rem as opposed to subject matter jurisdiction--be asserted either by a CPLR 3211 motion before answering or as a defense in the answer, what should a defendant do when the jurisdictional objection does not arise until after the time for the making of the CPLR 3211 motion has expired and the answer has already been served? In a situation like that arising in *Rich v. Rich*, 103 Misc.2d 723, 426 N.Y.S.2d 936 (Sup. Ct., New York County 1980), the court held that the defendant may make a motion for summary judgment based on the newly arising jurisdictional objection. *See* Siegel, New York Practice § 111 (Connors, 5th ed.).

The problem in the case revolved around an attachment. Under the procedures of article 62 of the CPLR, an attachment properly levied at the outset validates jurisdiction, but it is subject to the condition subsequent of a perfection of the levy by appropriate steps. In the interim, the time for making a CPLR 3211 motion, and for serving an answer, the two devices by which a jurisdictional objection may be asserted, expires. The time for perfecting a levy of the attachment may not yet have expired when the answering time does, however; perfection may yet take place, so there is not as yet any jurisdictional defect. But then suppose the time for perfection does expire, and without appropriate steps by the plaintiff. The *Rich* case holds that as soon as it becomes plain that the levy has been voided for want of perfection, thus undoing the jurisdiction that the levy had initially secured, the objection may be raised by the defendant and an appropriate expedient for the raising is a motion for summary judgment. That motion, which is governed by CPLR 3212, has no pre-answer time limit such as CPLR 3211 imposes.

Consistent with the procedural realities of the case in such a situation, the plaintiff's contention that the defendant "waived" a jurisdictional objection at a moment when she did not have one is of course rejected.

C3211:56. Counterclaim or Cross-Claim as Waiving Jurisdictional Objection.

If the plaintiff has an objection under paragraphs 8 or 9 of CPLR 3211(a)--that jurisdiction in personam or in rem is lacking--the plaintiff may assert it by a motion to dismiss under CPLR 3211(a). Or, if the plaintiff makes no motion, she may assert the objection by way of defense in the answer. The mere service of an answer containing a defense of lack of jurisdiction preserves the objection under the CPLR; it is not a waiver of it.

But assume that the defendant also includes a counterclaim in the answer. It was held early in the life of the CPLR that inclusion of a counterclaim does not waive the jurisdictional objection. *Goodman v. Solow*, 27 A.D.2d 920, 279 N.Y.S.2d 377 (1st Dep't 1967).

Since that time the rule has been refined, evolving a distinction between a counterclaim related to the plaintiff's claim, and an unrelated one. The related one (it was a related one in *Goodman*) does not waive the jurisdictional objection, but the interposition of an unrelated counterclaim does. *See Liebling v. Yankwitt*, 109 A.D.2d 780, 486 N.Y.S.2d 292 (2d Dep't 1985), in which the court holds that

[w]hen defendant interposed a counterclaim unrelated to the plaintiff's claim, he placed himself in the position of a plaintiff who initially invokes the jurisdiction of a court and by so doing effectively waives any jurisdictional objection he might have had against the prime action.

How does one test whether a counterclaim is "related" to the main claim? The Court of Appeals addressed the matter in *Textile Technology Exchange, Inc. v. Davis*, 81 N.Y.2d 56, 595 N.Y.S.2d 729, 611 N.E.2d 768 (1993), holding that

the doctrine of issue preclusion (collateral estoppel) holds the answer. When there are issues in common between the counterclaim and the plaintiff's main claim, such that an adjudication of an issue in the course of trying the main claim would necessarily be dispositive of the same issue when it afterwards becomes relevant on the trial of the counterclaim, then the counterclaim is to be deemed a related one and, practically speaking, the defendant really has no choice but to interpose it. Interposing it, therefore, does not waive a jurisdictional defense that the defendant may also have.

The defendant who is in doubt about the relatedness of the counterclaim and who wants at least a preliminary test of the merits of the jurisdictional objection should use the motion method to contest jurisdiction, i.e., move to dismiss under CPLR 3211(a)(8). The mere making of the motion extends the answering time, CPLR 3211(f), and the defendant will shortly have at least the trial court's view of whether the jurisdictional objection is valid.

As is plain from the Appellate Division stage of the *Textile* case, the judges will sometimes disagree about whether the counterclaim is related to the main claim. The adoption of the issue preclusion doctrine to test the point will help to avoid that, but is not likely to be a talisman in its own right.

What about a cross-claim? The *Goodman* case indicates that the inclusion of a cross-claim against a co-defendant may constitute a jurisdictional waiver, but it would be best to qualify that conclusion, too, so as to apply the waiver only to a cross-claim wholly unrelated to anything else in the action.

The same rationale that enables a defendant to interpose a related counterclaim without waiver consequences should apply to a related cross-claim as well. If a defendant fails to interpose a related cross-claim, she will be risking the consequences of the issue preclusion (collateral estoppel) doctrine: issues decided in the case will be binding on the defendant if they also turn up in a later, separate suit by the defendant on what would have been the cross-claim.

The interposition of an unrelated cross-claim, on the other hand--the cross-claim that neither seeks indemnity for something interposed against the defendant by some other party nor has any issue of law or fact in common with anything else in the case--marks the defendant's intention to exploit the forum for her own purposes, a posture inconsistent with the contention that the forum lacks jurisdiction.

Impleader of Third-Party Defendant as Waiving Jurisdictional Objection

The general rule that the interposition of a related counterclaim or cross-claim by the defendant should not be deemed a waiver of a jurisdictional defense that is also contained in the answer, has also been extended to a defendant's use of the impleader device. Thus, where the defendant included in her answer a defense of lack of jurisdiction of her person and then served a third-party summons and complaint on X, she did not forfeit the jurisdictional objection. That would be tantamount to forcing the defendant to raise the jurisdictional objection by motion, which in turn would divest her of her clear CPLR right to assert it by defense in the answer as an alternative. *Italian Colony Restaurant v. Wershals*, 45 A.D.2d 841, 358 N.Y.S.2d 448 (2d Dep't 1974).

Even under the expanded use of the impleader device of CPLR 1007, permitting it for anything related to something else in the case rather than restricting it--as a tight reading of the statute's language would indicate--only to a claim of indemnification to cover liability of some other claim, the device is limited to claims having at least some relationship to a matter already in the case. That relatedness should assure that the inclusion of a claim of want of jurisdiction will not run into any argument of waiver.

Risk of Moving for Summary Judgment on Counterclaim If Defendant Has Also Asserted Jurisdictional Objection

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As noted, the mere assertion of a related counterclaim does not prevent the defendant from also including in the answer a jurisdictional objection. But other conduct may forfeit the objection, as illustrated in the bizarre goings-on in *Flaks, Zaslow & Co. v. Bank Computer Network Corp.*, 66 A.D.2d 363, 413 N.Y.S.2d 1 (1st Dep't 1979).

The defendant took the jurisdictional objection by answer instead of by motion, also including a related counterclaim in the answer. Then the defendant apparently had a change of heart and wanted the jurisdictional point disposed of early. Too late now to make a CPLR 3211(a)(8) motion, the defendant made the jurisdictional objection the subject of a summary judgment motion (or, in any event, the equivalent of a summary judgment motion), which is a permissible alternative. Moreover, the defendant won on the point: plaintiff's action was dismissed for want of jurisdiction.

The counterclaim survived, however, and now the defendant moved for summary judgment on it on the merits. Although the mere interposition of the counterclaim did not waive the jurisdictional objection, the motion for summary judgment on the counterclaim--after the jurisdictional point in respect of the plaintiff's main claim was raised and disposed of in the defendant's favor--did. The plaintiff contended, in any event, that these merits proceedings by the defendant in respect of the counterclaim evinced an intention to submit to the court's general jurisdiction, and the court accepted this contention and permitted the plaintiff, with an amendment, to re-assert the main claim (the one which had been dismissed when the defendant's jurisdictional objection was sustained). Perhaps it would be more accurate to describe the situation as one in which a defendant, against whom jurisdiction was initially lacking, submitted to jurisdiction with the equivalent of an informal appearance, that is, a voluntary participation on the merits of the case, when he no longer had to (the claim against him having been dismissed).

The defendant brought this on itself. Had the defendant wanted the action dismissed for lack of jurisdiction, the defendant should have made a prompt motion under CPLR 3211(a)(8), which would have been granted and the action dismissed. Perhaps the defendant had calculated that with an answer instead of a motion the case could have been so set up that the defendant could obtain the services of the court for its counterclaim while denying them to the plaintiff for the main claim. The scheme, if that it was, did not work. Said the court, "If 'man bites dog' in this case, it is purely the defendant's fault," and with those words the court proceeded to add insult to injury: the defendant still had at least some hope of prevailing with the summary judgment motion that the defendant had made on the counterclaim. Here, too, a disappointment was in store for the defendant. A summary judgment motion "searches the record." *See* Commentary C3212:23 on McKinney's CPLR 3212. This means that the court will look behind the pleading being attacked (in this case the plaintiff's reply to the counterclaim), and back to the pleading containing the claim on which summary judgment is being sought (in this case the counterclaim in the defendant's answer). If that claim is defective, the search-the-record doctrine authorizes the court to grant summary judgment dismissing it even though the opposing party, in this case the plaintiff, has not asked for such relief. That is what happened in the *Flaks* case. The plaintiff, having been awarded jurisdiction (of the plaintiff's main claim) that the court did not initially have, was now also the beneficiary of a summary judgment (on the defendant's counterclaim) that the plaintiff did not ask for.

The case is one of the most vivid illustrations of the pitfalls that await a defendant who first elects to take a jurisdictional objection as a defense in her answer rather than by a clear-cut preliminary motion, and who then confounds the situation by presuming to impose on the court's jurisdiction with her own counterclaim after it has been advised that the court is willing to uphold the defendant's jurisdictional objection against the plaintiff.

C3211:57. Tools of CPLR 308(5) Designee.

On an ex-parte motion by the plaintiff pursuant to CPLR 308(5), the court can devise--literally invent--a method of summons service. One of the things the courts occasionally do under that provision is designate a person having some relationship to the defendant, directing the plaintiff to effect service on that person in the defendant's behalf. The premise is that the relationship of the designated person to the defendant is such as to make it reasonable to assume that the defendant will be notified through the designee.

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It may be true, however, that no such relationship exists, despite the fact that the plaintiff claimed it did on her ex-parte motion under CPLR 308(5). How does the designated person call to the court's attention the fact that she does not bear the assumed relationship to the defendant, or that she has no knowledge of the defendant's whereabouts, or, indeed, that she is even hostile to the defendant? The possibilities are many.

If it is quite clear that the designee does bear a relationship to the defendant such as to justify the designation-for-service under CPLR 308(5), it may be reasonable to require the designee to state any objections she has to the designation through the same routes that would be open to the defendant herself. *Cf. Cosby v. Moyant*, 55 Misc.2d 393, 285 N.Y.S.2d 980 (Sup. Ct., New York County 1967). The routes open to the defendant herself are the motion to dismiss under CPLR 3211 or the answer by way of defense. Clearly, however, the designee cannot be asked to assert her objections in an answer; she is not the defendant and cannot be asked to answer anything. Nor would it be appropriate to limit such a designee to the expedient of moving to dismiss under CPLR 3211(a)(8). Since she is not a party, but a mere expedient through whom the plaintiff seeks to notify the defendant, she should not be compelled to retain her own attorney and formally move under CPLR 3211. It would also seem that CPLR 3211 is not available to her, since it is the tool of the party against whom a claim is asserted. A person's designation under CPLR 308(5) as a person to be served in the defendant's behalf does not make her the equivalent of the defendant's attorney or empower her to act in the defendant's behalf.

The court nevertheless may hear anything the designee has to say about her designation. The court must recognize that her designation was made on only the ex-parte proof of the plaintiff, which could have been false or mistaken. The designee should not be bound to any particular course of procedure in bringing to the court's attention objections to her designation. Whatever means she chooses should be accepted by the court. If she has been served with or has otherwise obtained a copy of the ex-parte order designating her, so that she knows the name of the judge who signed the order, and she contacts the court, it could take the initiative in setting up a procedure whereby the designee's objections can be heard. The designee can be invited to chambers, the plaintiff being notified to attend and the matter resolved there.

The court should recognize the difficult position of the CPLR 308(5) designee and hear her objections regardless of the procedural route through which they come to the court's attention.

C3211:58. Initially Raising Objection in Amended Pleading.

If the party does not make a motion based on a subdivision (a) objection and also fails to include the objection in a responsive pleading, the objection is waived. Apparently excepted from the operation of this rule are the objections contained in paragraphs 2, 7, and 10 of CPLR 3211(a). *See* Commentary C3211:54. We thus address discussion here to the other grounds of objection contained under subdivision (a).

Assume that the defendant neither moves to dismiss on the particular ground nor includes it as a defense in the initial answer. May the defendant include it as a defense in an amended answer? In answering this question it will help to distinguish between the amendment of right allowed by CPLR 3025(a) and the amendment that requires court leave under CPLR 3025(b).

Amendment of Course; CPLR 3025(a)

If the amendment is one made of right (without court leave) under CPLR 3025(a), the amended pleading may include the previously omitted defense for the first time. *See*, *e.g., Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 800 N.Y.S.3d 116, 833 N.E.2d 259 (2005); *Moezinia v. Ashkenazi*, 136 A.D.3d 990, 25 N.Y.S.3d 632 (2d Dep't 2016). The as-of-course amendment allowed by CPLR 3025(a) is designed to permit each pleader to correct her pleading at least once without leave of court, and this category of amendment must be made so close in time to the service of the original pleading that it may be said to be nothing more than a final version of the original one. The time limit on the amendment as

of course under CPLR 3025(a) will itself guarantee in almost all instances that the adverse party will not be able to claim any prejudice traceable to the brief delay in asserting the objection in an as-of-course amendment.

We turn attention now more specifically to the amendment that requires court leave.

Amendment by Leave; CPLR 3025(b)

If the time to amend as of course has expired under CPLR 3025(a), and the pleader wishes to assert a CPLR 3211(a) objection for the first time in an amendment for which leave is needed under CPLR 3025(b), the pleader now faces an exercise of the court's discretion. Although CPLR 3025(b) directs that leave to amend be "freely given," the allowance of the amendment is in the last analysis for the court to determine on a case by case basis. The best rule of thumb under CPLR 3025(b), for the purpose of permitting an amendment to include a previously omitted CPLR 3211(a) objection, is that the amendment should be allowed if the adverse party cannot claim any significant prejudice due to the mere delay in asserting the objection. The court should consider too whether the proposed amendment is palpably insufficient or patently devoid of merit. *See*, *e.g.*, *Onewest, F.S.B. v. Goddard*, 131 A.D.3d 1028, 17 N.Y.S.3d 142 (2d Dep't 2015).

Here the likelihood of prejudice is greater than with the of-right amendment. If, for example, the objection is that the court lacks jurisdiction of the defendant's person and its omission from the original answer has prompted the plaintiff to go to substantial trouble or expense preparing the case on the merits, on the assumption that no jurisdictional objection has been asserted, the amendment to add the objection would properly be denied. But if the amendment is sought reasonably close in time to the service of the pleading to be amended and the plaintiff can show no prejudice because of the mere passage of time, the amendment should be allowed. It should also be allowed when a substantial period of time has passed unless the plaintiff can demonstrate that she has taken such steps in the interim as would enable the court to say that the delay in assertion of the objection by itself significantly prejudices the plaintiff.

Discourse like the foregoing should not be necessary for the careful practitioner. Once again: it is obviously the sounder practice to include the objection in the original pleading or in an amendment of right so as not to have to depend on an exercise of the court's discretion.

An additional dimension appears when the objection that a party seeks to interpose by way of amendment did not come into being until after service of the original pleading, as where a defense like res judicata (or payment, release, etc.) arises only afterwards. There the time to amend as of course under CPLR 3025(a) may have expired, necessitating leave to amend under CPLR 3025(b). This is a different scenario. Here the party is technically seeking to "supplement" the pleading rather than merely amend it, and the very fact that the objection came into being after service of the earlier pleading would appear to mandate a grant of leave to add the objection. *See Lance International, Inc. v. First National City Bank*, 86 A.D.3d 479, 927 N.Y.S.2d 56 (1st Dep't 2011); *George Strokes Electrical and Plumbing Inc. v. Dye*, 240 A.D.2d 919, 659 N.Y.S.2d 129 (3d Dep't 1997). That would be so, in any event, if the motion is made within a reasonable time after the objection comes into existence.

Leave to amend an answer to include a waived defense and summary judgment based on that defense can be sought in one motion. *Armstrong v. Peat, Marwick, Mitchell & Co.*, 150 A.D.2d 189, 540 N.Y.S.2d 799 (1st Dep't 1989).

C3211:59. Raising Objection in Answer to Amended Complaint.

Assume that the plaintiff serves a complaint and the defendant answers it without including an objection to personal jurisdiction, a CPLR 3211(a) ground of objection. Then the plaintiff, as allowed by CPLR 3025(a), amends the complaint as of right. The defendant must serve a new answer to it under CPLR 3025(d). The defendant now asserts the jurisdictional defense in her answer to the amended complaint. This was held permissible in *Blatz v. Benschine*, 53 Misc.2d 352, 278 N.Y.S.2d 533 (Sup. Ct., Queens County 1967), but later cases, such as *Boulay v. Olympic Flame,*

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Inc., 165 A.D.2d 191, 565 N.Y.S.2d 905 (3d Dep't 1991), indicate no, at least in general language. *Boulay* and like cases may reach the right result on their facts, but they should not be taken as setting forth a hard and fast rule in their reading of the Court of Appeals *Addesso* case. In *Boulay*, there may have been a little chicanery on the defendant's part in getting the plaintiff to amend the complaint to assert a different date for the accident--the change of date does not appear to have been of any consequence by itself--just so that the defendant, who failed to make a jurisdictional defense to the original complaint, might now make it against the amended one. The court would not countenance that.

Whether a defendant who has interposed no jurisdictional objection against the claim in the original complaint should be permitted to interpose one against an amended complaint should depend on what the amended one contains, and on the nature of the jurisdictional defect alleged. If, for example, the defendant claims never to have been served with a summons at all, or was served in a defective manner, such an objection would have just as much bearing on the original complaint as on the amended one. The fact that it was omitted from the CPLR 3211 motion made against the original complaint, or from an answer addressed to the original complaint, should therefore mean that it is waived so that it cannot be used against an amended complaint either. But if the particular ground of jurisdictional objection depends on the contents of the complaint, a waiver should not necessarily result. It is quite possible that an objection exists legitimately against a claim appearing for the first time in an amended complaint while the defendant may have had no jurisdictional objection to claims asserted in the original complaint. A situation involving longarm jurisdiction illustrates:

The plaintiff effects service of the summons and original complaint on the defendant, a nondomiciliary, in Ohio. The defendant concedes that the claims asserted in the original complaint arise out of the defendant’s New York acts and, making no jurisdictional objection, the defendant appears in the action by serving an answer on the merits. The plaintiff then amends the complaint as a matter of right, as the plaintiff may do under CPLR 3025(a), and adds yet another cause of action, claiming that this one, too, has a longarm basis in CPLR 302. (Note also, in this situation, CPLR 302[c].) The defendant does not concede longarm jurisdiction of this new claim, however, and wants to assert a jurisdictional defense to it. The defendant should of course be permitted to. If general language in *Boulay* and like cases indicate that the defendant is barred from making the objection, the courts are likely to narrow the language so as to preserve what seems plainly to be the defendant’s right in the example just put.

It is the plaintiff, when she amends the original complaint, who injects new matter into the case, and the defendant should be able, in answering the amended complaint, to address the new matter just as if the answer to the amended complaint is the only answer to appear in the case--the original answer deemed as effectively superseded by the amended answer as the original complaint is by the amended complaint.

A lesson from all of this for the plaintiff is that if the plaintiff has the remotest suspicion of the existence of a CPLR 3211(a) objection that the defendant has omitted from the initial answer, the plaintiff had best think twice before invoking CPLR 3025(a) and amending the complaint.

C3211:60. Leave to Replead on (a)(7) or (b) Motion.

The motion to dismiss a cause of action under CPLR 3211(a)(7) or to dismiss a defense under CPLR 3211(b) may be made to attack the cause of action or defense as defective on its face, or, conceding that it is good on its face, to attack it for lack of underlying merit.

If the basis of the defendant’s attack on the plaintiff’s claim is a defect in its pleading and the plaintiff now wishes to remedy the defect by amendment, the plaintiff may ask in the opposing papers for leave to replead. If the plaintiff is in doubt about whether the objection goes to the face of the pleading, the plaintiff should include the repleading request as a precaution. Perhaps the best rule of thumb here is that the plaintiff should make the request in the opposing

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papers, at least as an alternative, in any instance in which the plaintiff is confronted with a motion under subdivision (a)(7). The same is true for the defendant when it is defendant's defense that is attacked for facial invalidity.

The party who has at hand evidence to establish the validity of a claim or defense may of course submit it in or with his opposing papers. Affidavits used to support leave to replead should be made by those with knowledge of the facts. The courts constantly remind the bar that the affidavit of one lacking knowledge will not suffice and that leave to replead will be denied, although perhaps with leave to reapply on adequate papers. *See, e.g., Young v. Nelson*, 23 A.D.2d 531, 256 N.Y.S.2d 649 (4th Dep't 1965). The party who does not, merely needing time to secure supportive affidavits or to conduct disclosure proceedings to get the requisite evidence, *see* CPLR 3211(d), should so state in opposing papers.

If the party seeking leave to replead includes no extrinsic proof and relies solely on the face of the attacked pleading, all of that pleading's allegations are assumed to be true. And if the pleading is defective only as a matter of draftsmanship, as where it omits an essential allegation that can be shown to exist in fact, the court will be more disposed to grant leave to replead. Even in the situation in which the movant uses no extrinsic proof, however, the opposing party might still do well to submit extrinsic proof of the validity of the claim and the existence in fact of all of the elements on which it depends. The party who does that goes as far as possible to encourage the court to grant leave to replead if a defect is found to exist.

CPLR 3211(e) used to require a party desiring leave to replead to expressly request that relief in the opposing papers and demonstrate that she had "good ground" to support the claims she wished to replead. And the court was authorized to insist that the party produce evidence demonstrating the merit of those claims. These requirements were deleted as a result of a 2005 amendment of CPLR 3211(e). L.2005, ch. 616.

In the first significant appellate treatment of the post-amendment CPLR 3211(e), the Second Department in *Janssen v. Inc'd Village of Rockville Ctr.*, 59 A.D.3d 15, 869 N.Y.S.2d 572 (2d Dep't 2008), made several important points about the leave-to-replead device. First, in amending the law to eliminate the requirements previously associated with seeking leave to replead, the Legislature did not eliminate repleader. Second, the standard to be employed by a court in considering whether to grant a request or motion for leave to replead is the same as the standard employed on a motion for leave to amend a pleading (i.e., relief should be freely granted absent significant prejudice unless new claim is devoid of merit or palpably insufficient). *See*, *e.g., Rabos v. R&R Bagels & Bakery, Inc.*, 100 A.D.3d 849, 955 N.Y.S.2d 109 (2d Dep't 2012). Third, there is no time limitation on a motion for leave to replead.

With respect to the third point, the plaintiff pleaded several claims (including for harassment and retaliatory action) against several defendants (we'll call them collectively the defendant), along with their village employer. The court on the defendant's motion dismissed several of these. The plaintiff did not request leave to replead in the papers answering the motion. Months after that, with the action still pending, the plaintiff moved for leave to replead--couched also in the form of a motion to amend (which is in effect the same thing)--and the defendant argued that the motion was too late; that it was, by analogy if nothing else, limited to the time for appealing under CPLR 5513 or the time for moving to reargue under CPLR 2221(d)(3). The court rejected both analogies and held plaintiff's motion, made half a year after the original dismissal, timely enough. Neither the amendment itself nor any statement in its legislative bill jacket prescribes any time limit on a motion for leave to replead, the court pointed out.

A party desiring leave to replead should not take *Janssen* as an invitation to make a repleader motion at some remote point in the action. The motion will be judged under the standards applicable to a CPLR 3025(b) motion, and the principal consideration on the motion to amend is whether the non-moving party would be significantly prejudiced by the proposed amendment. The greater the delay in moving to amend, the greater the likelihood that such prejudice can be demonstrated. *See* Siegel, New York Practice § 275 (Connors 5th ed.).

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Courts occasionally insist that the party seeking leave to replead submit with her motion a proposed amended pleading. *Parker Waichman LLP v. Squier, Knapp & Dunn Communications, Inc.*, 138 A.D.3d 570, 28 N.Y.S.3d 603 (1st Dep't 2016); *Fletcher v. Boies, Schiller & Flexner, LLP*, 75 A.D.3d 469, 906 N.Y.S.2d 212 (1st Dep't 2010); *see JJM Sunrise Automotive, LLC v. Volkswagen Group of America, Inc.*, 49 Misc.3d 1208(A), 26 N.Y.S.3d 724 (table), 2015 WL 5971752 (Sup. Ct., Nassau County 2015). This requirement flows naturally from the *Janssen* court's conclusion that a motion for leave to replead is to be viewed in the same light as a motion for leave to amend. *See* CPLR 3025(b) ("Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.").

If repleading is allowed, the disposition of the motion should be a grant with leave to replead. The action itself would not be dismissed.

C3211:61. Amendment of Objectionable Pleading as Abating Motion.

It may happen that while defendant's CPLR 3211(a) motion against plaintiff's complaint is pending, the plaintiff amends the complaint as of right (without leave of court) under CPLR 3025(a). Upon such an amendment, the amended complaint supersedes the original pleading and becomes the only complaint in the action. *D'Amico v. Correctional Medical Care, Inc.*, 120 A.D.3d 956, 991 N.Y.S.2d 687 (4th Dep't 2014). Should such an amendment be deemed to abate the motion?

No amendment as of right of the pleading that asserts the cause of action should be deemed to abate a motion to dismiss under CPLR 3211(a). That rule has particular force where the amendment did not substantively alter the causes of action being challenged on the motion. *See Sim v. Farley Equipment Company LLC*, 138 A.D.3d 1228, 30 N.Y.S.3d 736 (3d Dep't 2016); *EDP Hospital Computer Systems, Inc. v. Bronx-Lebanon Hospital Ctr.*, 212 A.D.2d 570, 622 N.Y.S.2d 557 (2d Dep't 1995).

A motion that seeks merely to compel an amendment of the pleading, on the other hand, should be deemed abated upon amendment of the pleading moved against. A motion to require a separate statement and numbering of allegations under CPLR 3024 would be an example. *See* the Commentaries on 3024 and 3025. Since CPLR 3211(e) requires the court on a CPLR 3211(a)(7) motion to consider not merely whether the plaintiff has properly pleaded the cause of action but whether the plaintiff in fact has a cause of action, an amendment of the objectionable pleading while a motion is being brought on under CPLR 3211(a)(7) should not, under the CPLR, be deemed automatically to abate the motion. If the pleader has no cause of action, no quantity of amendments is going to give her one, for which reason the CPLR 3211(a)(7) motion does not necessarily lose its vigor because of the amendment. And whether or not it does is also a matter likely to engender disagreement between the parties, which only the court can resolve.

The court in *Sholom & Zuckerbrot Realty Corp. v. Coldwell Banker Commercial Group, Inc.*, 138 Misc.2d 799, 525 N.Y.S.2d 541 (Sup. Ct., Queens County 1988), held that plaintiff's amendment of the complaint after the defendant has made a motion under CPLR 3211 to dismiss it does not automatically abate the motion. It says that the "better rule" gives the movant "the option of withdrawing its motion or pressing it with regard to the amended pleading," observing that a rule that would have the amendment abate the motion automatically would only invite "additional motion practice." It is a good idea for the parties to be in touch to discuss the matter. Perhaps the defendant can be convinced that the amendment meets her objection and makes the motion academic, prompting its withdrawal.

Reviewing this subject in *Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 675 N.Y.S.2d 14 (1998), the First Department held that the moving party "has the option to decide whether its motion should be applied to the new pleadings." In *Sage*, the defendant asked the court to treat the original motion as being addressed to the amended complaint as well. This was permissible, held the court. And because plaintiff did not object to the treatment, plaintiff could claim no prejudice. *See Sobel v. Ansanelli*, 98 A.D.3d 1020, 951 N.Y.S.2d 533 (2d Dep't 2012); *Toikach v. Basmanov*, 31 Misc.3d 615, 918 N.Y.S.2d 844 (Sup. Ct., Kings County 2011).

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By making such a request, the defendant must of course be satisfied that the amended complaint does not add anything new, or at least does not add any new matter to which the original motion has not addressed itself. But that's up to the defendant. If there is anything at all in the amended complaint that was not present in the original one, the defendant may well wish to respond to it.

It would seem that the defendant could do so, if so disposed, by asking the court to retain the original motion papers and consider them as a response to the amended complaint, while perhaps offering the court additional affidavits responsive to just the new matter contained in the amended complaint. If the nature of the pleadings makes that feasible, it could save the effort that the total redoing of the answering papers might entail.

While *Sage* indicates that the matter should be left to the defendant in first instance, if the defendant chooses a course that encumbers the court's consideration of the motion after the plaintiff has amended the complaint, the court can direct the parties to do whatever's necessary to remove the encumbrance.

Most of the grounds stated in CPLR 3211(a) appear to be of the kind that cannot be cured by mere amendment of the pleading.

It has been held that where the plaintiff serves an amended complaint pursuant to a court order (as opposed to an amendment as of course) disposing of a CPLR 3211(a) motion, the service of such an amended pleading does make the original issues academic on an appeal from the order. *See* *Langer v. Garay*, 30 A.D.2d 942, 293 N.Y.S.2d 783 (1st Dep't 1968). This is a kind of abatement coming about because of an amended pleading--but only for appeal purposes. If there is some dispute about whether the amended complaint satisfies the order that permitted it, the dispute should be resolved by the judge who made the order before an appellate court is imposed on to determine the point.

C3211:62. Res Judicata Treatment of Granted CPLR 3211 Motion.

If a motion under CPLR 3211 is granted, the order or judgment in which it culminates is entitled to res judicata treatment. But it will of course be res judicata only of the point it decides.

If the motion was based on a ground in absolute bar of the action, such as release or payment, it will have the effect of a final judgment on the merits and will be entitled to future res judicata treatment as such. If it was based only on a ground in abatement, it will have narrower effect. Thus, where the action is dismissed on a CPLR 3211(a)(8) motion for lack of jurisdiction of the defendant's person, the plaintiff may of course sue anew if she can afterwards get jurisdiction; the only point decided is that the court lacked jurisdiction in the first action.

Most of the grounds listed in CPLR 3211(a)(5) are the so-called objections "in bar," and their application will ordinarily result in complete res judicata treatment precluding future suit on the same cause of action. Among these grounds are arbitration and award, collateral estoppel, discharge in bankruptcy, payment, release, and res judicata. The objection of infancy or disability, however, is only an objection "in abatement" and will not preclude future suit when the disability is removed or rectified.

The statute of limitations and statute of frauds objections cannot be as easily categorized. A limitations dismissal will bar future suit on the same claim in New York, at least to this extent: when the plaintiff sues anew in New York she can be met by the objection that the fact of untimeliness is res judicata, thereby necessitating dismissal of the second suit without relitigation of the timeliness issue. *See* *Spindell v. Brooklyn Jewish Hospital*, 35 A.D.2d 962, 317 N.Y.S.2d 963 (2d Dep't 1970), *aff'd* 29 N.Y.2d 888, 328 N.Y.S.2d 678 (1972). But if the first adjudication purported only to apply the New York period of limitation in a case with foreign elements, without any investigation or application of any foreign period of limitations, it may be possible for the plaintiff to sue anew in the foreign forum whose statute of limitations is applicable and under which the claim is still timely. If, however, the New York court in

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making the adjudication applied a foreign period of limitations under the so-called "borrowing statute," CPLR 202, the adjudication should preclude suit anew both in New York and in the foreign forum whose statute was applied. The objection to the second suit in either instance would be that the fact of untimeliness is res judicata, and it would be entitled to full faith and credit in the foreign forum.

The statute of frauds dismissal will bar future suit on the alleged agreement, but it may or may not bar a second suit based on a quantum meruit (depending on whether the particular statute of frauds applicable in the first action is construed to intend a complete bar to all recovery emanating from the transaction or merely to bar a claim based on the alleged agreement itself). Here, too, the impact of the New York dismissal may have differing results if the second suit is brought elsewhere. Much remains to be determined in this difficult conflict of laws realm, which is further discussed in Commentary C3211:65.

Many of the CPLR 3211(a) grounds are objections in mere abatement. A dismissal based on one of these grounds will not necessarily preclude future suit. Thus, a dismissal under paragraph 2 will not preclude suit in a court of adequate jurisdiction; one under paragraph 3 will not preclude future suit when the capacity to sue is achieved; one under paragraph 4 will not preclude future suit if the earlier action whose pendency wrought the dismissal is itself later dismissed for lack of jurisdiction; one under paragraph 10 will not preclude future suit in which the necessary party is brought under the court's jurisdiction.

A nice illustration of an objection in mere abatement at work is provided by *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 862 N.Y.S.2d 316, 892 N.E.2d 380 (2008). *Landau, P.C.*, involved a disbarred lawyer unable to keep his firm name (Eisen, P.C.) after the disbarment. So he dissolved the Eisen, P.C. firm and filed a certificate renaming it Landau, P.C., after his daughter, Debbi (also a lawyer). The gist of the dispute was a legal malpractice action by Landau, P.C. against the law firm (the defendant) that represented Eisen in an earlier action brought by New York City against Eisen for fraud and various other activities. Eisen claimed the firm didn't properly resist the city's summary judgment motion in that case.

The legal malpractice action was dismissed for lack of both "standing" and "capacity." Eisen couldn't sue for Eisen, P.C., because, since he was no longer a lawyer, he lacked "standing." And Eisen, P.C., could not be a plaintiff and initiate the action for itself because, as a dissolved corporation, it had no "capacity". The action by both attempted plaintiffs was therefore dismissed on those grounds, the judgment of dismissal reciting that it was "without prejudice."

Now, with Landau, P.C., as plaintiff, the legal malpractice action was brought with "a virtually identical summons and complaint." The defendant moved to dismiss this one on several grounds, but we address here only the res judicata ground. The Court of Appeals held that the earlier action was not res judicata.

The case occasioned a review of which of the various dismissal grounds listed in CPLR 3211(a) count as merits dispositions in actuality or in effect so as to bar a subsequent action under the res judicata doctrine. The grounds of the earlier dismissal here--lack of capacity and lack of standing--do not count as such grounds, the Court held, thus leaving the merits to be adjudicated when the "capacity" or "standing" defect was cured with a proper substitution of Landau, P.C., as plaintiff. *See Brown v. Lutheran Medical Ctr.*, 107 A.D.3d 837, 968 N.Y.S.2d 526 (2d Dep't 2013) (lack of capacity dismissal did not bar subsequent action).

Paragraph 7 dismissals merit separate treatment. *See* Commentary C3211:63.

C3211:63. Impact of Dismissal under CPLR 3211(a)(7).

The objection of failure to state a cause of action under CPLR 3211(a)(7) today tests not just the face of the pleading, but its basic merits as well. *See* Commentary C3211:23.

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If the paragraph 7 dismissal is based solely on the facial insufficiency of the pleading of the cause of action, the plaintiff may sue anew with a complaint that corrects the deficiency, *see*, *e.g.*, *Addeo v. Dairymen's League Co-op. Ass'n*, 47 Misc.2d 426, 262 N.Y.S.2d 771 (Sup. Ct., New York County 1965); the prior dismissal, which was not on the merits, will not be given res judicata effect. *Hock v. Cohen*, 125 A.D.3d 722, 4 N.Y.S.3d 70 (2d Dep't 2015). But if the complaint in the second suit is "virtually identical" to the one dismissed for insufficiency in the first, res judicata will be a basis for the second's dismissal. *Flynn v. Sinclair Oil Corp.*, 20 A.D.2d 636, 246 N.Y.S.2d 360 (1st Dep't 1964) *aff'd* 14 N.Y.2d 853, 251 N.Y.S.2d 967, 200 N.E.2d 633 (1964); *Grinstein v. Official Laura Branigan Fan Club*, 174 A.D.2d 545, 571 N.Y.S.2d 725 (1st Dep't 1991).

What about the situation where the granted CPLR 3211(a)(7) motion was supported by evidence? Is that dismissal entitled to res judicata effect, barring a subsequent similar action? The answer appears to be no. *See Amsterdam Savings Bank v. Marine Midland Bank, N.A.*, 140 A.D.2d 781, 528 N.Y.S.2d 184 (3d Dep't 1988); *Plattsburgh Quarries, Inc. v. Palcon Industries, Inc.*, 129 A.D.2d 844, 513 N.Y.S.2d 861 (3d Dep't 1987).

Of course, if the paragraph 7 motion in the first action was converted to one for summary judgment under CPLR 3211(c) and the converted motion is granted, the judgment or order from the first action should be entitled to res judicata effect. *See* Commentary C3211:64.

C3211:64. Impact of CPLR 3211 Motion "Treated" as Summary Judgment.

As previously discussed in Commentary C3211:42, the court is empowered to treat any CPLR 3211 motion as one for summary judgment. If it elects to do so, regardless of the ground on which the CPLR 3211 motion is made, it is in effect saying that the claim or defense lacks merit--a holding equivalent to a final judgment after trial--and it should as a rule be accorded full res judicata (claim preclusion) treatment in any future suit on the same cause. It should also be given full collateral estoppel (issue preclusion) treatment in a future suit on a different cause of action regardless of what the dismissed party may do in the interim.

But here we must hedge. The res judicata realm is one of the most subtle in the law. Even a dismissal made upon an outright motion for summary judgment under CPLR 3212 may carry less than res judicata consequences, as where judgment was granted summarily based on a mere objection "in abatement," such as lack of jurisdiction. This point is more fully developed in Commentary C3212:21 on CPLR 3212.

Ironically, the "treatment" of a CPLR 3211 motion as one for summary judgment may be more apparently a disposition on the merits than a dismissal made on a direct summary judgment motion under CPLR 3212. The court's election to "treat" the CPLR 3211 motion as one for summary judgment is its shorthand term to indicate that it has a complete body of evidence before it on the motion, that it has examined the evidence carefully, that it finds the claim or defense to lack merit, and that it therefore wants the judgment to be on the whole merits rather than limited to the particular CPLR 3211 ground on which the motion was made. But since a summary judgment motion under CPLR 3212 can be predicated on a ground that would have been a basis for a dismissal motion under CPLR 3211--as long as the objection has been preserved by being included as a defense in the answer--a situation may arise in which such a narrowly based summary judgment under CPLR 3212 can occur without the judgment or order specifying the limited ground of it. The fact that a CPLR 3211 motion has been treated as one for summary judgment, on the other hand, should always appear in the judgment or order itself. *See* Commentary C3211:42.

The practitioner should see to it that the order or judgment resulting from either a CPLR 3211 or CPLR 3212 motion fully clarifies its scope. Its future availability (or unavailability) for preclusion use will depend largely on that. If the matter is omitted and the judge who decided the case wrote no opinion, it may become difficult and sometimes impossible to know the precise ground of the disposition, thereby necessitating a rehearing that might otherwise have been avoided.

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C3211:65. Res Judicata in Later Suit in Foreign Forum.

The problems that res judicata and its family can present in the most usual of situations--when sought to be applied to a final judgment rendered only after a full trial--are ample enough and are not a topic of discussion here. When it is sought to append res judicata to a pretrial dismissal such as one resulting under CPLR 3211(a), the problems multiply, and that's the current subject. If one essays to determine how a foreign forum will treat a New York CPLR 3211 disposition, the problems can become more complicated still and will often involve the full faith and credit clause of the federal constitution.

Stating only a few essentials, we may take as the general rule that a New York disposition made with jurisdiction will be just as binding in the foreign forum as it would be in New York. But the scope that New York intended the disposition to have will be a prime source of contention in many cases. Here is one example.

New York dismisses the case on motion under CPLR 3211(a)(5) because the claim is on an oral contract and is barred by the statute of frauds. If the statute of frauds of State X would allow such suit, will the New York disposition be res judicata in State X? This will depend on a number of factors. Did the New York disposition presume to declare only that the case was barred in New York and intend to leave open the possibility of suit later in a forum that allows it? Did the court in New York look at the statutes of all of the related jurisdictions and then decide that the New York statute of frauds was the proper one to apply based on the contacts that the case had with New York? Did the New York court treat the matter as purely a "procedural" question? (If it did, then the adjudication may carry no effect at all in a foreign forum.) To resolve issues like these would require more space than we have here.

We raise the issues only to call to the practitioner's attention the fact that unique factors may be involved if foreign states also have contacts with the case and if jurisdiction of the defendant can be secured in a foreign forum and a suit is commenced anew there. Both sides would do well in such a case to anticipate the possible res judicata questions that can arise after a grant of a CPLR 3211 motion, researching foreign law in advance of the motion. A revelation concerning foreign law and its possible application later can dictate a step to be taken now in connection with the CPLR 3211 motion.

Assume, for example, that State X will apply its own longer statute of limitations to the case if it is shown that the New York court, in dismissing for untimeliness, looked only to the New York statute of limitations and gave no treatment to the foreign one. (*See* CPLR 202.) If the plaintiff can discern this to be the State X approach, and suit would be timely in State X after the New York dismissal, the plaintiff should see to it that either the order or judgment concluding the CPLR 3211 motion, or an opinion of the court written in connection with it, clarifies that only the New York statute of limitations was considered and applied.

The old adage about letting sleeping dogs lie might be invoked here to dictate that these matters not even be discussed within the framework of a general CPLR 3211 Commentary. The difficulty is that this sleeping dog may wake up later on, and wake up hungry, when a second suit is brought elsewhere. Research into foreign law in advance of making or answering a CPLR 3211 motion--whenever there is a prospect of a later foreign suit on the same or a connected claim--can suggest procedures that will be of great moment in the later suit but which would not have occurred to the party in the present action in New York without that little bit of foresight and research.

C3211:66. Denial of CPLR 3211 Motion as "Law of the Case."

The "Law of the Case" doctrine is a kind of intra-action res judicata. Within the framework of a single action it prevents relitigation of a point already adjudicated in it. The denial of a motion under CPLR 3211 will generally invoke this doctrine and prevent the adjudicated point from again being litigated within the action. *See* Siegel, New York Practice § 448 (Connors 5th ed.).

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Thus, the denial of a motion to dismiss for (e.g.) lack of jurisdiction of the defendant's person is a determination that the court has such jurisdiction and precludes relitigation of the point. While the defendant may appeal the order denying the motion, *see* CPLR 5701(a)(2), and may do so immediately or as part of an appeal from a later final judgment on the merits, *see* CPLR 5501(a)(1), she may not, after a denial of the motion, plead the objection as a defense in her answer and expect that the trial judge will hear the matter a second time.

The law of the case doctrine is invoked only when the court has actually adjudicated the point urged on the motion. If it has denied the motion without prejudice to its assertion by way of defense in a responsive pleading or otherwise indicated that it is not passing on its merits but rather deferring it to the trial or some later pretrial juncture--which the court has express power to do under CPLR 3211(d)--the matter is in no sense disposed of and may of course be determined at that future time.

If the point was adjudicated, however, the loser cannot raise the point at trial level again. Of course, she may move to reargue the motion; or, if she has additional and recently uncovered proof justifying a different result, she may move to renew the motion, but that is a different matter entirely. (On the reargument and renewal of motions, *see* Siegel, New York Practice § 254 and the Commentaries on CPLR 2221.)

Subdivision (f)

C3211:67. Motion Automatically Extends Responding Time.

The defendant or other person who must respond to a pleading (such as the plaintiff to a counterclaim) need not fear being in default by making a CPLR 3211 motion instead of pleading. The mere making of the motion during the time in which to respond automatically extends the responding time until 10 days after the movant is served with notice of entry of the order that disposes of the motion. CPLR 3211(f). A party gets the benefit of subdivision (f) only if the pre-answer motion was made within the time the party had to respond to the pleading. *See Wenz v. Smith*, 100 A.D.2d 585, 473 N.Y.S.2d 527 (2d Dep't 1984). As any practitioner can attest, that 10-day period, measured as it is by service of notice of entry of the order resolving the CPLR 3211 motion, can be a long time and can sometimes cover many months. *See* CPLR 2219(a). Note that if notice of entry of the order denying the motion isn't served, the CPLR 3211 movant's time to serve a responsive pleading will not begin to run. *De Falco v. JRS Confectionary, Inc.*, 118 A.D.2d 752, 500 N.Y.S.2d 143 (2d Dep't 1986); *Moore v. Latovitzki*, 25 Misc.3d 130(A), 901 N.Y.S.2d 908 (table), 2009 WL 3378381 (App. Term, 2d Dep't 2009).

Although subdivision (f) speaks only of service of "notice of entry" of the order, which is usually entered on the initiative of the prevailing party, it is customary to include with it a copy of the order itself.

If the dismissal motion is granted, resulting in a dismissal of the attacked pleading, there is of course nothing to answer. If several causes of action were pleaded, however, and the motion was aimed, successfully, at only one of them, only that one would be dismissed and the rest would now have to be responded to in a pleading.

If the motion is one by the plaintiff under CPLR 3211(b) to dismiss a defense contained in an answer that has no counterclaim, the answer requires no responsive pleading (*see* CPLR 3011) and the plaintiff therefore need not be concerned about the time element. If the answer does contain a counterclaim, however, it will require a reply, in which event the same time rules that govern the defendant's answer will govern the plaintiff's reply.

Since the making of a motion under CPLR 3211 extends the movant's responding time, it will ipso facto extend the time within which the opposing party can amend the attacked pleading as of right. CPLR 3025(a). Thus, where the defendant moves to dismiss the complaint and thereby extends her own time to answer until 10 days after notice of entry of the resulting order, the plaintiff can, within that extended period, amend the complaint as of right.

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The question of whether an amendment of the attacked pleading abates the motion being made against it is discussed in Commentary C3211:61.

Where a party's CPLR 3211 motion is denied and she does not serve a responsive pleading within CPLR 3211(f)'s 10-day window period, that party is in default. To be relieved from that default, the party must make a motion for an extension of time to serve the responsive pleading (*see* CPLR 3012[d]) or to vacate the default under CPLR 5015(a)(1). If no default judgment or order has been entered, the former mechanism can be used; if a default judgment or order has been entered, the latter should be invoked. *See Munroe v. Burgher*, 43 A.D.3d 891, 841 N.Y.S.2d 636 (2d Dep't 2007); *Rockland County Patrolmen's Benevolent Assoc., Inc.*, 288 A.D.2d 456, 733 N.Y.S.2d 874 (2d Dep't 2001).

C3211:68. Time to Respond Where Only Part of Pleading Attacked.

Assume that the plaintiff has pleaded multiple causes of action in the complaint. The defendant moves to dismiss the first one only. Must the defendant serve an answer to the others within the original responding time? No, because a CPLR 3211 motion made against any part of a pleading extends the time to serve a responsive pleading to all of it. Siegel, New York Practice § 277, n.3 (Connors 5th ed.), citing *United Equity Services, Inc. v. First Amer. Title Ins. Co. of N.Y.*, 75 Misc.2d 254, 347 N.Y.S.2d 377 (Sup. Ct., Nassau County 1973); *see Chagnon v. Tyson*, 11 A.D.3d 325, 783 N.Y.S.2d 29 (1st Dep't 2004). Thus, where the defendant moves to dismiss claim #1, she should be able to rely on subdivision (f) and its extension of time to serve her answer to the other claims (which answer would of course respond to the first claim, too, if the CPLR 3211 motion to dismiss it is denied).

Even if the construction were otherwise, the court's general power to extend time (CPLR 2004) is so broad--and its propensity to forgive defaults when reasonable ground is offered so widespread--that a plaintiff who seeks a default judgment on claim #2 simply because the defendant has deferred answering until after the disposition of a CPLR 3211 motion made against claim one will often be doing nothing more than wasting time.

The multiple-claim situation can get stickier when an appeal is also involved. Look at the situation in *Rotondo v. Reeves*, 192 A.D.2d 1086, 596 N.Y.S.2d 272 (4th Dep't 1993). The defendant was a county, which, under CPLR 5519(a)(1), gets an automatic stay of enforcement of an order when it takes an appeal. The defendant moved to dismiss two claims. The court granted the dismissal of claim one but not two. The defendant appealed the order--aggrieved that claim two was not also dismissed--but served no answer to claim two in the interim on the assumption that the need to answer was suspended. The court holds that it wasn't; that only proceedings to "enforce" the order are stayed, and that the obligation to answer was not a proceeding to "enforce" the order. The plaintiff was therefore granted a default judgment against the defendant. The Second and Third Departments would probably agree with that outcome; the First Department may well have gone the other way. *See* Robert L. Haig, Commercial Litigation in New York State Courts, § 8:74 (4th ed.).

Subdivision (g)

C3211:69. Easier Standard for Dismissing "SLAPP" Suit.

Subdivision (g) was added to CPLR 3211 in 1992, designed to deter what is sometimes referred to as a "SLAPP" suit, an acronym standing for "strategic lawsuit against public participation." A little background will make clear what a SLAPP suit is.

Developers, property owners, and a variety of others who must secure public approval of a project from some public agency, such as in the form of a permit, license, certificate, or like authorization, are often opposed before the agency by members of the public for an assortment of reasons, some publicly minded and some privately motivated.

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Whatever the source of the opposition, these "opposers," to use a handy reference word, don't make the applicants very happy, and it has become increasingly common, in an effort to discourage such opposition, for the applicant, during or after the agency proceedings, to bring an action against the opposer for damages, perhaps for defamation, perhaps on other grounds. *See 600 W. 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 589 N.Y.S.2d 825, 603 N.E.2d 930 (1992). Legislation adopted in Chapter 767 of the Laws of 1992 is designed to deter such "SLAPP" suits--which the Legislature describes as an "action involving public petition and participation"--by tightening up the legal requirements for them and by making it easier for the opposer (the defendant in the damages action) to get them dismissed.

Two of the several amendments with that purpose affect the CPLR: subdivision (g), added to CPLR 3211, and subdivision (h), added to CPLR 3212. These are best negotiated a little further on, after the more substantive parts of the package are briefly analyzed.

The more substantive parts of the package are in the Civil Rights Law, in §§ 70-a and 76-a. Subdivision (1)(a) of the latter contains the "public petition and participation" definition quoted above. *See National Fuel Gas Distribution Corp. v. PUSH Buffalo*, 104 A.D.3d 1307, 962 N.Y.S.2d 559 (4th Dep't 2013); *OSJ, Inc. v. Work*, 180 Misc.2d 804, 691 N.Y.S.2d 302 (Sup. Ct., Madison County 1999). The crux of the legislation is in subdivision 2 of § 76-a, which permits the recovery of damages in such an action only if the plaintiff (the applicant before the agency) establishes by "clear and convincing evidence" that the statement made before the agency by the defendant (the opposer before the agency) was made "with knowledge of its falsity or with reckless disregard of whether it was false," at least when falsity is at issue.

Section 70-a goes even further by enabling the opposer, either in the same suit by way of counterclaim or with a separate action against the applicant, to recover damages from the applicant, including attorneys' fees, if it can be shown that the applicant brought the action "without a substantial basis in fact and law." The "substantial" basis is supposed to be more stringent than the standard that would otherwise apply--"reasonable" rather than "substantial"--but, as the first Governor Cuomo noted in his approval message, the difference may be more theoretical than real.

If it is found that the applicant was motivated by harassment or intimidation in bringing the suit--and such a finding won't be hard if the action is determined to lack "substantial basis"--punitive damages can be assessed against the plaintiff/applicant, in addition to such compensatory damages as may be called for. The function of the two CPLR provisions in this whole design is to facilitate the early dismissal of the "SLAPP" suit if the proper showing can be made.

Subdivision (g) of CPLR 3211 provides that if the defendant/opposer moves to dismiss the action under subdivision (a)(7) of CPLR 3211 and demonstrates that the action is a SLAPP suit, the burden is thrust onto the plaintiff/applicant to establish that the claim has the requisite "substantial basis." *See Matter of Related Properties, Inc. v. Town Board of Town/Village of Harrison*, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dep't 2005). Subdivision (g) also requires that the "hearing of such motion" be granted a preference. That may be helpful if the court's or the individual judge's motion calendar is clogged. The preference instruction is a legislative statement that it wants this motion to go up front. What it probably really means to grant a preference to, however, is not just the "hearing" of the motion, but the trial of an issue of fact if such an issue should arise on the motion and hold up its disposition. *See* subdivision (c) of CPLR 3211.

The matter may come up on a summary judgment motion under CPLR 3212 made after the service of the answer instead of on a pre-answer CPLR 3211 motion. The same burden alights upon the plaintiff/applicant in the summary judgment context. That's what subdivision (h), added to CPLR 3212, prescribes. It also calls for a preference, but in this instance that may be a more substantial gift than it is under the counterpart CPLR 3211(g). If subdivision (h) of CPLR 3212 is construed to require not just a prompt entertainment of the motion, but the ordering of a prompt trial

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of any issue of fact arising on the motion, it will be by-passing the rule that subdivision (c) of CPLR 3212 applies on summary judgment motions generally.

Under that subdivision, the only time an immediate fact trial can be ordered in the summary judgment context is when it concerns only damages (as opposed to liability), or when the motion is based on one of the grounds enumerated in subdivision (a) or (b) of CPLR 3211. That authorization contained in CPLR 3212(c) was probably not intended to authorize the immediate trial of an issue of fact arising on a motion under CPLR 3211(a)(7), however--where the ground is that the complaint fails to state a cause of action--because that would open the door to the immediate trial of any issue of fact at all. *See* Commentary C3212:22. But given the general background and history of the "SLAPP" suit, the "preference" instruction of subdivision (h) of CPLR 3212 can reasonably be construed to permit just such an immediate trial--even of an issue going to liability under the new "SLAPP" suit standards.

As to whether CPLR 3211(g) applies in federal court actions, *see Egiazaryan v. Zalmayev*, 2014 WL 1244790, *2 (S.D.N.Y. 2014); *Douglas v. New York State Adirondack Park Agency*, 895 F.Supp.2d 321, 384-385 (S.D.N.Y. 2012); *Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead by its Board of Trustees of the Village of New Hempstead*, 98 F.Supp.2d 347, 358-360 (S.D.N.Y. 2000).

Subdivision (h)

C3211:70. Greater Scrutiny of Complaint Where Defendant is Design Professional.

Subdivision (h) provides a special dismissal tool to certain design professionals who are named as defendants in tort actions. If a licensed architect, engineer, land surveyor or landscape architect is a defendant in an action that is subject to CPLR 214-d ("Limitations on certain actions against licensed engineers and architects") and moves to dismiss the action under CPLR 3211(a)(7), the plaintiff must, to defeat the motion, "demonstrate[ ] that a substantial basis in law exists to believe that the performance, conduct or omission complained of such [design professional] ... was negligent and that such performance, conduct or omission was a proximate cause of [the plaintiff's damages]." CPLR 3211(h).

CPLR 214-d and 3211(h) (as well as CPLR 3212[i]) were added by the Legislature in 1996 to ameliorate the effects of New York's tort law, which, at the time, "tended to facilitate marginal claims against design professionals based on defects arising long after their work was completed and the improvements for which they were initially responsible had been in the owner's possession and subject to the owner's use and maintenance." *Castle Village Owners Corp. v. Greater New York Mutual Ins. Co.*, 58 A.D.3d 178, 183, 868 N.Y.S.2d 189, 192 (1st Dep't 2008).

As a result of subdivision (h)'s "substantial basis" element, a court reviewing a CPLR 3211(a)(7) motion in a qualifying action (*see* CPLR 214-d) must ask whether the plaintiff's claim is "supported by 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.' " *Castle Village Owners, Corp.*, 58 A.D.3d at 183, 868 N.Y.S.2d at 192, quoting Senate Memorandum in Support, L.1996, ch. 682, 1996 McKinney's Session Laws of N.Y., at 2614. While the plaintiff need not adduce evidence demonstrating that the claim is supported by a preponderance of the evidence--that's the burden that the plaintiff must meet at trial (*see* 1A N.Y. P.J.I.3d 1:23 [2016])--the bar at the motion-to-dismiss stage is set higher for the plaintiff. *See* Practice Commentaries for CPLR 214-d.

In the typical case, the CPLR 3211(a)(7) motion will be denied if the complaint states, i.e., pleads, a cognizable cause of action. When the motion to dismiss for failure to state a cause of action is augmented by subdivision (h), the plaintiff must adduce allegations and evidence that demonstrate the existence of triable issues of fact regarding the design professional's negligence and proximate cause. *See Castle Village Owners Corp.*, 58 A.D.3d at 183, 868 N.Y.S.2d at 192. Detailed allegations of negligence and the affidavit of an expert can go a long way in helping the plaintiff to defeat a CPLR 3211(a)(7) motion by a design professional. *See Schmitt v. Spector*, 129 A.D.3d 1052, 11 N.Y.S.3d 680 (2d Dep't 2015); *Castle Village Owners Corp. v. Greater New York Mutual Ins. Co., supra*.

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A motion subject to subdivision (h) is to be afforded a "preference," just like one subject to CPLR 3211(g). *See* Commentary C3211:69.

LEGISLATIVE STUDIES AND REPORTS

The First Report of the Revisers to the Legislature notes that this rule, taken from §§ 30 and 237(a)(1) of the civil practice act and rules 106, 107, 109 and 110 of the rules of civil practice, allows a motion at any time before a responsive pleading is required, with or without supporting proof, asserting specified objections which, if sustained, will dispose of the action.

In the original draft of subd. (a) of this rule, the Revisers eliminated the motion to dismiss for failure to state a cause of action which was authorized by rule 106(4) of the rules of civil practice. They comment that lawyers, judges and commentators have long been concerned about the ineffectiveness and dilatory nature of the motion to dismiss for legal insufficiency on the face of a pleading. Requiring a determination on the basis of allegations rather than facts, it does not perform well its traditional function of terminating groundless suits. With free amendment permitted, it more often serves only to secure a new and more technically acceptable pleading in place of one omitting an essential allegation or stating a claim in conclusory or other uninformative terms. The round of demurrers and amendments continues while the facts underlying the controversy remain hidden behind a wall of unsupported allegation. See, e.g., Dulberg v. Mock, 286 A.D. 1008, 145 N.Y.S.2d 533 (1st Dep't 1955), reversed, 1 N.Y.2d 54, 133 N.E.2d 695 (1956).

It is further stated that legal sufficiency should be tested on the basis of facts, rather than the allegations, to the extent that they may be ascertained prior to trial. To that end, the jurisdictions following the Federal rules allow proof outside the pleading to be submitted, both on a motion to dismiss and a motion for judgment on the pleadings, converting the motion into one for summary judgment. See rule 12(b), (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. This rule goes a step further, dispensing with the motion prior to answer and requiring that a preliminary challenge to legal sufficiency be made by motion for summary judgment after answer. Since such an attack, particularly when it goes beyond the pleadings, usually requires some preparation by counsel on the whole case, there is no extra burden in requiring an answer. At the same time, certain benefits ensue: since answer will not be stayed, the motion is less attractive as a delaying tactic. Moreover, the submission of the responsive pleading permits disclosure to proceed, it defines the issues, and it enables the court to grant judgment against the moving party where such a disposition is indicated.

Nor should the de-emphasis of the statement of the claim condone or encourage poor pleading. For the same reasons that dictate omission of rule 106(4) of the rules of civil practice, this rule abolishes the other motions directed to the legal sufficiency of a pleading on its face under rules 109(5), 109(6), 111 and 112 of the rules of civil practice.

Nevertheless, in the final draft of this subdivision, the Revisers inserted par. 7, which is derived from rule 106(4), and states that it reflects a middle view between the original proposal that the motion to dismiss for legal insufficiency should be abolished, and the feeling of some bar association committees that, despite abuses, such motions often perform a valuable function in permitting a party to have a defective pleading dismissed before being required to frame a responsive pleading and perhaps submit to disclosure proceedings unjustifiably extended by the scope of the defective pleading. The words "facts sufficient to constitute" were not carried forward into par. 7 to conform with the pleading rule which does not use this phrase.

It is further explained in the First Report that there is good reason to continue the provisions for a preliminary motion under rules 107 and 110 of the rules of civil practice and, indeed, to expand them. As separable and easily demonstrable bars to an action, they may often save a lawyer considerable time and effort preparing an answer in a complicated case. There is little danger that they will delay the litigation since, by their nature, they are difficult to fabricate and raise issues that are relatively easily resolved. The commentators have highly praised the New York provisions. See, e.g., Millar, Civil Procedure of the Trial Court in Historical Perspective 250-52 (1952); Atkinson, Pleading the Statute of Limitations, 36 Yale L.J. 914, 930-32 (1927). Similar provisions exist in Illinois and Michigan. Ill.Ann.Stat. c. 110, § 48 (Smith-Hurd Supp.1955); 6A Mich.Comp.Laws Annotations, app. 4, Court Rule 18 (1948).

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A new par. 1, relating to defense founded upon documentary evidence, was added by the Revisers, and they also included the defenses of estoppel, arbitration and award and discharge in bankruptcy in par. 5. The latter were chosen because they represent affirmative defenses that are usually easily established. Discharge in bankruptcy is an enumerated objection in the analogous Illinois provision, but this rule has not adopted the phrase "other affirmative matter" used in Illinois. Although par. 5 includes the most common defenses founded upon documentary evidence, par. 1 is added to cover all others that may arise, as for example, a written modification or any defense based on the terms of the written contract.

The words "in a court of any state or the United States" have been added in par. 4, in order to do away with the anomalous doctrine that an action in another state is not "another action pending" within the meaning of the rule. See Squier v. Houghton, 131 Misc. 129, 226 N.Y.S. 162 (Supp.Ct.1927). In the final draft of par. 4, the Revisers inserted provisions to give the court discretion to make an order other than dismissal, and they comment that in some cases, for example, stay of one of the actions or consolidation might be a more desirable solution.

Pars. 8 and 9 of subd. (a) of this rule were inserted to cover jurisdiction over the person and in rem or quasi in rem jurisdiction.

The objection of nonjoinder is covered by par. 10, and it is said that the rule that this objection is nonwaivable has been placed in subd. (e) of this rule.

Subd. (b) of this rule is derived from rule 109(6) of the rules of civil practice. As noted above in the discussion of subd. (a) of this rule, the Revisers originally planned to eliminate this provision. However, since they included the motion to dismiss for legal insufficiency, they carried forward rule 109(6) in this subdivision. The words "facts sufficient to constitute" a defense were omitted since this language in not used in the pleading rule.

Subd. (c) of this rule authorizes submission of evidence upon the hearing of a motion. The Revisers state in the First Report to the Legislature that rules 107 and 110 of the rules of civil practice, as to the evidence permitted, mention only affidavits, but "it is clear that the motion is in essence one for summary judgment."

Rule 108 of the rules of civil practice, permitting the court to direct an immediate trial of the issues raised, is continued in the second sentence of subd. (c). It is said that as to the specified defenses, it makes possible an accelerated judgment even though a genuine issue of fact exists which would defeat a motion for summary judgment. The Illinois and Michigan provisions analogous to rules 107 and 110 allow such a preliminary trial except where a jury trial is required. See note, 33 Chi.-Kent Law Rev. 191 (1955). The procedure seems worthy of retention, although courts are sometimes reluctant to use it because of the fear of two separate trials if the determination is against the moving party. See, e.g., Rizzuto v. U.S., Shipping Board Emergency Fleet Corp., 213 A.D. 326, 210 N.Y.S. 482 (2d Dep't 1925); Gordon v. Prishkoff, 67 N.Y.S.2d 373 (Sup.Ct.1946), aff'd 272 A.D. 872, 72 N.Y.S.2d 402 (1st Dep't 1947). A trial on any of the enumerated objections will usually be short; if it is before the court, it will require little more time than the motion itself. As often as not, it will result in a speedy disposition without calendar delay or the necessity of trying the whole case.

Rule 56(f) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is the source of subd. (d) of this rule. The discussion accompanying this subdivision in the First Report to the Legislature states that rule 108 of the rules of civil practice permits the court, in its discretion, to deny the motion and "allow the same facts to be alleged in the answer as a defense." Although the rule offers no criteria for exercise of this discretion, it would undoubtedly cover the situation where the facts are then unavailable to the opposing party This subdivision goes beyond this, allowing the court to retain the motion while permitting disclosure. Further, under the power to make "such other order as is just," it is contemplated that the court could require service of an answer during the continuance for disclosure and thereafter treat the motion as one for summary judgment.

Subd. (e) of this rule is based on § 279 of the civil practice act. As originally drafted this subdivision provided: "A party may combine in a single motion two or more of the enumerated objections, and no more than one motion shall be permitted under

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this rule. Any objection or defense enumerated in this rule except jurisdiction over the subject matter is waived unless it is raised by motion or in the responsive pleading." The Revisers explained in the First Report to the Legislature that this subdivision is designed to prevent the delay before answer that could result from a series of motions under this rule. With only a relatively short period ordinarily required for disposition of this motion, there is no serious need for allowing subsequent motions based on newly discovered evidence. In any event the party will lose no rights by failing to move or to include all available grounds in his motion, for he still may assert in his answer or reply any defense or objection not raised by motion.

The Revisers also stated that the waiver provision in the original draft does not change existing law. Affirmative defenses may not be proved unless pleaded. The generally non-waivable objections of nonjoinder and failure to state a cause of action or defense (cf. C.P.A. § 279; Rule 12(h) of the Federal Rules of Civil Procedure, 28 U.S.C.A.) are not affected because the provision applies only to objections or defenses enumerated in this rule. The rules concerning amendments and summary judgments, however, de-emphasize the objection of failure to state a cause of action and focus instead upon whether a cause of action actually exists.

Section 278 of the civil practice act provides for waiver of certain of the enumerated objections if they are not taken by motion; the purpose of that section, however, is merely to preserve the common law doctrine that dilatory pleas and pleas in abatement are waived unless claimed before trial. Thus, the doctrine is satisfied by the provision that they are waived unless claimed by motion or answer.

The final draft of subd. (e) of this rule inserted provisions relating to time, the rule of non-waiver of objection of legal insufficiency or of non-joinder, and the last sentence.

The rules of non-waiver of objections of legal insufficiency or of non-joinder were originally omitted from this subdivision becase of the proposal of the Revisers to omit the defense of legal insufficiency from subd. (a) of this rule. However, since the defense was included within subd. (a), the rules of non-waiver were required to be incorporated in subd. (e).

The last sentence was also added as part of the compromise approach toward the motion to dismiss for legal insufficiency. It is designed to remove the major objection to such objections--i.e., the liberality with which leave is granted to plead over without any showing that a legally sufficient claim exists. The combined operation of par. 7 of subd. (a) of this rule and this provision is to allow the motion at any time but also to put the burden on the opposing party to show that he has a good claim or defense even if he has not stated it; otherwise leave to plead over will not be granted.

The Sixth Report notes that subd. (e) of this rule, in its final form, is very flexible. If the judge hearing the motion wishes, he may insist that the party seeking leave to amend furnish him and the opponent with a proposed new pleading which can be considered in the light of the argument on the motion to dismiss and the information, if any, set forth in the opposing papers.

Subd. (f) of this rule follows the law under § 283 of the civil practice act. It will not operate to relieve a party's default if his time to plead expired before a motion was made, absent a stipulation or court order extending his time.

Official Reports to Legislature for this rule:

1st Report Leg.Doc. (1957) No. 6(b), p. 83.

2nd Report Leg.Doc. (1958) No. 13, p. 152.

5th Report Leg.Doc. (1961) No. 15, p. 482.

6th Report Leg.Doc. (1962) No. S, p. 329.

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Notes of Decisions (4946)

McKinney's CPLR Rule 3211, NY CPLR Rule 3211
Current through L.2024, chapters 1 to 49, 52, 61 to 112. Some statute sections may be more current, see credits for details.

End of Document

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McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 32. Accelerated Judgment (Refs & Annos)

McKinney's CPLR Rule 3214

Rule 3214. Motions heard by judge supervising disclosure; stay of disclosure

Currentness

(a) Judge supervising disclosure. Unless the chief administrator of the courts has, by rule, provided otherwise, if a case has been assigned to a judge to supervise disclosure pursuant to section 3104, all motions preliminary to trial shall be referred to such judge whenever practicable.

(b) Stay of disclosure. Service of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise. If the motion is based solely on the defense that the summons and complaint, summons with notice, or notice of petition and petition was not properly served, disclosure shall not be stayed unless the court orders otherwise.

Credits

(Formerly § 3214, L.1962, c. 308. Redesignated rule 3214, L.1962, c. 315, § 1. Amended L.1986, c. 355, § 7; L.1996, c. 501, § 2.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Hon. Mark C. Dillon

2023

C3214:2 Motion as Staying Disclosure

An effort to hold the defendants' attorney in civil contempt for failing to take the deposition of the plaintiff's supervisor, as had been previously scheduled, was denied in *Weir v Montefiore Medical Center*, 208 A.D.3d 1122, 175 N.Y.S.3d 498 (1st Dep't. 2022). *Weir* was an employment discrimination and retaliation action, where the defendant made a motion for summary judgment five days before the plaintiff's supervisor was scheduled to be deposed. The court denied the plaintiff's motion to hold defense counsel in contempt, as the filing of the defendant's summary judgment stayed disclosure under CPLR 3214(b), which had the effect of staying the supervisor's deposition as well.

2022

C3214:2 Motion as Staying Disclosure

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When motions are filed for dispositive relief under CPLR 3211, 3212, or 3213, disclosure is stayed by operation of CPLR 3214(b). After all, little purpose is served conducting discovery if the action may be disposed of on the papers already pending before the court. The stay of disclosure is automatic under the statute, regardless of whether discovery demands are outstanding or a court order is unfulfilled. Courts, however, have the discretion to direct that discovery proceed despite the automatic stay of CPLR 3214(b) if an application for a continuation of discovery is made, as courts are the ultimate masters of discovery oversight.

Attorneys must be respectful of the statutory discovery stay. *Dojce v 1302 Realty Company, LLC*, 199 A.D.3d 647, 157 N.Y.S.3d 478 (2nd Dep't. 2021) provides an instructive example. In *Dojce,* the defendant moved under CPLR 3212 for summary judgment dismissing the plaintiff's Labor Law claims. The motion had the effect of triggering the stay of further disclosure. While the stay was in effect, the defendant noticed the deposition of the plaintiff's work supervisor, to which the plaintiff objected based on the stay provision of CPLR 3214(b). Not to be deterred, defendant's counsel moved to lift the stay, and while that motion was pending, proceeded with the supervisor's deposition without the permission of the court and without the participation of plaintiff's counsel. Accordingly, the plaintiff's counsel moved to strike the work supervisor's testimony on the ground that it had been improperly obtained, which was granted by the court. At a minimum, defense counsel should have waited for a decision/order from the court on the application to lift the discovery stay to the extent of the deposition, before proceeding with the deposition in violation of CPLR 3214(b). The striking of the unauthorized deposition was independent of the merits, or lack of merit, attending the defendant's initial motion for summary judgment.

2021
C3214:2 Motion as Staying Disclosure

When dispositive motions are made under CPLR 3211, 3212, or 3213, discovery is automatically stayed in the action under CPLR 3214(b), unless the court orders otherwise. The statutory stay is not violated if the parties in an action are directed to participate in an alternative dispute resolution procedure, such as that which exists at the Commercial Division's Alternative Dispute Resolution Program of the Supreme Court (*Kato Intl. LLC v Gerard Fox Law, P.C.*, 195 A.D.3d 516, 150 N.Y.S.3d 711 [1st Dep't. 2021]). Alternative dispute resolution procedures are distinct from discovery and outside the scope of CPLR 3214(b). The same would be true of any court-initiated settlement discussions.

PRACTICE COMMENTARIES

by Hon. Mark C. Dillon

2021
Subdivision (a)

C3214:1 Motion to Judge Supervising Disclosure

CPLR 3214 is not so much a rule of procedure followed by the bar as it is authority to the courts to administratively re-assign cases from one judge to another for supervising disclosure. This provision makes more sense when read in conjunction with CPLR 3104. CPLR 3104 allows any party or witness in a pending action to file a motion on notice, seeking the appointment of a judge or referee to supervise all or part of the discovery in the action. The court may even appoint a designated judge or discovery referee at its own initiative without notice. As a practical matter these discretionary assignments, when made, go to referees rather than judges. Referees that are appointed under CPLR 3104 have all the powers of the court except for relieving himself or herself of the assignment, appointing a successor,

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or adjudging a person in contempt (CPLR 3104[c]), and orders by the referee may be reviewed by means of a notice motion (CPLR 3104[d]).

The supervision of discovery by a designated judge or referee tends to be seen when litigations involve complex issues of discovery (*Transamerica Delaval v Tallman Constructors*, 109 A.D.2d 716, 487 N.Y.S.2d 720 [1st Dep't. 1985], or when the parties would benefit from particular expertise that a referee may provide (*Whalen v Kawasaki Motors Corp.,* 175 A.D.2d 667, 572 N.Y.S.2d 593 [4th Dep't. 1991]), or when the parties' level of contentiousness with each other requires that an independent middle person be present to make necessary rulings (*Capoccia v Brognano*, 126 A.D.2d 323, 513 N.Y.S.2d 863 [3d Dep't. 1987], *app. dism'd*., 70 N.Y.2d 742, 519 N.Y.S.2d 964, 514 N.E.2d 384 [1987], *app. dism'd*., 70 N.Y.2d 743, 519 N.Y.S.2d 965, 514 N.E.2d 385 [1987]), or when a party's unilateral recalcitrance frustrates disclosure (*Kogan v Royal Indem. Co.*, 179 A.D.2d 399, 577 N.Y.S.2d 849 [1st Dep't. 1992]). Such appointments are to be made sparingly, and are not exercised in the absence of special circumstances (*DiGiovanni v Pepsico, Inc*., 120 A.D.2d 413, 502 N.Y.S.2d 23 [1st Dep't. 1986]). For these reasons, the appointment of judges or referees to supervise disclosure, while seen on occasion, is not seen frequently.

Our discussion now returns to CPLR 3214. When a judge or referee has been assigned to supervise disclosure, all pre-trial motions should be referred by the court to that designated judge or referee "whenever applicable." The type of motions to be referred are not expressly restricted to discovery motions, as the statute speaks expansively to "all motions preliminary to trial." Therefore, a party filing a motion does so using the normal procedures, and the presiding judge responsible for overseeing the litigation then administratively refers the motion to the previously-designated discovery judge or referee.

The referral of the motion to the judge or referee supervising disclosure is qualified by the language "whenever practical." This is not the language of mandate. Rather, it takes into account circumstances where the discovery judge or referee is sick, indisposed, on vacation, engaged in another lengthy matter, or otherwise not in a position to provide the motion with the level of attention it deserves.

CPLR 3214 should not be confused with Uniform Rule 202.3(c)(5) (22 N.Y.C.R.R. 202.3[c][5]). The Uniform Rule allows for the administrative reassignment of related cases from one judge to another. Reassignments under the Uniform Rule are not driven by considerations of discovery *per se*, but are instead made to promote the efficiency of having a single jurist preside over related matters and to avoid potentially inconsistent judicial rulings.

Subdivision (b)

C3214:2 Motion as Staying Disclosure

CPLR 3214(b) provides that disclosure is stayed in the event that a dispositive motion is made by a party under CPLR 3211, 3212, or 3213. CPLR 3214(b) makes sense to the extent that there may be no good purpose served by performing further disclosure if a dispositive motion may potentially render the disclosure unnecessary. The stay of the statute has the effect of maintaining the *status quo* of the parties in relation to one another, which might be fine and dandy for the moving party, but not so much so for the party opposing the dispositive motion and the timing thereof.

The stay of disclosure is automatic, regardless of whether there are outstanding discovery demands or an outstanding and unfilled court order. Under CPLR 2211, the motion is "made" when the moving papers are served on the adversary party, so the operative date for triggering the stay is actually the date of service. If service is effected by mail, the "mailbox rule" directs that service is effected on the date the papers are dropped in an official depository of the U.S. postal service, or placed for delivery in the possession of another delivery service. Now, with the prevalence of e-filing, the filing and service of moving papers occurs at the same time (Uniform Rule 202.5-b[f][2][ii]).

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While the stay of CPLR 3214 is automatic, the statute authorizes courts to nevertheless order a continuation of disclosure on a case by case basis, in the exercise of its discretion. This is seen infrequently. If the court says nothing, the stay is in effect. Only if the court steps in and affirmatively directs that all or some discovery proceed is the general rule of the statute overridden and the parties must comply with their outstanding discovery obligations.

When the CPLR 3211, 3212, or 3213 motion is denied, the automatic stay of discovery is lifted, the parties' discovery obligations revive, and new discovery demands may be asserted. For motions by defendants to dismiss the complaint in lieu of an answer (CPLR 3211) and by plaintiffs for summary judgment in lieu of a complaint (CPLR 3213), the motions are filed and served at the earliest stages of the action, before any discovery demands are made. Technically, therefore, while discovery is stayed, there are not yet outstanding demands or court orders affected by the stay. Parties are prohibited from initiating discovery or, at least, from expecting any compliance, if demands are served while the stay is in effect. The motion for summary judgment (CPLR 3212) is the motion which may be made while discovery compliance is outstanding and where CPLR 3214 will have its most immediate and visible effect.

Worth mentioning, a motion for a protective order under CPLR 3103 also stays discovery. But in that instance, the stay is operative only as to the subject matter in dispute (CPLR 3103[b]). Other discovery outside the scope of the motion for a protective order is not stayed.

Little case law is generated as to CPLR 3214, which is always a good indication that its provisions are not controversial and work without much complication.

CPLR 3214 does not have a counterpart in the Federal Rules of Civil Procedure. In federal courts, the parties' discovery obligations are unaffected by the filing of dispositive motions such as those under Federal Rules 12(b) (dismissal) and 56 (summary judgment).

The law loves having exceptions to general rules, and CPLR 3214 provides a vivid example. One exception to the automatic stay provision of CPLR 3214 is where the defendant objects to *in personem* jurisdiction on the ground that process was not properly served. CPLR 3211(e) provides that when a defendant raises the lack of personal jurisdiction as an affirmative defense in its answer, a motion to dismiss the action under CPLR 3211(a)(8) must be made within 60 days from service of the defendant's answer, absent a judicially-approved time extension for undue hardship. CPLR 3214(b) expressly directs that when a motion is made to dismiss for the alleged improper service of process, disclosure is *not* stayed unless the court orders otherwise. In that instance, therefore, circumstances of a stay are flipped from the general rule--instead of being automatic but subject to the court ordering otherwise, there is no stay unless the court imposes one.

A second exception to the general rule that the making of a dispositive motion stays disclosure is found in CPLR 3407. CPLR 3407 was enacted in 1992. It provides that in personal injury actions involving a terminally ill party, where the terminal illness is allegedly attributable to the culpable conduct of another party, preliminary conference orders are to be issued directing expedited discovery to be completed within 90 days. CPLR 3407(3) modifies CPLR 3214(b). It provides that when a dispositive motion is served under CPLR 3211, 3212, or 3213, disclosure shall not be stayed in any action involving a terminally ill party where discovery is expedited under a CPLR 3407 preliminary conference order. CPLR 3407 was enacted to protect the interests of terminally ill plaintiffs such as those suffering the effects of asbestosis or cancers. CPLR 3407(3)'s language, denying the stay otherwise provided by CPLR 3214(b), only eliminates the stay that is *automatic* under the statute; it does not restrict the court's inherent authority to stay, postpone, modify, or otherwise affect discovery with a specific order, including modification of its own preliminary conference order deadlines.

An interesting twist to CPLR 3214(b) was seen in *Arazosa v 3M Co.*, 60 Misc.3d 1205(A) (Sup. Ct. New York County 2018). There, the plaintiff sought damages from the alleged exposure to talcum powder products containing asbestos,

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and a foreign defendant filed and served a CPLR 3211 motion to dismiss on the ground that it was not subject to the personal jurisdiction of the New York courts. A special master had been appointed to supervise disclosure in the action, and granted the plaintiff's request for disclosure of information specific to the issue of jurisdiction. That, in turn, prompted a motion of the foreign defendant to the court arguing that, inter alia, the disclosure was stayed by operation of CPLR 3214(b). In *Arazosa*, the action was subject to the New York City Asbestos Litigation Case Management Order (CMO) which not only authorized the special master to supervise disclosure, but also contained a provision that the special master's authority superseded any contrary provisions of the CPLR. The Supreme Court held that the CMO trumped the CPLR generally, and the language of CPLR 3214(b) specifically, in that the special master was authorized to ignore any stay of disclosure otherwise directed by the statute. The court did not specifically address the language of CPLR 3214(b) that disclosure is stayed by the filing of a dispositive motion "unless the court orders otherwise," as the CMO authorized the special master to ignore CPLR 3214(b) altogether. The result avoided a catch-22 that would have arisen if the plaintiff, wishing to establish general or specific jurisdiction over the foreign defendant, was stayed from obtaining the very disclosure she needed on the issue by the mere filing of the foreign defendant's motion to dismiss.

LEGISLATIVE STUDIES AND REPORTS

This rule has no counterpart in the civil practice act or in the rules of civil practice. The Revisers comment in the First Report to the Legislature that subd. (b) of this rule is designed to prevent free and perhaps unnecessary resort to disclosure after a motion is made, except as the court sees fit.

Official Reports to Legislature for this rule:

1st Report Leg.Doc. (1957) No. 6(b), p. 91.

5th Report Leg.Doc. (1961) No. 15, p. 493.

6th Report Leg.Doc. (1962) No. 8, p. 339.

Notes of Decisions (35)

McKinney's CPLR Rule 3214, NY CPLR Rule 3214
Current through L.2024, chapters 1 to 49, 52, 61 to 112. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Partnership Law (Refs & Annos)
Chapter 39. Of the Consolidated Laws (Refs & Annos)
Article 6. Dissolution and Winding up (Refs & Annos)

McKinney's Partnership Law § 62

§ 62. Causes of dissolution

Currentness

Dissolution is caused:

1. Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

2. In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

3. By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

4. By the death of any partner;

5. By the bankruptcy of any partner or the partnership;

6. By decree of court under section sixty-three.

Credits
(L.1919, c. 408.)

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Notes of Decisions (101)

McKinney's Partnership Law § 62, NY PARTNER § 62
Current through L.2024, chapters 1 to 49, 52, 61 to 112. Some statute sections may be more current, see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Partnership Law (Refs & Annos)
Chapter 39. Of the Consolidated Laws (Refs & Annos)
Article 8-B. Registered Limited Liability Partnerships (Refs & Annos)

McKinney's Partnership Law § 121-1500

§ 121-1500. Registered limited liability partnership

Effective: January 1, 2023
Currentness

(a)(I) Notwithstanding the education law or any other provision of law, (i) a partnership without limited partners each of whose partners is a professional authorized by law to render a professional service within this state and who is or has been engaged in the practice of such profession in such partnership or a predecessor entity, or will engage in the practice of such profession in the registered limited liability partnership within thirty days of the date of the effectiveness of the registration provided for in this subdivision or a partnership without limited partners each of whose partners is a professional, at least one of whom is authorized by law to render a professional service within this state and who is or has been engaged in the practice of such profession in such partnership or a predecessor entity, or will engage in the practice of such profession in the registered limited liability partnership within thirty days of the date of the effectiveness of the registration provided for in this subdivision, (ii) a partnership without limited partners authorized by, or holding a license, certificate, registration or permit issued by the licensing authority pursuant to the education law to render a professional service within this state, which renders or intends to render professional services within this state, or (iii) a related limited liability partnership may register as a registered limited liability partnership by filing with the department of state a registration which shall set forth:

(1) the name of the registered limited liability partnership;

(2) the address of the principal office of the partnership without limited partners;

(3) the profession or professions to be practiced by such partnership without limited partners and a statement that it is eligible to register as a registered limited liability partnership pursuant to subdivision (a) of this section;

(4) a designation of the secretary of state as agent of the partnership without limited partners upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it or served upon it. The partnership without limited partners may include an email address to which the secretary of state shall email a notice of the fact that process against it has been electronically served upon him or her;

(5) if the partnership without limited partners is to have a registered agent, its name and address in this state and a statement that the registered agent is to be the agent of the partnership without limited partners upon whom process against it may be served;

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(6) that the partnership without limited partners is filing a registration for status as a registered limited liability partnership;

(7) if the registration of the partnership without limited partners is to be effective on a date later than the time of filing, the date, not to exceed sixty days from the date of such filing, of such proposed effectiveness;

(8) if all or specified partners of the registered limited liability partnership are to be liable in their capacity as partners for all or specified debts, obligations or liabilities of the registered limited liability partnership as authorized pursuant to subdivision (d) of section twenty-six of this chapter, a statement that all or specified partners are so liable for such debts, obligations or liabilities in their capacity as partners of the registered limited liability partnership as authorized pursuant to subdivision (d) of section twenty-six of this chapter; and

(9) any other matters the partnership without limited partners determines to include in the registration.

(II) (A) Within one hundred twenty days after the effective date of the registration, a copy of the same or a notice containing the substance thereof shall be published once in each week for six successive weeks, in two newspapers of the county in which the principal office of the registered limited liability partnership is located in this state, one newspaper printed weekly and one newspaper to be printed daily, to be designated by the county clerk. When such county is located within a city with a population of one million or more, such designation shall be as though the copy or notice were a notice or advertisement of judicial proceedings. Proof of the publication required by this subparagraph, consisting of the certificate of publication of the registered limited liability partnership with the affidavits of publication annexed thereto, must be filed, with a fee of fifty dollars, with the department of state. Notwithstanding any other provision of law, if the office of the registered limited liability partnership is located in a county wherein a weekly or daily newspaper of the county, or both, has not been so designated by the county clerk, then the publication herein required shall be made in a weekly or daily newspaper of any county, or both, as the case may be, which is contiguous to, such county, provided that any such newspaper meets all the other requirements of this subparagraph. A copy or notice published in a newspaper other than the newspaper or newspapers designated by the county clerk shall not be deemed to be one of the publications required by this paragraph. The notice shall include: (1) the name of the registered limited liability partnership; (2) the date of filing of the registration with the department of state; (3) the county within this state, in which the principal office of the registered limited liability partnership is located; (3-a) the street address of the principal business location, if any; (4) a statement that the secretary of state has been designated as agent of the registered limited liability partnership upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him or her; (5) if the registered limited liability partnership is to have a registered agent, his or her name and address within this state and a statement that the registered agent is to be the agent of the registered limited liability partnership upon whom process against it may be served; (6) if the registered limited liability partnership is to have a specific date of dissolution in addition to the events of dissolution set forth in section sixty-two of this chapter, the latest date upon which the registered limited liability partnership is to dissolve; and (7) the character or purpose of the business of such registered limited liability partnership. Where, at any time after completion of the first of the six weekly publications required by this subparagraph and prior to the completion of the sixth such weekly publication, there is a change in any of the information contained in the copy or notice as published, the registered limited liability partnership may complete the remaining publications of the original copy or notice, and the registered limited liability partnership shall not be required to publish any further or amended copy or notice. Where, at any time after completion of the six weekly publications required by this subparagraph, there is a change to any of the information contained in the copy or notice as published, no further or amended publication or republication shall be required to be made. If within one hundred twenty days after its formation, proof of such publication, consisting of the certificate of publication of the registered limited liability partnership with the affidavits of publication of the newspapers annexed thereto has not been filed with the department of state, the authority of such registered limited liability partnership to carry on, conduct or transact any business in this state shall be suspended, effective as of the expiration of such one hundred twenty day period. The failure of a registered limited

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liability partnership to cause such copy or notice to be published and such certificate of publication and affidavits of publication to be filed with the department of state within such one hundred twenty day period or the suspension of such registered limited liability partnership's authority to carry on, conduct or transact business in this state pursuant to this subparagraph shall not limit or impair the validity of any contract or act of such registered limited liability partnership, or any right or remedy of any other party under or by virtue of any contract, act or omission of such registered limited liability partnership, or the right of any other party to maintain any action or special proceeding on any such contract, act or omission, or right of such registered limited liability partnership to defend any action or special proceeding in this state, or result in any partner or agent of such registered limited liability partnership becoming liable for the contractual obligations or other liabilities of the registered limited liability partnership. If, at any time following the suspension of a registered limited liability partnership's authority to carry on, conduct or transact business in this state pursuant to this subparagraph, such registered limited liability partnership shall cause proof of publication in substantial compliance with the provisions (other than the one hundred twenty day period) of this subparagraph, consisting of the certificate of publication of the registered limited liability partnership with the affidavits of publication of the newspapers annexed thereto, to be filed with the department of state, such suspension of such registered limited liability partnership's authority to carry on, conduct or transact business shall be annulled.

(B)(1) A registered limited liability partnership which was formed prior to the effective date of this subparagraph and which complied with the publication and filing requirements of this paragraph as in effect prior to such effective date shall not be required to make any publication or republication or any filing under subparagraph (A) of this paragraph, and shall not be subject to suspension pursuant to this paragraph.

(2) Within twelve months after the effective date of this subparagraph, a registered limited liability partnership which was formed prior to such effective date and which did not comply with the publication and filing requirements of this paragraph as in effect prior to such effective date shall publish a copy of its registration or a notice containing the substance thereof in the manner required (other than the one hundred twenty day period) by this paragraph as in effect prior to such effective date and file proof of such publication, consisting of the certificate of publication of the registered limited liability partnership with the affidavits of publication of the newspapers annexed thereto, with the department of state.

(3) If a registered limited liability partnership that is subject to the provisions of clause two of this subparagraph fails to file the required proof of publication with the department of state within twelve months after the effective date of this subparagraph, its authority to carry on, conduct or transact any business in this state shall be suspended, effective as of the expiration of such twelve month period.

(4) The failure of a registered limited liability partnership that is subject to the provisions of clause two of this subparagraph to fully comply with the provisions of said clause two or the suspension of such registered limited liability partnership's authority to carry on, conduct or transact any business in this state pursuant to clause three of this subparagraph shall not impair or limit the validity of any contract or act of such registered limited liability partnership, or any right or remedy of any other party under or by virtue of any contract, act or omission of such registered limited liability partnership, or the right of any other party to maintain any action or special proceeding on any such contract, act or omission, or right of such registered limited liability partnership to defend any action or special proceeding in this state, or result in any partner or agent of such registered limited liability partnership becoming liable for the contractual obligations or other liabilities of the registered limited liability partnership.

(5) If, at any time following the suspension of a registered limited liability partnership's authority to carry on, conduct or transact business in this state, pursuant to clause three of this subparagraph, such registered limited liability partnership shall cause proof of publication in substantial compliance with the provisions (other than the one hundred twenty day period) of subparagraph (A) of this paragraph, consisting of the certificate of publication of the registered limited liability partnership with the affidavits

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of publication of the newspapers annexed thereto, to be filed with the department of state, such suspension of such registered limited liability partnership's authority to carry on, conduct or transact business shall be annulled.

(6) For the purposes of this subparagraph, a registered limited liability partnership which was formed prior to the effective date of this subparagraph shall be deemed to have complied with the publication and filing requirements of this paragraph as in effect prior to such effective date if (A) the registered limited liability partnership was formed on or after January first, nineteen hundred ninety-nine and prior to such effective date and the registered limited liability partnership filed at least one affidavit of the printer or publisher of a newspaper with the department of state at any time prior to such effective date, or (B) the registered limited liability partnership was formed prior to January first, nineteen hundred ninety-nine, without regard to whether the registered limited liability partnership did or did not file any affidavit of the printer or publisher of a newspaper with the secretary of state.

(C) The information in a notice published pursuant to this paragraph shall be presumed to be in compliance with and satisfaction of the requirements of this paragraph.

(b) The registration shall be executed by one or more partners of the partnership without limited partners.

(c) The registration shall be accompanied by a fee of two hundred dollars.

(d) A partnership without limited partners is registered as a registered limited liability partnership at the time of the payment of the fee required by subdivision (c) of this section and the filing of a completed registration with the department of state or at the later date, if any, specified in such registration, not to exceed sixty days from the date of such filing. A partnership without limited partners that has been registered as a registered limited liability partnership is for all purposes the same entity that existed before the registration and continues to be a partnership without limited partners under the laws of this state. The status of a partnership without limited partners as a registered limited liability partnership shall not be affected by changes in the information stated in the registration after the filing of the registration. If a partnership without limited partners that is a registered limited liability partnership dissolves, a partnership without limited partners which is the successor to such registered limited liability partnership (i) shall not be required to file a new registration and shall be deemed to have filed the registration filed by the registered limited liability partnership pursuant to subdivision (a) of this section, as well as any withdrawal notice filed pursuant to subdivision (f) of this section, any statement or certificate of consent filed pursuant to subdivision (g) of this section or any certificate of amendment filed pursuant to subdivision (j) of this section and (ii) shall be bound by any revocation of registration pursuant to subdivision (g) of this section and any annulment thereof of the dissolved partnership without limited partners that was a registered limited liability partnership. For purposes of this section, a partnership without limited partners is a successor to a partnership without limited partners that was a registered limited liability partnership if a majority of the total interests in the current profits of such successor partnership without limited partners are held by partners of the predecessor partnership without limited partners that was a registered limited liability partnership who were partners of such predecessor partnership immediately prior to the dissolution of such predecessor partnership.

(e) If the signed registration delivered to the department of state for filing complies as to form with the requirements of law and the filing fee required by any statute of this state has been paid, the registration shall be filed and indexed by the department of state.

(f) A registration may be withdrawn by filing with the department of state a written withdrawal notice executed by one or more partners of the registered limited liability partnership, with a filing fee of sixty dollars. A withdrawal notice must include: (i)

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the name of the registered limited liability partnership (and if it has been changed since registration, the name under which it was registered); (ii) the date the registration was filed with the department of state pursuant to subdivision (a) of this section; (iii) the address of the registered limited liability partnership's principal office; (iv) if the withdrawal of the registered limited liability partnership is to be effective on a date later than the time of filing, the date, not to exceed sixty days from the date of such filing, of such proposed effectiveness; (v) a statement acknowledging that the withdrawal terminates the partnership's status as a registered limited liability partnership; and (vi) any other information determined by the registered limited liability partnership. A withdrawal notice terminates the status of the partnership as a registered limited liability partnership as of the date of filing the notice or as of the later date, if any, specified in the notice, not to exceed sixty days from the date of such filing. The termination of registration shall not be affected by errors in the information stated in the withdrawal notice. If a registered limited liability partnership is dissolved, it shall within thirty days after the winding up of its affairs is completed file a withdrawal notice pursuant to this subdivision.

(g) Each registered limited liability partnership shall, within sixty days prior to the fifth anniversary of the effective date of its registration and every five years thereafter, furnish a statement to the department of state setting forth: (i) the name of the registered limited liability partnership, (ii) the address of the principal office of the registered limited liability partnership, (iii) the post office address within or without this state to which the secretary of state shall mail a copy of any process accepted against it served upon him or her, which address shall supersede any previous address on file with the department of state for this purpose, and (iv) a statement that it is eligible to register as a registered limited liability partnership pursuant to subdivision (a) of this section. The statement shall be executed by one or more partners of the registered limited liability partnership. The statement shall be accompanied by a fee of twenty dollars if submitted directly to the department of state. The commissioner of taxation and finance and the secretary of state may agree to allow registered limited liability partnerships to provide the statement specified in this subdivision on tax reports filed with the department of taxation and finance in lieu of statements filed directly with the secretary of state and in a manner prescribed by the commissioner of taxation and finance. If this agreement is made, starting with taxable years beginning on or after January first, two thousand sixteen, each registered limited liability partnership required to file the statement specified in this subdivision that is subject to the filing fee imposed by paragraph three of subsection (c) of section six hundred fifty-eight of the tax law shall provide such statement annually on its filing fee payment form filed with the department of taxation and finance in lieu of filing a statement under this subdivision with the department of state. However, each registered limited liability partnership required to file a statement under this section must continue to file a statement with the department of state as required by this section until the registered limited liability partnership in fact has filed a filing fee payment form with the department of taxation and finance that includes all required information. After that time, the registered limited liability partnership shall continue to provide annually the statement specified in this subdivision on its filing fee payment form in lieu of the statement required by this subdivision. The commissioner of taxation and finance shall deliver the completed statement specified in this subdivision to the department of state for filing. The department of taxation and finance must, to the extent feasible, also include in such delivery the current name of the registered limited liability partnership, department of state identification number for such registered limited liability partnership, the name, signature and capacity of the signer of the statement, name and street address of the filer of the statement, and the email address, if any, of the filer of the statement. If a registered limited liability partnership shall not timely file the statement required by this subdivision, the department of state may, upon sixty days' notice mailed to the address of such registered limited liability partnership as shown in the last registration or statement or certificate of amendment filed by such registered limited liability partnership, make a proclamation declaring the registration of such registered limited liability partnership to be revoked pursuant to this subdivision. The department of state shall file the original proclamation in its office and shall publish a copy thereof in the state register no later than three months following the date of such proclamation. This shall not apply to registered limited liability partnerships that have filed a statement with the department of state through the department of taxation and finance. Upon the publication of such proclamation in the manner aforesaid, the registration of each registered limited liability partnership named in such proclamation shall be deemed revoked without further legal proceedings. Any registered limited liability partnership whose registration was so revoked may file in the department of state a statement required by this subdivision. The filing of such statement shall have the effect of annulling all of the proceedings theretofore taken for the revocation of the registration of such registered limited liability partnership under this subdivision and (1) the registered limited liability partnership shall thereupon have such powers, rights, duties and obligations as it had on the date of the publication of the proclamation, with the same force

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and effect as if such proclamation had not been made or published and (2) such publication shall not affect the applicability of the provisions of subdivision (b) of section twenty-six of this chapter to any debt, obligation or liability incurred, created or assumed from the date of publication of the proclamation through the date of the filing of the statement with the department of state. If, after the publication of such proclamation, it shall be determined by the department of state that the name of any registered limited liability partnership was erroneously included in such proclamation, the department of state shall make appropriate entry on its records, which entry shall have the effect of annulling all of the proceedings theretofore taken for the revocation of the registration of such registered limited liability partnership under this subdivision and (A) such registered limited liability partnership shall have such powers, rights, duties and obligations as it had on the date of the publication of the proclamation, with the same force and effect as if such proclamation had not been made or published and (B) such publication shall not affect the applicability of the provisions of subdivision (b) of section twenty-six of this chapter to any debt, obligation or liability incurred, created or assumed from the date of publication of the proclamation through the date of the making of the entry on the records of the department of state. Whenever a registered limited liability partnership whose registration was revoked shall have filed a statement pursuant to this subdivision or if the name of a registered limited liability partnership was erroneously included in a proclamation and such proclamation was annulled, the department of state shall publish a notice thereof in the state register.

(h) The filing of a withdrawal notice by a registered limited liability partnership pursuant to subdivision (f) of this section, a revocation of registration pursuant to subdivision (g) of this section and the filing of a certificate of amendment pursuant to subdivision (j) of this section shall not affect the applicability of the provisions of subdivision (b) of section twenty-six of this chapter to any debt, obligation or liability incurred, created or assumed while the partnership was a registered limited liability partnership. After a withdrawal or revocation of registration, the partnership without limited partners shall for all purposes remain the same entity that existed during registration and continues to be a partnership without limited partners under the laws of this state.

(i) The department of state shall remove from its active records the registration of a registered limited liability partnership whose registration has been withdrawn or revoked.

(j) A registration or statement filed with the department of state under this section may be amended or corrected by filing with the department of state a certificate of amendment executed by one or more partners of the registered limited liability partnership. No later than ninety days after (i) a change in the name of the registered limited liability partnership or (ii) a partner of the registered limited liability partnership becomes aware that any statement in a registration or statement was false in any material respect when made or that an event has occurred which makes the registration or statement inaccurate in any material respect, the registered limited liability partnership shall file a certificate of amendment. The filing of a certificate of amendment shall be accompanied by a fee of sixty dollars. The certificate of amendment shall set forth: (i) the name of the limited liability partnership and, if it has been changed, the name under which it was registered and (ii) the date of filing its initial registration or statement.

(j-1) A certificate of change which changes only the post office address to which the secretary of state shall mail a copy of any process against a registered limited liability partnership served upon him or her, and/or the email address to which the secretary of state shall email a notice of the fact that process against it has been electronically served upon the secretary of state, and/or the address of the registered agent, provided such address being changed is the address of a person, partnership or corporation whose address, as agent, is the address to be changed, and/or the email address being changed is the email address of a person, partnership or other corporation whose email address, as agent, is the email address to be changed, and/or who has been designated as registered agent for such registered limited liability partnership shall be signed and delivered to the department of state by such agent. The certificate of change shall set forth: (i) the name of the registered limited liability partnership and, if it has been changed, the name under which it was originally filed with the department of state; (ii) the date of filing of its initial registration or notice statement; (iii) each change effected thereby; (iv) that a notice of the proposed change was mailed to the limited liability partnership by the party signing the certificate not less than thirty days prior to the date of delivery to

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the department of state and that such limited liability partnership has not objected thereto; and (v) that the party signing the certificate is the agent of such limited liability partnership to whose address the secretary of state is required to mail copies of process, and/or to whose email address the secretary of state is required to mail a notice of the fact that process against it has been electronically served upon the secretary of state, and/or the registered agent, if such be the case. A certificate signed and delivered under this subdivision shall not be deemed to effect a change of location of the office of the limited liability partnership in whose behalf such certificate is filed. The certificate of change shall be accompanied by a fee of five dollars.

(k) The filing of a certificate of amendment pursuant to subdivision (j) of this section with the department of state shall not alter the effective date of the registration being amended or corrected.

(l) Except as otherwise provided in any agreement between the partners, the decision of a partnership without limited partners to file, withdraw or amend a registration pursuant to subdivision (a), (f) or (j), respectively, of this section is an ordinary matter connected with partnership business under subdivision eight of section forty of this chapter.

(m) A registered limited liability partnership, other than a registered limited liability partnership authorized to practice law, shall be under the supervision of the regents of the university of the state of New York and be subject to disciplinary proceedings and penalties in the same manner and to the same extent as is provided with respect to individuals and their licenses, certificates and registrations in title eight of the education law relating to the applicable profession. Notwithstanding the provisions of this subdivision, a registered limited liability partnership authorized to practice medicine shall be subject to the pre-hearing procedures and hearing procedures as are provided with respect to individual physicians and their licenses in title two-A of article two of the public health law. In addition to rendering the professional service or services the partners are authorized to practice in this state, a registered limited liability partnership may carry on, or conduct or transact any other business or activities as to which a partnership without limited partners may be formed. Notwithstanding any other provision of this section, a registered limited liability partnership (i) authorized to practice law may only engage in another profession or business or activities or (ii) which is engaged in a profession or other business or activities other than law may only engage in the practice of law, to the extent not prohibited by any other law of this state or any rule adopted by the appropriate appellate division of the supreme court or the court of appeals. Any registered limited liability partnership may invest its funds in real estate, mortgages, stocks, bonds or any other types of investments.

(n) No registered limited liability partnership may render a professional service except through individuals authorized by law to render such professional service as individuals, provided, that nothing in this chapter shall authorize a registered limited liability partnership to render a professional service in this state except through individuals authorized by law to render such professional service as individuals in this state.

(o) This section shall not repeal, modify or restrict any provision of the education law or the judiciary law or any rules or regulations adopted thereunder regulating the professions referred to in the education law or the judiciary law except to the extent in conflict herewith.

(p) A certified copy of the registration and of each certificate of amendment shall be filed by the registered limited liability partnership with the licensing authority within thirty days after the filing of such registration or amendment with the department of state.

(q) [Eff. until June 8, 2024. See, also, subd. (q) below.] Each partner of a registered limited liability partnership formed to provide medical services in this state must be licensed pursuant to article 131 of the education law to practice medicine in

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this state and each partner of a registered limited liability partnership formed to provide dental services in this state must be licensed pursuant to article 133 of the education law to practice dentistry in this state. Each partner of a registered limited liability partnership formed to provide veterinary services in this state must be licensed pursuant to article 135 of the education law to practice veterinary medicine in this state. Each partner of a registered limited liability partnership formed to provide professional engineering, land surveying, geological services, architectural and/or landscape architectural services in this state must be licensed pursuant to article 145, article 147 and/or article 148 of the education law to practice one or more of such professions in this state. Each partner of a registered limited liability partnership formed to provide licensed clinical social work services in this state must be licensed pursuant to article 154 of the education law to practice clinical social work in this state. Each partner of a registered limited liability partnership formed to provide creative arts therapy services in this state must be licensed pursuant to article 163 of the education law to practice creative arts therapy in this state. Each partner of a registered limited liability partnership formed to provide marriage and family therapy services in this state must be licensed pursuant to article 163 of the education law to practice marriage and family therapy in this state. Each partner of a registered limited liability partnership formed to provide mental health counseling services in this state must be licensed pursuant to article 163 of the education law to practice mental health counseling in this state. Each partner of a registered limited liability partnership formed to provide psychoanalysis services in this state must be licensed pursuant to article 163 of the education law to practice psychoanalysis in this state. Each partner of a registered limited liability partnership formed to provide applied behavior analysis service in this state must be licensed or certified pursuant to article 167 of the education law to practice applied behavior analysis in this state.

(q) [Eff. June 8, 2024. See, also, subd. (q) above.] Each partner of a registered limited liability partnership formed to provide medical services in this state must be licensed pursuant to article 131 of the education law to practice medicine in this state and each partner of a registered limited liability partnership formed to provide dental services in this state must be licensed pursuant to article 133 of the education law to practice dentistry in this state. Each partner of a registered limited liability partnership formed to provide veterinary services in this state must be licensed pursuant to article 135 of the education law to practice veterinary medicine in this state. Each partner of a registered limited liability partnership formed to provide public accountancy services as a firm, whose principal place of business is in this state and who provides public accountancy services, must be licensed pursuant to article 149 of the education law to practice public accountancy in this state. Each partner of a registered limited liability partnership formed to provide professional engineering, land surveying, geological services, architectural and/or landscape architectural services in this state must be licensed pursuant to article 145, article 147 and/or article 148 of the education law to practice one or more of such professions in this state. Each partner of a registered limited liability partnership formed to provide licensed clinical social work services in this state must be licensed pursuant to article 154 of the education law to practice clinical social work in this state. Each partner of a registered limited liability partnership formed to provide creative arts therapy services in this state must be licensed pursuant to article 163 of the education law to practice creative arts therapy in this state. Each partner of a registered limited liability partnership formed to provide marriage and family therapy services in this state must be licensed pursuant to article 163 of the education law to practice marriage and family therapy in this state. Each partner of a registered limited liability partnership formed to provide mental health counseling services in this state must be licensed pursuant to article 163 of the education law to practice mental health counseling in this state. Each partner of a registered limited liability partnership formed to provide psychoanalysis services in this state must be licensed pursuant to article 163 of the education law to practice psychoanalysis in this state. Each partner of a registered limited liability partnership formed to provide applied behavior analysis service in this state must be licensed or certified pursuant to article 167 of the education law to practice applied behavior analysis in this state. A registered limited liability partnership formed to lawfully engage in the practice of public accountancy as a firm, as such practice is defined under article 149 of the education law, shall be required to show (1) that a simple majority of the ownership of the firm, in terms of financial interests and voting rights held by the firm's owners, belongs to individuals licensed to practice public accountancy in some state, and (2) that all partners of a limited liability partnership whose principal place of business is in this state, and who are engaged in the practice of public accountancy in this state, hold a valid license issued under section seventy-four hundred four of the education law. For purposes of this subdivision, "financial interest" means capital stock, capital accounts, capital contributions, capital interest, or interest in undistributed earnings of a business entity. Although firms registered with the education department may include non-licensee owners, the firm and its owners must comply with rules promulgated by the state board of regents. Notwithstanding the

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foregoing, a firm registered with the education department may not have non-licensee owners if the firm's name includes the words “certified public accountant,” or “certified public accounts,” or the abbreviations “CPA” or “CPAs”. Each non-licensee owner of a firm that is formed under this section shall be (1) a natural person who actively participates in the business of the firm or its affiliated entities, or (2) an entity, including, but not limited to, a partnership or professional corporation, provided each beneficial owner of an equity interest in such entity is a natural person who actively participates in the business conducted by the firm or its affiliated entities. For purposes of this subdivision, “actively participate” means to provide services to clients or to otherwise individually take part in the day-to-day business or management of the firm or an affiliated entity.

Credits

(Added L.1994, c. 576, § 15. Amended L.1995, c. 643, § 21; L.1997, c. 470, § 12, eff. Aug. 26, 1997; L.1998, c. 448, § 9, eff. Oct. 20, 1998; L.1999, c. 172, §§ 45, 46, eff. July 6, 1999; L.1999, c. 420, § 16, eff. Aug. 31, 1999; L.2002, c. 420, § 5, eff. Sept. 1, 2004; L.2002, c. 676, § 16, eff. Jan. 1, 2005; L.2005, c. 767, §§ 15, 16, eff. June 1, 2006; L.2006, c. 44, § 10, eff. June 1, 2006; L.2013, c. 554, § 9, eff. Jan. 10, 2014; L.2014, c. 475, § 26, eff. Nov. 21, 2016; L.2015, c. 59, pt. S, § 8, eff. April 13, 2015; L.2021, c. 56, pt. KK, § 50, eff. Jan. 1, 2023; L.2023, c. 701, § 8, eff. June 8, 2024.)

Notes of Decisions (7)

McKinney's Partnership Law § 121-1500, NY PARTNER § 121-1500
Current through L.2024, chapters 1 to 49, 52, 61 to 112. Some statute sections may be more current, see credits for details.

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