FILED: APPELLATE DIVISION - 2ND DEPT 09/19/2024 01:52 PM 2022-07617
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/19/2024

To be Argued by:
MELANIE I. WIENER
(Time Requested: 15 Minutes)

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

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

Plaintiffs-Appellants-Respondents,

-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.

Docket No.: 2022-07617

BRIEF FOR DEFENDANTS-RESPONDENTS

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Kings County Clerk's Index No.: 506730/2019

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PRELIMINARY STATEMENT

This appeal arises from a dispute over the dissolution of a law firm that was commenced by plaintiff-appellant Scott Epstein ("Epstein"), individually and as an alleged partner of the law firm, against defendants-respondents-appellants Robert I. Cantor ("Cantor") and Robert I. Cantor PLLC ("Cantor PLLC") (all defendants-respondents-appellants, collectively, "Cantor defendants"), and defendants-respondents Bryan J. Mazzola ("Mazzola"), W. Todd Boyd ("Boyd"), Boyd Richards Parker & Colonnelli, P.L. ("BRPC"), and Boyd Richards NY, LLC ("Boyd NY") (all defendants-respondents, collectively, "Boyd defendants").

As is relevant here, Epstein appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated August 19, 2022, which denied his motion pursuant to CPLR 2221(e) for leave to renew, and denied in part his motion pursuant to CPLR 2221(d) for leave to reargue, his opposition to the Boyd defendants' motion pursuant to CPLR 3211(a) to dismiss the complaint as against them.[1]

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[1] The Cantor defendants appeal from the portion of the Supreme Court's order that granted plaintiff leave to reargue his opposition to their motion to dismiss the complaint as against them and, upon reargument, reinstated several of his claims as

QUESTION PRESENTED

Leave to renew may be granted only if the moving party sets forth: (1) new facts not offered on the prior motion that would change the prior determination; and (2) a reasonable justification for the failure to present those facts on the prior motion and for any undue delay in bringing the motion. Accordingly, leave to renew must be denied if the moving party fails to make either of those showings. Here, Epstein's motion for leave to renew his opposition to the Boyd defendants' motion to dismiss was not supported by facts that would have changed the Supreme Court's prior determination to grant the Boyd defendants' motion and was devoid of a reasonable justification for both not presenting those facts on the prior motion and the nine-month delay in bringing the motion. In light of the above, did the Supreme Court properly deny Epstein's renewal motion? Yes.

SUMMARY OF ARGUMENT

In 1995, Epstein and Cantor entered into an agreement regarding the operation of a law firm (the "firm"). In 2007, Mazzola joined the firm

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against Cantor. R. 4. The Cantor defendants' appeal has no bearing on the Boyd defendants' position and therefore will be discussed in this brief only to the extent that it provides context for the Boyd defendants' response to Epstein's appeal.

pursuant to an agreement with Cantor (and not Epstein) and acquired an equity interest in the firm from Cantor.

In 2012, however, Mazzola relinquished his equity interest in the firm and became a W-2 employee of the firm. Mazzola's relinquishment of his equity was memorialized in a written agreement signed by, among others, Epstein. The agreement expressly stated that Mazzola's partnership agreement with the firm was "null and void" and that Mazzola is "solely [a] W-2 salaried employees of [the firm] . . . with no equity interest in same . . . . " By this agreement, Epstein also acknowledged that Mazzola had no financial obligation to him.

The firm employed Mazzola as a W-2 employee for the next four years, until 2016, when after Cantor announced his retirement, Mazzola left the firm to join BRPC. The firm was dissolved, and Cantor created Cantor PLLC. Prior to Mazzola leaving the firm, he and the firm entered into a written agreement, in which the firm released Mazzola "from all liability arising out of [his employment]," except for certain obligations not relevant here.

In 2019, Epstein commenced this action, alleging, in sum and substance, that Mazzola, BRPC, the principal of that firm, Boyd, Boyd NY, Cantor, and Cantor PLLC, improperly solicited clients from the now-defunct

firm. Epstein asserted the following claims against the Boyd defendants: (1) breach of fiduciary duty against Mazzola; (2) violation of New York Partnership Law against Mazzola; (3) violation of the faithless servant doctrine against Mazzola; (4) unjust enrichment against Mazzola; (5) corporate raiding against all of the Boyd defendants; (6) aiding and abetting breach of fiduciary duty against all of the Boyd defendants; (7) unfair competition against BRPC and Boyd NY; and (8) tortious interference with contract against all of the Boyd defendants. The first two claims were based on the allegation that the firm was a partnership, whereas the other claims were not based on that allegation.

By order dated December 11, 2020, the Supreme Court granted the Boyd defendants' motion to dismiss the complaint in its entirety as against them pursuant to CPLR 3211(a). The Supreme Court determined that the firm was not a partnership and, based on that determination, dismissed the claims predicated on the allegation that the firm was a partnership, i.e., breach of fiduciary duty and violation of New York Partnership Law. The Supreme Court dismissed the remaining claims for other reasons.

Over nine months later, in September 2021, Epstein moved, among other things, for leave to renew his opposition to the Boyd defendants'

motion to dismiss. Epstein based his motion for leave to renew on two pieces of evidence: (1) an excerpt from Cantor's deposition testimony from a separate lawsuit, taken on January 26, 2021, in which Cantor testified that the firm was a partnership, and that Epstein was a non-equity partner; and (2) an affidavit by a former employee of the firm, dated August 20, 2021, in which the employee opined that the firm was a partnership of which Epstein was an equity partner. According to Epstein, those pieces of evidence would have changed the Supreme Court's prior determination to grant the Boyd defendants' dismissal motion because, contrary to the Supreme Court's determination, they conclusively proved that the firm was a legal partnership of which he was a partner.

The Supreme Court properly denied Epstein's renewal motion for at least three reasons.

First, Epstein failed to provide a "reasonable justification" for: (1) the failure to procure and submit the employee's affidavit in opposition to the Boyd defendants' motion for dismiss; (2) the over-eight-month delay between the granting of the Boyd defendants' motion to dismiss and Epstein obtaining the employee's affidavit; and (3) the nearly eight-month delay between Cantor's deposition testimony and the filing of Epstein's renewal

motion based on that testimony.

Second, neither Cantor's deposition testimony nor the employee's affidavit would have changed the Supreme Court's determination that the firm was not a partnership and, consequently, would not have changed the Supreme Court's prior to decision to grant the Boyd defendants' motion to dismiss, because merely referring to an organization as a partnership or to people as partners, standing alone, cannot demonstrate the existence of a partnership as a matter of law. Either of those deficiencies, without more, is a sufficient basis for denying Epstein's renewal motion.

Third, even if Cantor's deposition testimony or the employee's affidavit would have changed the Supreme Court's determination that the firm was not a partnership, there were independent, stand alone, bases for dismissing the claims against the Boyd defendants. To start, even if the firm could be considered a partnership, the firm released Mazzola from any liability, under any circumstances, pursuant to the 2016 agreement. Next, even if the firm could be considered a partnership, Mazzola relinquished his equity in the firm pursuant to the 2012 agreement, again precluding any liability against Mazzola because he was no longer a partner at the relevant time. Finally, the Supreme Court dismissed numerous claims against the

Boyd defendants for reasons wholly unrelated to the question of whether the firm was a partnership and therefore the "new" evidence would not change this result.

By the same token, the Supreme Court's decision to reinstate some of the claims against the Cantor defendants upon reargument, based on its determination that the firm could potentially be considered a partnership, but not reinstate those same claims against the Boyd defendants, makes perfect sense and is supported by the record. Even if the firm could be considered a partnership, the firm not only released Mazzola from liability pursuant to the 2016 agreement, but Mazzola relinquished any equity he had in the firm pursuant to the 2012 agreement. Moreover, some of the claims were not predicated on the firm being a partnership and therefore the firm's partnership status is irrelevant to those claims. Put simply, while the Supreme Court's determination on reargument that the firm could be partnership may have had an impact on the claims against the Cantor defendants, that determination had no impact whatsoever on the claims against the Boyd defendants because there were independent bases for dismissing the claims against them.

This Court, therefore, should affirm the Supreme Court's order.

STATEMENT OF FACTS

A. Epstein and Cantor enter into an agreement to create a law firm.

In 1995, Epstein and Cantor entered into an agreement (the "1995 agreement") regarding the operation of a law practice to be known as Cantor, Epstein, Bailey & Degenshein, LLP (the "firm"), as the firm was known at the time. R. 37-44. Although the 1995 agreement referred to the firm as a "partnership," R. 37-44, there were several provisions in the 1995 agreement that demonstrated that no legal "partnership" between Epstein and Cantor had been created:

- Section 5.1 provides that Cantor was required to make all capital contributions to the firm, and that Epstein was not required to make any capital contributions to the firm. R. 38.

- Section 6.1 provides that all profits and losses generated by the firm shall be allocable to Cantor and that Cantor contributed all start-up capital to the firm. R. 39.

- Section 6.2(a) provides that Epstein' would receive 25% of the gross income received by the firm from fees received from his referrals, irrespective of whether the firm incurred losses. R. 39.

- Section 7.1(a) provides that Cantor has full decision-making authority and control over the firm's practice and clients, including that Cantor shall devote all of his time to the operation of the firm business and be exclusively responsible for managing the firm's business operations, such as paying all bills and expenses, collecting receivable, monitoring legal files, hiring staff and attorneys, and servicing the firm's clients. R. 40.

- Section 7.1(b) provides that Epstein had no control or authority over the firm's operations and would form a plaintiff persona injury firm, to which he would devote his time, and he would be prohibited from litigating any of the cases for which the firm was retained. R. 40.

- Section 7.2 provides that Epstein was not Cantor's partner, stating, however, that Epstein could elect to become a full and equal partner with Cantor in the firm, provided that he, among other things, resigned from his personal injury practice. R. 41.

- Section 7.3 provides that only Cantor could sign firm's checks, or a person selected by Cantor. R. 41.

- Section 7.5 provides Cantor had sole responsibility for hiring and firing personnel. R. 42.

- Article 10 provides that the addition of a new partner in the firm required only Cantor's consent. R. 44.

B. Mazzola joins the firm.

In 2007, by which time named partners "Bailey" and "Degenshein" had left the firm, Mazzola joined the firm as a named and an equity partner through an agreement solely between him and Cantor. R. 452. In turn, the firm changed its name to Cantor, Epstein & Mazzola, LLP. R. 452. Mazzola's equity in the firm was memorialized in a partnership agreement with Cantor (the "2007 agreement"). R. 452. Pursuant to the 2007 agreement, Mazzola had the option to buy Cantor's equity interest in the firm. R. 452.

Ultimately, Mazzola did not exercise his option and, instead, relinquished his equity interest in the firm. R. 452. To that end, in 2012, Epstein, Cantor, and Mazzola entered into an agreement that memorialized Mazzola's relinquishment of his equity interest in the firm (the "2012 agreement"). R. 389-390. The 2012 agreement provided, among other things, that the 2007 agreement was "null and void," that Mazzola would be a "W-2 salaried employee" of the firm "with no equity interest in [the firm]," that the 1995 agreement was still "in full force and effect," and that Mazzola had no financial obligation to Epstein. R. 389-390.

C. Cantor decides to retire and dissolve the firm.

Around mid-2015, Cantor informed Epstein and Mazzola that he intended to retire and close the firm's doors unless they reached an agreement to continue the firm's operation. R. 453. Specifically, Cantor informed Epstein and Mazzola that they had until the summer of 2016 to reach an agreement to continue the firm's operation. R. 453.

Over the next year, Epstein, Cantor, and Mazzola engaged in extensive discussions and entertained various proposals about continuing the firm's operation. R. 453-454. During those discussions, Mazzola made it known that he would leave the firm if a deal could not be made. R. 453-454.

Ultimately, Epstein, Cantor, and Mazzola were unable to agree on a deal to continue the firm's operation. R. 453-454.

Throughout this time, knowing that Cantor intended to dissolve the firm if a deal could not be reached, Epstein had the option to elect to become an equity partner and take over the practice, as provided within the 1995 agreement. R. 41. Epstein, however, did not elect to do so.

D. With the fate of the firm uncertain, Mazzola leaves the firm and joins BRPC.

In the summer of 2016, with no deal having been made to continue the firm's operation and the fate of the firm uncertain, Mazzola left the firm and joined BRPC. R. 139-140, 454-455. Mazzola joined BRPC as W-2 salaried employee, without any equity interest. R. 455.

Prior to Mazzola's departure, Cantor, Mazzola, and the firm entered into an agreement relating to Mazzola's departure (the "2016 agreement"). R. 139-140. The 2016 agreement, which identified Cantor as "the [100%] equity owner and managing member of [the firm]" and Mazzola as an "employee[]" of the firm "with no equity interest," provided that: (1) the firm would notify a specifically delineated list of clients that Mazzola had serviced of Mazzola's departure and the firm's acquiescence to those clients

continuing to be represented by Mazzola; (2) Mazzola would not affirmatively contact a specifically delineated list of the firm's clients that were serviced primarily by Cantor; and (3) the firm, Mazzola, and Cantor shall "mutually release each other from all liability arising out of the employment of [Mazzola] . . . by [the firm] except for the obligations set forth in this [a]greement, professional obligations[,] and acts of undisclosed malfeasance." R. 139-140.

In accordance with the 2016 agreement, the firm issued letters to the delineated clients serviced by Mazzola. R. 136-138. Each letter stated that Mazzola had left the firm to join BRPC, that Mazzola would contact the specific client directly about continuing to represent them, that each client had the right to choose their attorney, and that the firm had no objection to Mazzola contacting them. R. 136-138.

E. Epstein commences this action.

In 2019, Epstein—having left the firm without ever exercising his right to become Cantor's partner pursuant to section 7.2 of the 1995 agreement—commenced this action against the Cantor defendants and the Boyd defendants. R. 45-60. The operative complaint asserted eight claims against the Boyd defendants. R. 403-419.

Two of the claims were for breach of fiduciary duty and violation of New York Partnership Law as against Mazzola (claims two and three). R. 411-413. To support those claims, the operative complaint alleged that the firm was a partnership, consisting of Epstein, Cantor, and Mazzola as equity partners, and that Mazzola breached his fiduciary duties and obligations to Epstein and the firm under New York Partnership Law by soliciting the firm's clients after he had left the firm. R. 411-413.

Two of the claims were for violation of the faithless servant doctrine and unjust enrichment as against Mazzola (claims six and seven). R. 414-416. To support those claims, the operative complaint alleged that Mazzola was an employee of the firm, that Mazzola used confidential client information to transfer the firm's clients to BRPC and/or Boyd NY, and that Mazzola benefited from doing so by procuring partnership in BRPC and/or Boyd NY. R. 414-416.

The remaining claims were for corporate raiding against all of the Boyd defendants, aiding and abetting Cantor's breach of fiduciary duty against all of the Boyd defendants, unfair competition against BRPC and Boyd NY, and tortious interference with contract against all of the Boyd defendants (claims eight through eleven). R. 416-419. To support those

claims, the operative complaint alleged, in sum and substance, that the Boyd Defendants used confidential information to steal the firm's clients, misrepresented to the firm's clients that the firm could no longer service them, assisted Cantor in transferring the firm's clients to BRPC and Boyd NY, and induced Cantor to breach the 1995 agreement. R. 416-419.

F. The Boyd defendants and the Cantor defendants move to dismiss the operative complaint as against them.

The Boyd defendants and the Cantor defendants each moved to dismiss the operative complaint as against them pursuant to CPLR 3211(a). R. 383-504.

The Boyd defendants argued that the operative complaint should be dismissed for the following reasons: (1) the claims for breach of fiduciary duty and violation of New York Partnership Law were based on the allegations that the firm was a partnership and that Epstein was an equity partner in the firm, but the terms of the 1995 agreement, as well as the 2012 agreement, demonstrate that no legal partnership was ever created and that neither Epstein nor Mazzola were equity partners in the firm; (2) the claims for breach of fiduciary duty and violation of New York Partnership Law were based on the allegations that the firm was a partnership and that

Mazzola was an equity partner in the firm at the time of its dissolution, but the 2012 agreement demonstrates that Mazzola was no longer a partner in the firm at the relevant time, but rather was a W-2 employee; (3) Mazzola could not be held liable for any claims because, pursuant to the 2016 agreement, the firm released him from all claims arising from his employment with the firm; (4) the claims based on the allegation that Mazzola solicited the firm's clients after leaving the firm must be dismissed because the alleged clients referred to by Epstein were insurance company business contacts, not the firm's clients, and, under the ethical rules, Mazzola properly solicited actual clients with whom he had a previous relationship (Epstein, who practiced personal injury law, had no relationship with them), and Cantor, the firm's managing member, consented to Mazzola soliciting his previously serviced clients. R. 456-473.

Epstein opposed both the Boyd defendants' and the Cantor defendants' motions. R. 106-117, 530-575, 577-598. Epstein's main argument was that the firm was a partnership, of which he, Cantor, and Mazzola were equity partners. R. 546-551, 587-598.

G. The Supreme Court properly grants the Boyd defendants' motion.

By order dated December 11, 2020, the Supreme Court: (1) granted the

Boyd defendants' motion and dismissed the operative complaint in its entirety as against the Boyd defendants; and (2) granted in part the Cantor defendants' motion and dismissed all claims as against them, except for breach of the 1995 agreement that was asserted against only Cantor. R. 69-73.

The Supreme Court correctly determined that the 1995 agreement did not form a partnership between Epstein and Cantor because: (1) section 7.2 afforded Epstein the right to elect to become a full and equal partner, but Epstein never made that election; (2) section 6.1 provided that Epstein did not share in the losses and profits generated by the firm and that all net profits and losses generated by the firm were solely allocable to Cantor; (3) section 6.2(a) provided that Epstein received 25% of the gross income derived from his referrals and he was not permitted to manage files or perform work for the firm other than in certain limited capacities; and (4) section 5.1 did not require Epstein to make capital contributions to the firm. R. 69-72.

Based on its determination that the firm was not a partnership, the Supreme Court dismissed all claims predicated on the allegations that the firm was a partnership, and that Epstein and/or Mazzola were equity

partners. R. 72.

The Supreme Court further determined that the Boyd defendants' actions were undertaken with the consent, or at the direction of, Cantor, the firm's managing member, and that Epstein's purported losses resulted from Cantor's decision to retire and Epstein's failure to take steps to protect himself from that decision. R. 72. Based on that determination, the Supreme Court dismissed the remaining claims against the Boyd defendants. R. 72.[2]

H. Epstein moves for leave to renew and reargue his opposition to the Boyd defendants' motion to dismiss.

Over nine months later, on September 15, 2021, Epstein moved for leave to renew and reargue, among other things, his opposition to the Boyd defendants' motion to dismiss and the Cantor defendants' motion to dismiss. R. 14-15.

Epstein based his motion for leave to renew on two pieces of evidence. R. 17-18, 74-102, 198-201. First, Epstein relied on an excerpt from Cantor's deposition testimony from a separate lawsuit, taken on January 26, 2021, in which Cantor testified that the firm was a partnership, and that Epstein was

[2] Epstein's appeal from the Supreme Court's order granting the Boyd defendants' motion to dismiss is fully briefed and pending under Docket No. 2020-09376.

a non-equity partner, but not an equity partner, in the firm. R. 97-100. Second, Epstein relied on an affidavit by a former firm employee, dated August 20, 2021, in which that employee opined that the firm was a partnership, and that Cantor and Epstein were equity partners. R. 198-201.

Epstein claimed that these pieces of evidence were new and would have changed the Supreme Court's prior determination to grant the Boyd defendants' dismissal motion because they proved that the firm was a legal partnership and Epstein was an equity partner. R. 18-34, 217-223. Critically, however, Epstein failed to explain his nearly-nine-month delay in securing the employee's affidavit, which was available when he opposed dismissal, and his nearly-eight-month delay in moving based on Cantor's deposition testimony. R. 18-34, 217-223.

As to his motion for leave to reargue, Epstein argued that, in determining that the firm was not a legal partnership, the Supreme Court misinterpreted the law and overlooked several facts that, according to Epstein, demonstrated that the firm was a legal partnership. R. 223-227.

I. The Boyd defendants oppose Epstein's renewal/reargument motion.

The Boyd defendants and the Cantor defendants each opposed

Epstein's renewal/reargument motion. R. 233-380.

In opposition to Epstein's renewal motion, the Boyd defendants argued, among other things, that: (1) Epstein failed to provide a reasonable justification for the lengthy delay in making the renewal motion based on Cantor's deposition testimony; (2) Epstein failed to supply a reasonable justification for his failure to procure and submit the employee's affidavit in opposition to their motion to dismiss; (3) Epstein failed to provide a reasonable justification for the nearly-nine-month delay between the Supreme Court granting their motion to dismiss and Epstein securing the employee's affidavit; and (4) neither Cantor's deposition testimony nor the employee's affidavit would have changed the Supreme Court's prior determination to grant their motion to dismiss. R. 350-351, 361-374.

In opposition to Epstein's reargument motion, the Boyd defendants argued that the Supreme Court did not overlook any evidence in granting their motion to dismiss and the evidence cited by Epstein is insufficient to establish existence of a partnership and refute the evidence demonstrating that no partnership existed. R. 375-379.

J. The Supreme Court orders supplemental briefing to address an issue that was, ostensibly, raised during a court appearance that is not included in the record.

By order dated March 14, 2022, the Supreme Court ordered the parties to submit supplemental briefing on a particular issue. R. 766-768.

The Supreme Court explained that its original decision to grant the Boyd defendants' motion to dismiss was based on its determination that no partnership existed under the Court of Appeals' ruling in *Steinbeck v. Gerosa*, 4 N.Y.2d 302 (1958), which held that sharing in profits and losses is an indispensable element of a partnership. R. 767. Applying that rule, the Supreme Court concluded that no partnership existed because the 1995 agreement demonstrates that Cantor and Epstein did not share in the firm's profits and losses. R. 767.

According to the Supreme Court, "on reargument," Epstein "cite[d]" *Congel v. Malfitano*, 31 N.Y.3d 272 (2018)—which must have occurred during an off-the-record court appearance because this citation does not appear in any of Epstein's motion papers. R. 767. The Supreme Court interpreted *Congel* as having implicitly overruled 60 years of precedent flowing from *Steinbeck* and its progeny, and standing for the proposition that sharing profits and losses was not critical to the formulation of a partnership and

that the existence of a partnership agreement, such as the 1995 agreement, alone could be sufficient to establish the existence of a partnership, even absent sharing of profits and losses. R. 767-768. Based on that interpretation of *Congel* and its belief that *Congel* conflicts with *Steinbeck*, the Supreme Court, "upon reargument," ordered supplemental briefing to "reconcil[e]" the "Court of Appeals precedent as to the indispensability [of] profit and loss sharing." R. 768.

Epstein, the Boyd defendants, and the Cantor defendants submitted the requested supplemental briefing. R. 769-811.

K. The Supreme Court denies Epstein's motion for leave to renew but grants Epstein's motion for leave to reargue, and, upon reargument, reinstates certain claims as against Cantor.

By order dated May 3, 2022, the Supreme Court: (1) denied Epstein's motion for leave to renew; and (2) granted Epstein leave to reargue, and, upon reargument, reinstated only certain claims against Cantor, including breach of fiduciary duty, violation of New York State Partnership Law, accounting, and conversion. R. 7-13.

In denying leave to renew, the Supreme Court concluded that: (1) Cantor's deposition testimony would not have changed its prior determination because merely referring to the firm as a partnership and

calling Epstein a non-equity partner, standing alone, does not make them true; and (2) Epstein failed to provide a reasonable justification for failing to procure and submit the employee's affidavit in opposition to the Boyd defendants' motion to dismiss. R. 12-13.

However, upon reargument, the Supreme Court determined that there were several factors establishing, contrary to its initial determination, that the firm could be a partnership. R. 12. Based on that determination, the Supreme Court reinstated the claims for breach of fiduciary duty and violation of New York Partnership Law as against Cantor. R. 12-13. The Supreme Court correctly explained that the claims for breach of fiduciary duty and violation of New York Partnership Law would not be reinstated as against Mazzola because those claims were predicated on the allegation that Mazzola was an equity partner at the firm at the time of the alleged improper conduct, which was refuted by the 2012 agreement wherein Epstein acknowledged that Mazzola no longer had an equity interest in the firm and was only a W-2 employee at that time. R. 9. The Supreme Court further determined that there was no basis to reinstate any of the other claims as against the Boyd defendants. R. 9, 12-13.

Epstein appeals. R. 2.

ARGUMENT

I

The Supreme Court properly denied Epstein's renewal motion

"[A] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." *Seegopaul v. MTA Bus Co.*, 210 A.D.3d 715, 716 (2d Dep't 2022), *lv. dismissed* 39 N.Y.3d 1127 (2023). Accordingly, leave to renew may be granted only if the movant meets their burden of proffering: (1) "new facts not offered on the prior motion that would change the prior determination"; and (2) a "reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(2)-(3); *see Seegopaul*, 210 A.D.3d at 716. The determination of a motion for leave to renew is a matter committed to the sound discretion of the Supreme Court that should be overturned only if it was an "improvident[]" exercise of discretion. *Seegopaul*, 210 A.D.3d at 716.

Judged by those standards, the Supreme Court's refusal to grant Epstein leave to renew his opposition to the Boyd defendants' motion to dismiss constituted a provident exercise of discretion that should not be disturbed because Epstein failed to satisfy the elements for renewal.

To support his renewal motion, Epstein relied upon Cantor's

deposition testimony, in which Cantor stated that the firm was a partnership and that Epstein was a non-equity partner, and the employee's affidavit, in which the employee opined that the firm was a partnership of which Epstein was an equity partner. R. 17-18, 74-102, 198-201. According to Epstein, he was entitled to renewal because: (1) those materials presented new facts that demonstrate that the firm was a partnership of which he was a partner and therefore would have changed the Supreme Court's determination to grant the Boyd defendants' motion to dismiss; and (2) there was a "reasonable justification" for his failure to procure and submit those materials in opposing the Boyd defendants' motion to dismiss. *See* Epstein Brf. at 25-31.

Epstein is wrong on both accounts. Contrary to Epstein's claims, *see* Epstein Brf. at 25-31, the Supreme Court properly denied his motion for leave to renew for at least three reasons. First, Epstein failed to provide a "reasonable justification" for waiting nearly nine months to secure the employee's affidavit and for waiting nearly eight months to make a renewal motion based on Cantor's deposition testimony. Second, neither Cantor's deposition testimony nor the employee's affidavit would have changed the Supreme Court's prior determination to grant the Boyd defendants' motion to dismiss, even if considered, because an opinion that an entity is a

partnership and that someone is a partner, without more, does not make it true. Third, even if Cantor's deposition testimony or the employee's affidavit would have changed the Supreme Court's determination that the firm was not a partnership, there were alternative bases for dismissing the claims against the Boyd defendants.

A. There is no "reasonable justification" for Epstein's failure to procure and submit the employee's affidavit in opposition to the Boyd defendants' motion to dismiss or Epstein's nearly-nine-month delay in bringing his renewal motion.

As noted, a party seeking renewal must set forth a "reasonable justification" for the failure to present the facts underlying the renewal motion on the prior motion. CPLR 2221(e)(3). This "reasonable justification" requirement has been expanded to require the party seeking renewal to also provide a justification for any undue delay in bringing the renewal motion. *See Cole-Hatchard v. Grand Union*, 270 A.D.2d 447, 448 (2d Dep't 2000) ("the plaintiffs failed to offer any excuse for the seven-month delay in making the motion"); *Christ v. Solomon*, 6 A.D.3d 569, 569 (2d Dep't 2004) ("the plaintiffs failed to offer a justifiable excuse for the eight-month delay in making the motion"); *Matter of Allstate Ins. Co. v. Liberty Mut. Ins.*, 58 A.D.3d 727, 728 (2d Dep't 2009) ("the petitioner failed to offer a reasonable justification for its

eight-month delay in moving for leave to renew to correct various deficiencies in the petition"); *Matter of Tri-State Consumer Ins. Co. v. Singh*, 297 A.D.2d 349, 349 (2d Dep't 2002) ("The Supreme Court properly denied the appellant's motion for leave to renew, as it offered no reasonable excuse as to why the evidence submitted with the motion was not previously submitted in opposition to the petition. Additionally, even if the appellant's excuse was reasonable, it failed to explain the nearly five-month delay in moving to renew") (internal citations omitted); *Elgem, Inc. v. National Gypsum*, 192 A.D.2d 636, 637 (2d Dep't 1993) ("Significantly, the appellant has also failed to proffer any explanation for his 13–month delay in submitting the affidavit to the court").

Epstein did not, and cannot, meet this standard because his excuses are neither credible nor reasonable.

Epstein argues that he had a "reasonable justification" for failing to procure and submit the employee's affidavit because the employee initially refused to give him an affidavit because he did not want to voluntarily involve himself in this dispute and there was no way to subpoena the employee to provide the affidavit because the filing of the Boyd defendants' motion to dismiss stayed discovery. *See* Epstein Brf. at 26-27. But there is

nothing "reasonable" about that purported "justification" because the employee's belated about-face, in which he, suddenly and without explanation, had a change of heart and volunteered to involve himself in this action nine months after the Boyd defendants' motion to dismiss had been granted, strains credulity. It simply is not credible that the employee initially did not want to involve himself and assist in trying to avoid dismissal of the complaint, then made an about-face and volunteered to involve himself in this action to try to undo the dismissal of the complaint months later. *See Pacheco v. Halsted Communications, Ltd.*, 144 A.D.3d 768, 769-770 (2d Dep't 2016) ("The Supreme Court providently exercised its discretion in denying that branch of Halsted's motion which was for leave to renew. Halsted submitted an affidavit of its former employee setting forth his version of events surrounding the accident, which included facts not previously considered by the court. However, the justification offered by Halsted for failing to submit those facts in opposition to the plaintiff's prior cross motion was not reasonable"); *Lardo v. Rivlab Transp. Corp.*, 46 A.D.3d 759, 759-760 (2d Dep't 2007) (same).

Put simply, the explanation for the failure to supply the employee's affidavit in opposition to the Boyd defendants' motion to dismiss months

earlier is inconsistent, contradictory, and objectively unbelievable. *See Citizens Ins. Co. of Am. v. Hatzigeorgiou*, 94 A.D.3d 586, 587 (1st Dep't 2012).

Beyond that, Epstein did not even attempt to reasonably justify the undue delay in making his renewal motion. Although the Supreme Court granted the Boyd defendants' motion to dismiss on December 11, 2020, Epstein did not obtain the employee's affidavit until over eight months later, on August 20, 2021. R. 69-73, 198-201. Epstein has failed to explain the over-eight-month delay in securing the employee's affidavit—a delay that completely undercuts Epstein's argument that the justification for not securing the employee's affidavit was the stay of discovery resulting from the Boyd defendants' motion to dismiss, because that stay was lifted upon the grant of that motion and therefore did not exist during that eight-month period. Moreover, even though Cantor's deposition was taken on January 26, 2021, Epstein did not make his renewal motion until nearly eight months later, on September 15, 2021, without any explanation. R. 14-15, 74-102. Epstein's failure to offer reasonable excuses for the delays warranted the denial of Epstein's renewal motion. *See* CPLR 2221(e)(3); *Cole-Hatchard*, 270 A.D.2d at 448; *Christ*, 6 A.D.3d at 569; *Matter of Allstate Ins. Co.*, 58 A.D.3d at 728; *Matter of Tri-State Consumer Ins. Co.*, 297 A.D.2d at 349; *Elgem, Inc.*, 192

A.D.2d at 637.

B. Neither Cantor's deposition testimony nor the employee's affidavit would have changed the Supreme Court's prior determination to grant the Boyd defendants' motion to dismiss.

It is well settled that "calling an organization a partnership does not make it one." *Brodsky v. Stadlen*, 138 A.D.2d 662, 663 (2d Dep't 1988). Indeed, the fact that parties have "held themselves out as partner is not decisive" because "'calling an organization a partnership does not make it one.'" *Kyle v. Brenton*, 184 A.D.2d 1036, 1036 (4th Dep't 1992), quoting *Brodsky*, 138 A.D.2d at 663; *see Hammond v. Smith*, 151 A.D.3d 1896, 1900 (4th Dep't 2017), *lv. denied* 153 A.D.3d 1677 (4th Dep't 2017).

Applying that standard, Epstein's renewal motion was properly denied because neither Cantor's deposition testimony nor the employee's affidavit would have changed the Supreme Court's prior determination to deny the Boyd defendants' motion to dismiss. Both failed to address the critical element necessary to establish a partnership under New York law, i.e., that Cantor and Epstein shared in the firm's losses.

In his deposition testimony, Cantor testified that the firm was a partnership of which Epstein was a non-equity partner. R. 97-100. In the employee's affidavit, the employee averred that the firm was a partnership

of which Epstein was an equity partner. R. 198-201. According to Epstein, those materials would have changed the Supreme Court's prior determination to grant the Boyd defendants' dismissal motion because they conclusively proved that the firm was a legal partnership of which he was a partner. *See* Epstein Brf. at 29-31. Again, mere reference to an organization as a partnership or to people as partners, standing alone, cannot demonstrate the existence of a partnership. *See Hammond*, 151 A.D.3d at 1900; *Kyle*, 184 A.D.2d at 1036; *Brodsky*, 138 A.D.2d at 663. Moreover, the cases cited by Epstein, *see* Epstein Brf. at 29, are inapt because, in stark contrast to this case, there was no dispute in those cases that a partnership existed. *See United States v. Carlin*, 948 F. Supp. 271, 273, 276 (S.D.N.Y. 1996); *Foley v. Kaplan*, 162 A.D.2d 155, 156 (1st Dep't 1990); *Matter of Heymann (Hudacs)*, 192 A.D.2d 861, 861 (3d Dep't 1993).

Moreover, even if Cantor's deposition testimony or the employee's affidavit would have changed the Supreme Court's determination that the firm was not a partnership, there were alternative bases for dismissing the claims against the Boyd defendants.

Most fundamentally, the firm released Mazzola from liability arising out of his employment with the firm pursuant to the 2016 agreement. R. 139-

140. Specifically, the 2016 agreement stated that the firm, Mazzola, and Cantor shall "mutually release each other from all liability arising out of the employment of [Mazzola] . . . by [the firm] except for the obligations set forth in this [a]greement, professional obligations[,] and acts of undisclosed malfeasance." R. 139-140. This release alone is case determinative and dictates that none of the claims should be reinstated against the Boyd defendants, regardless of the "new" evidence. In fact, if it is ultimately determined that Cantor and Epstein were equity partners in the firm, it follows that Epstein is bound by his partner's actions, including Cantor and the firm's release of claims against Mazzola by way of the 2016 agreement. *See generally* Partnership Law § 22. Indeed, Epstein has never challenged the validity of the release and is therefore estopped by the release from bringing any claims against Mazzola. *See Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 (2011) ("a valid release constitutes a complete bar to an action on a claim which is the subject of the release") (internal quotation marks omitted).

Next, even if the firm was a partnership, there can be no dispute that Mazzola was not a partner at the relevant time. Four years prior, in the 2012 agreement, the parties agreed that Mazzola had relinquished his equity

interest in the firm and would be a W-2 employee. R. 389-390. Accordingly, even if the firm was a partnership and Epstein was a partner in 2016, Mazzola was not, and any claims predicated on Mazzola being a partner at that time therefore must fail.

Finally, even if the firm was a partnership, the remaining claims against the Boyd defendants were not predicated on the firm being a partnership and therefore the dismissal of such claims must be left undisturbed.

* * *

In sum, the Supreme Court properly denied Epstein's renewal motion because: (1) Epstein failed to provide a reasonable justification for waiting nearly nine months to secure the employee's affidavit and to make a renewal motion based on Cantor's deposition testimony; and (2) neither Cantor's deposition testimony nor the employee's affidavit would have changed the Supreme Court's prior determination to grant the Boyd defendants' motion to dismiss. *See* CPLR 2221(e).

II

The Supreme Court's determination is internally consistent

On reargument, the Supreme Court: (1) determined that the firm was a partnership; (2) reinstated the claims for breach of fiduciary duty and violation of New York Partnership Law as against only Cantor based on its determination that the firm was a partnership; and (3) declined to reinstate any of the claims as against the Boyd defendants, including the claims for breach of fiduciary duty and violation of New York Partnership Law as against Mazzola, despite its determination that the firm was a partnership. R. 9-13. Epstein argues that the decision to reinstate the claims for breach of fiduciary duty and violation of New York Partnership Law as against Cantor but not the claims against the Boyd defendants is "internally inconsistent." Epstein Brf. at 31-33. But Epstein is wrong.

The Supreme Court's newfound determination that the firm was possibly a partnership, while potentially dispositive to the claims for breach of fiduciary duty and violation of New York Partnership Law against Cantor, was not dispositive to any of the claims against the Boyd defendants. As Epstein concedes, *see* Epstein Brf. at 33, it was proper for the claims for breach of fiduciary duty and violation of New York Partnership Law to

remain dismissed as against Mazzola, despite the Supreme Court's partnership determination, because of the critical points that were just discussed—namely, the release of Mazzola from all liability, Mazzola not being a partner at the relevant time, and the dismissal of certain claims not being predicated on the existence of a partnership. Thus, for these same reasons, Epstein's claim that the Supreme Court's determination is internally inconsistent, *see* Epstein Brf. at 31-33, is patently meritless.

CONCLUSION

For all of these reasons, the order appealed from should be affirmed.

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September 19, 2024

PRINTING SPECIFICATIONS STATEMENT
Pursuant to 22 NYCRR 1250.8[j]

The foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

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Point Size:	14 point
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New York
Official Reports

KeyCite Yellow Flag - Negative Treatment
Distinguished by Krivulya v. Bay Parkway Physicians P.C., N.Y.Sup., March 21, 2022

138 A.D.2d 662, 526 N.Y.S.2d 478

Richard Brodsky, Appellant,

v.

Lewis J. Stadlen et al., Respondents.

Supreme Court, Appellate Division,
Second Department, New York
2218E
March 28, 1988

CITE TITLE AS: Brodsky v Stadlen

HEADNOTE

PARTNERSHIP
EXISTENCE OF RELATION

(1) Parties were involved in production of show; plaintiff attorney, who performed legal work, conducted negotiations and acted as general manager for production, claims that production company which produced play was partnership between three men, plaintiff and defendant coauthors --- In absence of written partnership agreement between parties, Supreme Court properly found that there was not partnership, but rather employer-employee relationship between defendant producer and plaintiff; evidence shows that plaintiff was employee who was entitled to 2% of gross profits as well as fixed salary every week show was performed during his employment; he performed legal services, ran office, and acted as general manager; there is no indication he was liable for loses of enterprise; he did, however, advance money which was repaid by defendant producer --- Certain documents which refer to production company as partnership do not establish partnership, since calling organization partnership does not make it one.

OPINION OF THE COURT

Thompson, J. P., Brown, Weinstein and Sullivan, JJ., concur.
In an action to recover damages for breach of a partnership agreement and an accounting, specific performance of that agreement, and a quantum meruit award for services rendered, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Westchester County (Walsh, J.), entered April 23, 1986, as dismissed portions of the plaintiff's complaint.

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

In 1979 the parties were involved in the production of the show "Lewis J. Stadlen as Groucho!" The defendants were the coauthors of the play. The defendant Stadlen was its producer and star, and the defendant Flinn was its director and choreographer. The plaintiff, an attorney who teaches entertainment law, performed legal work, conducted negotiations and acted as general manager for the production. The plaintiff claims that the production company which produced the play was a partnership between the three men. The defendants deny this allegation. ***663**

There is no written partnership agreement as such between the parties. Therefore, we must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties. The Supreme Court found that there was not a partnership, but rather an employer-employee relationship between the defendant Stadlen and the plaintiff. We agree.

No one characteristic of a business relationship is determinative in finding the existence of a partnership in fact *(see*, Partnership Law §11; Reuschlein & Gregory, Agency and Partnership § 262). Case law reveals a series of factors to be considered in determining whether or not there is a partnership: (1) sharing of profits, (2) sharing of losses, (3) ownership of partnership assets, (4) joint management and control, (5) joint liability to creditors, (6) intention of the parties, (7) compensation, (8) contribution of capital, and (9) loans to the organization *(see generally*, 43 NY Jur, Partnership, §§ 30-40).

The credible evidence in this case shows that the plaintiff was an employee who was entitled to 2% of gross profits as well as a fixed salary every week the show was performed during his employment. He performed legal services, ran the office, and acted as general manager. There is no indication he was liable

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for the losses of the enterprise. He did, however, advance money which was repaid by the defendant Stadlen. It has been noted that such loans of cash by one person to another for the purposes of business during the existence of the claimed relationship usually negates the notion of partnership *(Smith v. Maine*, 145 Misc 521). So too, the failure of a party to contribute capital is strongly indicative that no partnership exists *(Smith v. Maine*, supra*)*.

The plaintiff relies heavily on certain documents which refer to the production company, known as Diana Enterprises, as a partnership. It should be noted that calling an organization a partnership does not make it one. Indeed, the defendants indicated no intention to enter into a partnership arrangement with its concomitant joint management and control with the plaintiff. In fact the defendant Flinn made no management decisions and little or no contribution beyond directing the play prior to its first performance. We do not find that these documents establish a partnership.

As to plaintiff's claim that he is entitled to the quantum meruit value of his services as general manager and attorney, we disagree. The plaintiff agreed to perform legal services for out-of-pocket expenses. He in fact did so. Since the plaintiff ***664** and the defendant Stadlen agreed to this arrangement and it has been complied with, the plaintiff is not entitled to further compensation for legal services. As the play's general manager, we find that the plaintiff was an at-will employee and is not entitled to payments after his employment was terminated *(see, Mackie v. La Salle Indus.*, 92 AD2d 821, *appeal dismissed in part* 59 NY2d 750).

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New York
Official Reports

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Allen v. Devon Energy Holdings, L.L.C., Tex.App.-Hous. (1 Dist.), March 9, 2012

17 N.Y.3d 269, 952 N.E.2d 995, 929 N.Y.S.2d 3, 2011 N.Y. Slip Op. 04720

**1 Centro Empresarial Cempresa S.A. et al., Appellants

v

América Móvil, S.A.B. de C.V., et al., Respondents.

Court of Appeals of New York
93
Argued April 27, 2011

Decided June 7, 2011

CITE TITLE AS: Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 3, 2010. The Appellate Division, with two Justices dissenting, (1) reversed, on the law, an order of the Supreme Court, New York County (Richard B. Lowe, III, J.), which had denied defendants' motion to dismiss the complaint; (2) granted the motion; and (3) directed the clerk to enter judgment in favor of defendants dismissing the complaint.

Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V., 76 AD3d 310, affirmed.

HEADNOTES

Release
Scope of Release
Unknown Fraud Claims

(1) The general release (Members Release) plaintiffs granted to defendants in connection with the sale of plaintiffs' ownership interests in a company they co-owned with one of the defendants encompassed unknown fraud claims. A release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is fairly and knowingly made. The broad language of the Members Release here reached "all manner of actions . . . whatsoever . . . whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of . . . the ownership of membership interests in" the company. The phrase "all manner of actions," in conjunction with the reference to "future" and """"contingent" actions, indicated an intent to release defendants from fraud claims unknown at the time of contract. Although the parties executed, at the same time, a separate release (Master Release) that was substantially similar but expressly excluded fraud claims, that exception was not imported into the Members Release. Even assuming that the argument for including the exception, raised for the first time on appeal before the Court of Appeals, could be reached, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. If anything, the explicit exclusion of fraud claims from the Master Release suggested that the Members Release was not so limited.

Release
Scope of Release
Unknown Fraud Claims

(2) An action claiming that plaintiffs were fraudulently induced to sell their ownership interests in a company they co-owned with one of the defendants, and to release defendants from claims arising out of that ownership, was barred by the general release plaintiffs granted to defendants in connection with the sale of the ownership interests. The broad language of the release reached "all manner of actions . . . whatsoever . . . whether past, present or future, actual or contingent" arising out of the ownership of the company, and *270 encompassed unknown fraud claims. Having executed the release, plaintiffs could not subsequently claim that defendants fraudulently misled them regarding the value of their ownership interests unless the release was itself induced by a separate fraud. The fraud described in the complaint, that plaintiffs were induced to sell their interests in the company and execute the release based on defendants' false information regarding the company's value, fell squarely within the scope of the release. Although the parties had a fiduciary relationship,

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plaintiffs were sophisticated entities that negotiated and executed an extraordinarily broad release with their eyes wide open and they could not subsequently invalidate that release by claiming ignorance of the depth of their fiduciary's misconduct. Moreover, plaintiffs failed to allege that they justifiably relied on defendants' fraudulent statements in executing the release. Plaintiffs knew that defendants had not supplied them with the financial information that they needed and were entitled to, yet they chose to cash out their interests and release defendants from fraud claims without demanding either access to the information or assurances as to its accuracy.

Release
Scope of Release
Sophisticated Principal May Release Fiduciary

(3) A sophisticated principal is able to release its fiduciary from claims—at least where the fiduciary relationship is no longer one of unquestioning trust—so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into. To the extent that Appellate Division decisions such as *Littman v Magee* (54 AD3d 14, 17 [1st Dept 2008]), *Blue Chip Emerald v Allied Partners* (299 AD2d 278, 279-280 [1st Dept 2002]) and *H.W. Collections v Kolber* (256 AD2d 240, 241 [1st Dept 1998]) suggest otherwise, they misapprehend Court of Appeals case law.

RESEARCH REFERENCES

Am Jur 2d, Fraud and Deceit § 321; Am Jur 2d, Release §§ 28, 29, 31, 33, 41.

NY Jur 2d, Compromise, Accord, and Release §§ 82, 84, 93–96, 98, 99, 103, 105, 107.

Williston on Contracts (4th ed) § 73:4.

ANNOTATION REFERENCE

See ALR Index under Discharge or Release; Fraud and Deceit.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: release /s unknown /2 fraud & intent

POINTS OF COUNSEL

Fox Horan & Camerini LLP, New York City (*Kathleen M. Kundar*, *JooYun Kim* and *Jennifer A. Fischer* of counsel),for appellants.

I. In dismissing the complaint, the Appellate ***271** Division majority committed reversible error when it concluded that plaintiffs had not alleged any basis for voiding the release they had granted defendants. (*Bloss v Va'ad Harabonim of Riverdale*, 203 AD2d 36; *Littman v Magee*, 54 AD3d 14; *Lobel v Maimonides Med. Ctr.*, 39 AD3d 275; *Anger v Ford Motor Co., Dealer Dev.*, 80 AD2d 736; *Newin Corp. v Hartford Acc. & Indem. Co.*, 37 NY2d 211; *Farber v Breslin*, 47 AD3d 873; *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403; *H.W. Collections v Kolber*, 256 AD2d 240; *Madison Hudson Assoc. LLC v Neumann*, 44 AD3d 473; *Birnbaum v Birnbaum*, 73 NY2d 461; *Meinhard v Salmon*, 249 NY 458.) II. The issues argued at the Appellate Division as to dismissing the complaint on grounds other than the release should be decided in favor of plaintiffs consistent with the opinion of the dissenting Justices. (*Selinger Enters., Inc. v Cassuto*, 50 AD3d 766; *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287; *Mañas v VMS Assoc., LLC*, 53 AD3d 451; *Rich v New York Cent. & Hudson Riv. R.R. Co.*, 87 NY 382; *Albemarle Theatre v Bayberry Realty Corp.*, 27 AD2d 172; *M & T Bank Corp. v Gemstone CDO VII, Ltd.*, 23 Misc 3d 1105[A], 2009 NY Slip Op 50590 [U]; *Mandelblatt v Devon Stores*, 132 AD2d 162; *Zumpano v Quinn*, 6 NY3d 666; *General Stencils v Chiappa*, 18 NY2d 125; *Century Fed. Sav. & Loan Assn. of Long Is. v Net Realty Holding Trust*, 87 AD2d 858.)

Mayer Brown LLP (*Donald M. Falk* of the California bar, admitted pro hac vice, of counsel), *Mayer Brown LLP*, New York City (*Philip Allen Lacovara* and *Scott A. Chesin* of counsel), *Mayer Brown LLP*, Houston, Texas (*Steven R. Selsberg* of counsel), and *Mayer Brown LLP*, Chicago, Illinois (*Timothy S. Bishop* and *Joshua D. Yount* of counsel), for respondents.

I. Plaintiffs released all of their claims. (*Troy News Co. v City of Troy*, 167 AD2d 730; *Ingram Corp. v J. Ray McDermott & Co., Inc.*, 698 F2d 1295; *Erie Telecoms., Inc. v City of Erie, Pa.*, 853 F2d 1084; *Henslee v Houston*, 566 F2d 475; *RBS Holdings, Inc. v Wells Fargo Century, Inc.*, 485 F Supp 2d 472; *Cardiovascular Diagnostics Inc. v Boehringer Mannheim Corp.*, 985 F Supp 615; *Booth v 3669 Delaware*, 92 NY2d 934; *Mangini v McClurg*, 24 NY2d 556; *Rocanova*

v Equitable Life Assur. Socy. of U.S., 83 NY2d 603; *Matter of Schaefer*, 18 NY2d 314.) II. If not released, plaintiffs' claims nonetheless fail as a matter of law. (*Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88; *Arcadian Phosphates, Inc. v Arcadian Corp.*, 884 F2d 69; *Tonkery v Martina*, 78 NY2d 893; *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475; *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105; ***272** *Saint Regis Paper Co. v Hubbs & Hastings Paper Co.*, 235 NY 30; *United Press v New York Press Co.*, 164 NY 406; *Demisay v Allied Clove Lakes Co.*, 91 AD2d 1032; *Marinas of the Future v City of New York*, 87 AD2d 270; *Willmott v Giarraputo*, 5 NY2d 250.) III. Most of the causes of action must be dismissed on additional grounds. (*Krantz v Chateau Stores of Canada*, 256 AD2d 186; *Tesoro Petroleum Corp. v Holborn Oil Co.*, 108 AD2d 607; *Bridgestone/Firestone, Inc. v Recovery Credit Servs., Inc.*, 98 F3d 13; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308; *Stangel v Zhi Dan Chen*, 74 AD3d 1050; *McGee v J. Dunn Constr. Corp.*, 54 AD3d 1010; *Mañas v VMS Assoc., LLC*, 53 AD3d 451; *Selinger Enters., Inc. v Cassuto*, 50 AD3d 766; *Old Clinton Corp. v 502 Old Country Rd.*, 5 AD3d 363; *Skillgames, LLC v Brody*, 1 AD3d 247.)

OPINION OF THE COURT

Ciparick, J.

Plaintiffs claim they were fraudulently induced to sell their ownership interests in a company they co-owned with one of the defendants, and to release defendants from claims arising out of that ownership. We affirm the Appellate Division's determination that this action ****2** is barred by the release.

Plaintiffs Centro Empresarial Cempresa S.A. (Centro) and Conecel Holding Limited (CHL) allege they once owned substantial shares of an Ecuadorian telecommunications company, defendant Consorcio Ecuatoriano de Telecomunicaciones S.A. Conecel (Conecel). The complaint alleges that, in 1999, they approached defendant Carlos Slim Helú (Slim), the "moving force behind" defendant Teléfonos de México, S.A. de C.V. (Telmex México), which owned defendant AMX Ecuador LLC, then known as Telmex Wireless LLC (Telmex), about the possibility of Telmex investing in Conecel.

Through a "Master Agreement" executed in March 2000, Telmex obtained a 60% indirect interest in Conecel, while plaintiffs each retained a minority interest, all held through a new entity, defendant Telmex Wireless Ecuador LLC (TWE). In exchange for its interest, Telmex contributed $150 million to TWE and paid CHL $35 million to cancel Conecel debts. The parties simultaneously entered into various other agreements. Under the "Limited Liability Company Agreement," the members of TWE agreed that Telmex would manage accounting, tax, and record-keeping for TWE, and that TWE would provide quarterly financial statements to all its members. In the ***273** "Agreement Among Members," the members of TWE agreed that if Telmex ever consolidated —or "rolled up"—its Latin American telecommunications interests into a single entity "for purposes of selling the equity securities of such entity in international capital markets" at a time when plaintiffs owned 5% or more of TWE, plaintiffs could """"negotiate in good faith (for a period not to exceed 20 days)" to exchange their TWE units for equity shares in the new company "at a mutually satisfactory rate of exchange." The Agreement also stated that, prior to any roll-up, Telmex and TWE would provide "financial, accounting and legal information with respect to Conecel and [TWE] as may reasonably be requested." A fourth agreement, the "Put Agreement," gave plaintiffs the right to require Telmex to purchase plaintiffs' TWE units at a set "floor price" during three separate 180-day periods between March 2002 and March 2006. Plaintiffs could exercise these put options for up to 50% of their units during the 2002 period; up to 75% during the 2004 period; and up to 95% during the 2006 period.

In September 2000, Telmex México formed defendant América Móvil, S.A.B. de C.V. (América Móvil), which became the holding company for several entities, including TWE. Plaintiffs allege that, under the Agreement Among Members, this triggered their right to negotiate an exchange of their TWE units for shares in América Móvil. They allege that in March 2001 they asked defendant Daniel Hajj Aboumrad (Hajj), Slim's son-in-law and CEO of América Móvil, for financial information about Conecel and TWE for use in the contemplated negotiations. Plaintiffs assert that they never received the information, despite repeated requests. They also allege that throughout 2001 Hajj falsely represented that Conecel was financially weak and had not generated any profits to distribute to TWE.

At this point, the complaint states, plaintiffs were "wary of the threat that ****3** Defendants would never negotiate in good faith and would never distribute the Conecel profits . . . as agreed." Thus left with "no practical alternative," plaintiffs exercised the first put option in March 2002 and sold Telmex 50% of their TWE units, the maximum number allowed in the first 180-day period, for which the put agreement entitled them to over $66 million. Over the next year, plaintiffs

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allege that they repeatedly attempted to open exchange negotiations, but defendants refused to negotiate. In 2003, defendants provided Conecel's balance sheet, which indicated that the company was not doing well, and made further representations to that effect.

***274** In 2003, Telmex offered to purchase plaintiffs' remaining units at the floor price, and plaintiffs—allegedly relying on the false financial information—agreed, entitling them to additional substantial consideration. In July 2003, plaintiffs entered a Purchase Agreement with América Móvil, AM Wireless, LLC (formerly Telmex), and Wireless Ecuador LLC (formerly TWE). The parties executed various releases in connection with the sale. In the "Release for Agreement Among Members" (Members Release), the sellers released Telmex and its affiliates, shareholders, and agents from

> "all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands, liability, whatsoever, in law or equity, whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of, based upon, attributable to or resulting from the ownership of membership interests in [TWE] or having taken or failed to take any action in any capacity on behalf of [TWE] or in connection with the business of [TWE]."

A second release, the "Release for Master Agreement" (Master Release), employed nearly identical language, but added a proviso. It released the Telmex-related parties from claims,

> "relating to (A) the ownership by the Telmex Released Parties of the [TWE] Units, or (B) any matter arising under or in connection with the Master Agreement, or any other document, agreement, instrument related thereto or executed in connection therewith . . . provided that the foregoing release shall not release any claims involving fraud."

In June 2008, plaintiffs commenced this action against Telmex México and several of its affiliates: América Móvil, AMX Ecuador (formerly Telmex), Wireless Ecuador LLC (formerly TWE), Conecel, Slim, and Hajj. The complaint asserts 12 causes of action for, ****4** among other things, breach of contract, breach of fiduciary duty, fraud, and unjust enrichment. The crux of plaintiffs' claim is that defendants failed to provide them with accurate tax and financial statements for Conecel and were unwilling to negotiate in good faith for a share exchange. ***275** Plaintiffs allege that they only discovered that defendants supplied them with fraudulent information in 2008, after the Ecuadorian government audited Conecel and released the results. They seek a minimum of $900,000,000 in damages—the amount they claim they would have made if a good faith share exchange had been accomplished under the terms of the Members Agreement—plus interest.

Defendants moved to dismiss the complaint on several grounds, including that a defense is founded on documentary evidence (*see* CPLR 3211 [a] [1]) and the action is barred by a release (*see* CPLR 3211 [a] [5]). Supreme Court, ruling from the bench, denied the motion.

The Appellate Division reversed and granted the motion to dismiss, holding that plaintiffs' claims, "are barred by the general release they granted defendants in connection with the sale of their interest" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 76 AD3d 310, 311 [1st Dept 2010]). After finding that the release "includes any claim possibly to be discovered in the future that defendants had misrepresented the value of Conecel" (*id.* at 317), the court concluded that the release was not fraudulently induced, since plaintiffs failed to allege any fraud "separate and distinct" from that contemplated by the release (*id.* at 317-318). That Telmex, as the majority shareholder, owed plaintiffs a fiduciary duty did not alter the court's analysis. Further, the court noted, plaintiffs were allegedly aware that they lacked a full picture of Conecel's internal finances and that the relationship between the parties had become adversarial, yet they failed to condition the release on the truth of the information supplied by defendants, obtain representations or warranties to that effect, or insist on viewing additional information.

Two justices dissented on the ground that the release was fraudulently induced, since plaintiffs did not realize the depths of the alleged fraud and a fiduciary cannot be released from liability unless it has fully disclosed its tortious conduct (*see id.* at 329 [Catterson, J., dissenting]). The dissent emphasized that the complaint does not allege that plaintiffs had knowledge of defendants' fraud, and plaintiffs were "reasonably justified in their expectations that the defendants," as fiduciaries, "would disclose any information in their possession that might affect plaintiffs' decision on their best course of action" (*id.* at 330). Moreover, in the dissent's view, the release did not "mention[ ] or

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contemplate[ ]" fraud claims (*id.* at 331). Plaintiffs appealed as of right pursuant to CPLR 5601 (a).

***276** Plaintiffs argue that, as the Appellate Division dissent found, the Members Release was not intended to reach fraud claims. They further contend that the release itself was fraudulently induced, particularly in light of the parties' fiduciary relationship, and that their reliance on defendants' financial disclosures was justified.

Generally, "a valid release constitutes a complete bar to an action on a claim ****5** which is the subject of the release" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (*Booth v 3669 Delaware*, 92 NY2d 934, 935 [1998], quoting *Mangini v McClurg*, 24 NY2d 556, 563 [1969]). A release "should never be converted into a starting point for . . . litigation except under circumstances and under rules which would render any other result a grave injustice" (*Mangini*, 24 NY2d at 563). A release may be invalidated, however, for any of "the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake" (*id.*).

Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release "shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release" (*Fleming v Ponziani*, 24 NY2d 105, 111 [1969]). A plaintiff seeking to invalidate a release due to fraudulent inducement must "establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Global Mins.*, 35 AD3d at 98).

Notably, a release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is "fairly and knowingly made" (*Mangini*, 24 NY2d at 566-567; *Alleghany Corp. v Kirby*, 333 F2d 327, 333 [2d Cir 1964]). As the Appellate Division majority explained below (*Centro*, 76 AD3d at 318), a party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release (*see Bellefonte Re Ins. Co. v Argonaut Ins. Co.*, 757 F2d 523, 527-528 [2d Cir 1985]). Were this not the case, no party could ever settle a fraud claim with any finality.

(1) ***277** As a preliminary matter, the parties here debate whether the Members Release encompasses unknown fraud claims. We find that it does. The broad language of the release reaches "all manner of actions . . . whatsoever . . . whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members and/or arising out of . . . the ownership of membership interests in [TWE]." The phrase "all manner of actions," in conjunction with the reference to "future" and """"contingent" actions, indicates an intent to release defendants from fraud claims, like this one, unknown at the time of contract (*see Ingram Corp. v J. Ray McDermott & Co., Inc.*, 698 F2d 1295, 1312 [5th Cir 1983]; *Consorcio Prodipe, S.A. de C.V. v Vinci, S.A.*, 544 F Supp 2d 178, 192 [SD NY 2008]).

Plaintiffs note that the Master Release, executed at the same time as the Members Release, is substantially similar but expressly excludes fraud claims. They argue—apparently for the first time in their briefs before us—that the fraud exception in the Master Release should be read into the Members Release. Even assuming we can reach this argument (*see Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals*, 95 NY2d 437, 442 [2000]), "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978]). We see no reason to import the Master Release's express statement into the Members Release. If anything, the explicit exclusion of fraud claims from the Master Release suggests that the Members Release is not so limited. Plaintiffs' claims are either brought under the Agreement Among Members, under which Telmex agreed to negotiate in good faith and provide Conecel and TWE's financial information, or otherwise "aris [e] out of" their "ownership of membership interests in [TWE]." They therefore fall under the Members Release.

(2) Having executed this release, plaintiffs cannot now claim that defendants fraudulently misled them regarding the value of their ownership interests in TWE unless the release was itself induced by a separate fraud. The fraud described in the complaint, however, falls squarely within the scope of the release: plaintiffs allege that defendants supplied them with false financial information regarding the value of Conecel and TWE, and that, based on this false information, plaintiffs sold their interests in TWE and released defendants from

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claims in connection with that sale. Thus, as the Appellate Division ***278** observed: "plaintiffs seek to convert the 2003 release into a starting point for new . . . litigation, essentially asking to be relieved of the release on the ground that they did not realize the true value of the claims they were giving up" (*Centro*, 76 AD3d at 317).

That the parties had a fiduciary relationship does not alter our conclusion. It is true that Telmex, as a majority shareholder in a closely held corporation, owed a fiduciary duty to plaintiffs, minority shareholders (*see Fender v Prescott*, 64 NY2d 1077, 1079 [1985]). Telmex was therefore required to "disclose any information that could reasonably bear on plaintiffs' consideration of [its purchase] offer" (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 341 [2001]).

(3) A sophisticated principal is able to release its fiduciary from claims—at least where, as here, the fiduciary relationship is no longer one of unquestioning trust—so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into (*see Alleghany Corp.*, 333 F2d at 333 ["There is no prerequisite to the settlement of a fraud case that the (fiduciary) defendant must come forward and confess to all his wrongful acts in connection with the subject matter"]; *Consorcio Prodipe, S.A. de C.V.*, 544 F Supp 2d at 191). To the extent that Appellate Division decisions such as *Littman v Magee* (54 AD3d 14, 17 [1st Dept 2008]), *Blue Chip Emerald v Allied Partners* (299 AD2d 278, 279-280 [1st Dept 2002]) and *H.W. Collections v Kolber* (256 AD2d 240, 241 [1st Dept 1998]) suggest otherwise, they misapprehend our case law. Plaintiffs here are large corporations engaged in complex transactions in which they were advised by counsel. As sophisticated entities, they negotiated and executed an extraordinarily broad release with their eyes wide open. They cannot now invalidate that release by claiming ignorance of the depth of their fiduciary's misconduct. ****6**

(2) In addition to failing to allege that the release was induced by a separate fraud, plaintiffs have failed to allege that they justifiably relied on defendants' fraudulent statements in executing the release. As we recently reiterated:

> "[I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he ***279** must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010], quoting *Schumaker v Mather*, 133 NY 590, 596 [1892]).

Here, according to the facts alleged in the complaint, plaintiffs knew that defendants had not supplied them with the financial information necessary to properly value the TWE units, and that they were entitled to that information. Yet they chose to cash out their interests and release defendants from fraud claims without demanding either access to the information or assurances as to its accuracy in the form of representations and warranties. In short, this is an instance where plaintiffs "have been so lax in protecting themselves that they cannot fairly ask for the law's protection" (*id.* at 154).

In certain circumstances, a fiduciary's disclosure obligations might effectively operate like a written representation that no material facts are undisclosed, and this might satisfy a principal's obligation to investigate further (*see id.* at 154-155). Where a principal and fiduciary are sophisticated parties engaged in negotiations to terminate their relationship, however, the principal cannot blindly trust the fiduciary's assertions. This is particularly true where, as alleged here, the principal has actual knowledge that its fiduciary is not being entirely forthright: "[W]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy" (*Global Mins.*, 35 AD3d at 100 [citations omitted]; *see also Littman*, 54 AD3d at 17 [if the fiduciary is "aware of information that rendered (its) reliance unreasonable, or if (it) had enough information to create a duty to investigate further, the requisite reliance cannot be established"]).

Plaintiffs repeatedly and unsuccessfully attempted to hold defendants to their disclosure obligations for years before negotiating and executing the sale of their shares and the accompanying releases. Moreover, the complaint alleges that plaintiffs were driven to sell because they were "wary of the threat that Defendants would never negotiate in good faith and would never distribute the Conecel profits." Plaintiffs therefore cannot be said to have reasonably relied on defendants' assertions regarding Conecel's performance in executing the releases. ****7**

***280** In sum, the 2003 Members Release was intended to bar the very claims that plaintiffs now bring, and plaintiffs fail to allege that the release was induced by any fraud beyond that contemplated by the release. In any event, the fraudulent

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statements plaintiffs point to cannot support a conclusion that the release was fraudulently induced, since plaintiffs allege that they released defendants from claims relating to the sale of their TWE units without conducting even minimal diligence to determine the true value of what they were selling. The Appellate Division majority was therefore correct in concluding that, fully crediting plaintiffs' allegations, they would not be able to prevail as a matter of law.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Order affirmed, with costs.

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New York Official Reports

6 A.D.3d 569, 774 N.Y.S.2d 833
(Mem), 2004 N.Y. Slip Op. 02901

***1** George Christ et al., Appellants

v

Harold Solomon, Respondent.

Supreme Court, Appellate Division,
Second Department, New York
April 19, 2004

CITE TITLE AS: Christ v Solomon

HEADNOTE

Motions and Orders
Reargument or Renewal

In an action, inter alia, to recover damages for legal malpractice, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Franco, J.), dated March 21, 2003, which denied their motion for leave to renew the defendant's prior motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The Supreme Court providently exercised its discretion in denying the plaintiffs' motion for leave to renew the prior summary judgment motion, as it was based on evidence that could have been discovered earlier with due diligence (*see* CPLR 2221 [e]; *Dawkins v Long Is. R.R.,* 302 AD2d 349, 350 [2003]; *Ford v Lasky,* 300 AD2d 536, 537 [2002]). Moreover, the plaintiffs failed to offer a justifiable excuse for the eight-month delay in making the motion (*see Cole-Hatchard v Grand Union,* 270 AD2d 447, 448 [2000]).

The plaintiffs' remaining contentions are without merit (*see Martinez v City of New York,* 292 AD2d 349 [2002]). Santucci, J.P., Krausman, Schmidt and Rivera, JJ., concur.

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New York Official Reports

94 A.D.3d 586, 942 N.Y.S.2d
109, 2012 N.Y. Slip Op. 02952

**1 Citizens Insurance Co. of America, Doing Business as Hanover Insurance Group, Appellant

v

Aristotle Hatzigeorgiou, Individually and Doing Business as Play, et al., Respondents.

Supreme Court, Appellate Division,
First Department, New York
112377/08, 7435, 7436
April 19, 2012

CITE TITLE AS: Citizens Ins. Co. of Am. v Hatzigeorgiou

HEADNOTE

Motions and Orders
Reargument or Renewal
No Reasonable Justification for Insurer's Failure to Submit Notice of Disclaimer Letter on Prior Motion for Summary Judgment

Ryan & Conlon, LLP, New York (William F. Ryan of counsel), for appellant.
Pillinger Miller Tarallo, LLP, Elmsford (C. William Yanuck of counsel), for Aristotle Hatzigeorgiou, Alexandra G. Juliano, Michael Maglio, Global Entertainment Group, LLC and Play, respondents.
Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for Anna Fernandez, respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered July 9, 2010, which denied plaintiff insurer's motion for summary judgment, and, upon searching the record, granted summary judgment to defendant insureds declaring that plaintiff is obligated to defend and indemnify defendant insureds in an underlying personal injury action, and order, same court and Justice, entered July 18, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to renew, unanimously affirmed, without costs.

In its motion for summary judgment, plaintiff asserted that it *587 timely disclaimed coverage for the underlying accident by letter dated July 9, 2008. In opposition, defendants asserted that the July 9, 2008 letter was not a notice of disclaimer, but a reservation of rights, and that plaintiff did not disclaim coverage until commencing this declaratory judgment action more than two months after receiving notice of the underlying action, which was untimely as a matter of law. Supreme Court agreed with defendants and denied plaintiff's motion. Plaintiff then moved to renew based on the "new facts" that it actually sent a letter disclaiming coverage on July 16, 2008 and that it never sent the "draft" letter dated July 9, 2008.

Supreme Court properly denied the motion to renew, as plaintiff did not provide a reasonable justification for failing to present the July 16, 2008 letter on the prior motion (*see* CPLR 2221 [e] [3]; *Whalen v New York City Dept. of Envtl. Protection*, 89 AD3d 416, 417 [2011]). Plaintiff's excuse that its counsel inadvertently attached the wrong letter in its prior motion papers is unreasonable, given that, in reply to defendants' opposition to the original motion, plaintiff submitted a sworn affidavit from its agent attesting to the fact that the July 9, **2 2008 letter was the disclaimer letter sent to defendants. The agent's affidavit on renewal asserting that the July 16, 2008 letter is the actual disclaimer letter contradicts her prior sworn affidavit; accordingly, Supreme Court properly determined that the failure to submit the July 16, 2008 letter was more than mere law office failure.

Plaintiff is not entitled to summary judgment, as the July 9, 2008 letter was the only letter before the court on the original motion, and plaintiff asserts that the letter was never sent. Concur—Gonzalez, P.J., Saxe, Sweeny, Acosta and Renwick, JJ.

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New York Official Reports

270 A.D.2d 447, 705 N.Y.S.2d
605, 2000 N.Y. Slip Op. 02798

Mildred Cole-Hatchard et al., Respondents,

v.

Grand Union, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
1999-03329
(March 27, 2000)

CITE TITLE AS: Cole-Hatchard v Grand Union

HEADNOTE

MOTIONS AND ORDERS
REARGUMENT OR RENEWAL

(1) In action to recover damages for personal injuries, order which granted plaintiffs' motion, in effect, for renewal, and, upon renewal, vacated previous order granting motion for summary judgment dismissing complaint reversed, motion denied and complaint dismissed--motion for leave to renew must be based upon new or additional facts which, although in existence at time of original motion, were not known to party seeking renewal, and, therefore, were not made known to court; although leave to renew may be granted in trial court's discretion even where additional facts were known to party seeking renewal at time of original motion, leave to renew should be denied unless moving party offers reasonable excuse as to why additional facts were not submitted on original application; while law office failure can be accepted as reasonable excuse in exercise of court's sound discretion, movant must submit supporting facts to explain and justify default and mere neglect is not accepted as reasonable excuse--plaintiffs' proffered excuse, that eyewitness to accident was not contacted because his name was inadvertently not included in investigation file of plaintiffs' counsel, may be sufficient to explain counsel's failure to contact eyewitness at outset of case; however, that excuse is insufficient to explain why counsel failed to contact eyewitness after depositions revealed his identity and upon receipt of summary judgment motion; moreover, plaintiffs failed to offer any excuse for seven-month delay in making motion, in effect, for renewal; accordingly, Supreme Court improvidently exercised its discretion in granting leave to renew.

In an action to recover damages for personal injuries, etc., the defendant appeals from an order of the Supreme Court, Rockland County (Weiner, J.), dated March 1, 1999, which granted the plaintiffs' motion, in effect, for renewal, and, upon renewal, vacated its previous order dated April 1, 1998, granting the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, the motion is denied, the order dated April 1, 1998, is reinstated, and the complaint is dismissed.

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 known to the party seeking renewal, and, therefore, were not made known to the court (*see, Matter of Shapiro v New York,* 259 AD2d 753). Although leave to renew may be granted in the trial court's discretion even where the additional facts were known to the party seeking renewal at the time of the original motion (*see, Perla Assocs. v Ginsberg,* 256 AD2d 303; *Oremland v Miller Minutemen Constr. Corp.,* 133 AD2d 816), "[l]eave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application" (*Matter of Shapiro v New York, supra,* at 754). While law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion (*see,* CPLR 2005), the movant must submit supporting facts to explain and justify the default (*see, Bravo v New York City Hous. Auth.,* 253 AD2d 510) and mere neglect is not accepted as a reasonable excuse (*see, De Vito v Marine Midland Bank,* 100 AD2d 530). ***448**

The plaintiffs' proffered excuse, that an eyewitness to the accident was not contacted because his name was inadvertently not included in the investigation file of the plaintiffs' counsel, may be sufficient to explain counsel's failure to contact the eyewitness at the outset of the case. However, that excuse is insufficient to explain why counsel failed to contact the eyewitness after depositions revealed his identity and upon receipt of the summary judgment motion. Moreover, the plaintiffs failed to offer any excuse for

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the seven-month delay in making the motion, in effect, for renewal. Accordingly, under the circumstances of this case, the Supreme Court improvidently exercised its discretion in granting leave to renew.

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

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New York Official Reports

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Distinguished by Wiener v. Weissman, N.Y.A.D. 1 Dept., September 25, 2018

31 N.Y.3d 272, 101 N.E.3d 341, 76
N.Y.S.3d 873, 2018 N.Y. Slip Op. 02119

****1** Robert J. Congel et al., as Members of the Executive Committee of, and on Behalf of, Poughkeepsie Galleria Company, Respondents,

v

Marc A. Malfitano, Appellant.

Court of Appeals of New York
30
Argued February 13, 2018

Decided March 27, 2018

CITE TITLE AS: Congel v Malfitano

SUMMARY

Appeal, by permission of the Court of Appeals, from a second amended judgment of the Supreme Court, Dutchess County (Charles D. Wood, J.), entered August 15, 2016. The Supreme Court, upon remittal from the Appellate Division of the Supreme Court in the Second Judicial Department, (1) applied a minority discount to reduce defendant's interest in the Poughkeepsie Galleria Company, a New York general partnership, to $911,072.50; (2) ruled that plaintiffs were entitled to damages in the amount of $1,822,460.25, which included $1,596,157.50 in legal and expert fees plus statutory interest; (3) set a fixed amount to be recovered by plaintiffs of $911,387.75; and (4) directed the clerk of the court to enter judgment. The appeal brings up for review two prior nonfinal orders of that Appellate Division entered April 21, 2009, and one entered May 18, 2016.

The first order entered April 21, 2009, modified, on the law, so much of an order of that Supreme Court (James D. Pagones, J.) as had (1) denied defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action; and (2) granted those branches of plaintiffs' motion which were to cancel a notice of pendency and for an award of costs and disbursements occasioned by the filing and cancellation of the notice of pendency in an amount to be determined by a referee, with defendant to bear the cost of the referee's fee. The modification consisted of (1) deleting the provision granting that branch of plaintiffs' motion which was for an award of costs and disbursements occasioned by the filing and cancellation of the notice of pendency in an amount to be determined by a referee and substituting a provision therefor denying that branch of plaintiffs' motion; and (2) deleting the provision directing defendant to bear the cost of the referee's fee and substituting a provision therefor directing plaintiffs to pay one half of the referee's fee and defendant to pay one half of the referee's fee. The Appellate Division affirmed the order as modified.

The second order entered April 21, 2009, (1) affirmed so much of an order of that Supreme Court (James D. Pagones, J.) as ***273** had (a) granted those branches of plaintiffs' motion which were for summary judgment on the first cause of action declaring that defendant wrongfully dissolved the Poughkeepsie Galleria Company Partnership and on the issue of liability on the second cause of action to recover damages for breach of contract, and dismissing the first, second and fourth counterclaims; (b) denied defendant's cross motion for summary judgment; and (c) denied his separate motion to be "treated as a partner of Poughkeepsie Galleria Company"; (2) remitted the matter to the Supreme Court for further proceedings on the issue of damages on the second cause of action and the entry of a judgment declaring that defendant wrongfully dissolved the Poughkeepsie Galleria Company Partnership.

The order entered May 18, 2016, (1) modified, on the law and the facts, an amended judgment of that Supreme Court (Charles D. Wood, J.), which had (a) declared that defendant wrongfully dissolved the Poughkeepsie Galleria Company Partnership; (b) declared that he breached the Poughkeepsie Galleria Company Partnership agreement; and (c) entered judgment in favor of defendant and against plaintiffs in the principal sum of $857,164.75; (2) affirmed, insofar as appealed and cross-appealed from, the amended judgment as modified; and (3) remitted the matter to the Supreme Court for a new calculation of damages that incorporated a 66% minority discount applied to the value of defendant's interest in the partnership and for entry of an appropriate second amended judgment thereafter. The modification consisted of deleting the provision in favor of defendant and against plaintiffs in the principal sum of $857,164.75.

Congel v Malfitano, 61 AD3d 807, modified.

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Congel v Malfitano, 61 AD3d 810, modified.

Congel v Malfitano, 141 AD3d 64, modified.

HEADNOTES

Partnership
Dissolution
Wrongful Dissolution—Definite Term or Particular Undertaking Specified in Agreement

(1) In a breach of contract action seeking a declaratory ruling that defendant minority partner wrongfully dissolved the partnership by withdrawing from and unilaterally electing to dissolve it, the lower courts erred in applying Partnership Law § 62 (1) (b) in finding that the dissolution breached the partnership agreement, as the agreement clearly specified under what terms the partnership could be dissolved and therefore did not intend for an "at will" partnership. Partnership Law § 62 (1) (b) states that a partner may unilaterally dissolve a partnership, without violating the partnership agreement, ***274** if "no definite term or particular undertaking is specified" in the agreement and the partnership is therefore "at will." However, parties to a partnership agreement generally have the right to contract around a provision of the Partnership Law, provided they do so in language that is clear, unequivocal and unambiguous. Therefore, dissolution does not violate a partnership agreement if it occurs "[b]y the termination of the definite term or particular undertaking specified in the agreement" (Partnership Law § 62 [1] [a]). The agreement stated that the partnership "shall continue until it is terminated as hereinafter provided," and, in a subsequent provision, stated that the partnership would dissolve upon "[t]he election by the partners to dissolve the [p]artnership" or "[t]he happening of any event which makes it unlawful for the business of the [p]artnership to be carried on or for the [p]artners to carry it on in [p]artnership." The partners clearly intended that the methods provided in the agreement for dissolution were the only methods whereby the partnership would dissolve in accordance with the agreement, and by implication that unilateral dissolution would breach the agreement. The lower courts' conclusion that defendant's dissolution was wrongful, however, was correct. The breach was clear from the agreement alone.

Partnership
Dissolution
Wrongful Dissolution—Attorneys' Fees

(2) In a breach of contract action seeking a declaratory ruling that defendant minority partner had wrongfully dissolved the partnership by withdrawing from and unilaterally electing to dissolve it, plaintiff remaining partners were not entitled to collect attorneys' or experts' fees with respect to their lawsuit from defendant as part of their "damages for breach of the agreement" under Partnership Law § 69 (2) (a) (II). To award fees to plaintiffs would contradict New York's well-established adoption of the American Rule that the prevailing litigant ordinarily cannot collect attorneys' fees from its unsuccessful opponents. Attorneys' fees are treated as incidents of litigation, rather than damages. The exception is when an award is authorized by agreement between the parties or by statute or court rule, but plaintiffs pointed to no provision within the agreement or the Partnership Law authorizing such an exception to the American Rule here. There is a distinction between, on the one hand, legal fees incurred in prosecuting or defending a successful civil lawsuit and, on the other hand, legal fees, in the nature of damages, incurred in carrying out separate acts necessitated by the breach.

Partnership
Dissolution
Wrongful Dissolution—Goodwill Deduction

(3) In a breach of contract action arising from defendant minority partner's wrongful dissolution of the partnership, the lower courts' assessment of a goodwill deduction against defendant's interest in the partnership pursuant to Partnership Law § 69 (2) (c) (II) was supported by evidence in the record, and the Court of Appeals therefore lacked power to review that factual determination. Partnership Law § 69 (2) (c) (II) gives a partner who dissolves a partnership in contravention of the partnership agreement the right "to have the value of his [or her] interest in the partnership, less any damages caused to his [or her] copartners by the dissolution, ascertained and paid" in cash. However, any goodwill component in the value of the partner's interest must be deducted. Goodwill is an intangible asset of a business, corresponding in this context to what a buyer would pay for the business, over and above its value as a mere sum of tangible assets, because of the patronage and support of regular customers. Although no goodwill value was reflected in the books or financial

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statements of the partnership, which had been formed for the ***275** ownership, operation, and management of a shopping mall, lack of goodwill does not follow as a matter of law from that circumstance. The trial court found, based on the expert testimony and other evidence, that the shopping mall and the mall's tenants attracted regular, loyal shoppers, and there was record support for the affirmed finding that the value of the partnership included, in addition to its real property and cash, a goodwill component.

Appeal
Preservation of Issue for Review
Marketability Discount after Wrongful Dissolution of Partnership

(4) In a breach of contract action arising from defendant minority partner's wrongful dissolution of the partnership, defendant failed to preserve any challenge to the lower courts' application of a marketability discount to the value of his partnership interest. At trial, defendant's expert conceded that a marketability discount would apply and defendant did not depart from that in his posttrial motion papers. The parties' dispute before the trial court was over the percentage. Because the broader issue was not preserved, the application of the marketability discount was not properly before the Court of Appeals.

Partnership
Dissolution
Wrongful Dissolution—Minority Discount

(5) In a breach of contract action arising from defendant minority partner's wrongful dissolution of the partnership in which plaintiff remaining partners continued the business under Partnership Law § 69 (2) (b), a minority discount was properly applied in calculating defendant's partnership interest pursuant to Partnership Law § 69 (2) (c) (II). A minority discount is a standard tool in valuation of a financial interest, designed to reflect the fact that the price an investor is willing to pay for a minority ownership interest in a business, whether a corporation or a partnership, is less because the owner of a minority interest lacks control of the business. Partnership Law § 69 (2) (c) (II) contemplates a valuation of a wrongfully dissolving partner's interest based on treating the partnership as a going concern, rather than an asset to be liquidated. In other words, the statute does not contemplate a valuation of the entire business as if it were being sold on the open market, but rather a determination of the fair market value of the wrongfully dissolving partner's interest as if that interest were being sold piecemeal and the rest of the business continuing as a going concern. Given that the focus is on one partner's interest in a persisting concern, a minority discount was applicable because a minority interest is worth less to anyone buying that interest alone.

RESEARCH REFERENCES

Am Jur 2d Partnership §§ 351, 353, 358, 374, 560, 568, 661, 707, 737.

Carmody-Wait 2d Actions and Proceedings by or Against, or in Reference to, Partnerships and Associations §§ 122:7, 122:39, 122:73, 122:76, 122:80, 122:84, 122:86, 122:95.

McKinney's, Partnership Law §§ 62 (1) (a), (b); 69 (2) (b), (c) (II).

NY Jur 2d Business Relationships §§ 1170, 1598, 1776, ***276** 1798, 1801, 1804–1805, 1830, 1838, 1850, 1912, 1991, 2361.

ANNOTATION REFERENCE

Actions at law between partners and partnerships. 168 ALR 119.

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POINTS OF COUNSEL

Harris Beach PLLC, Albany (*Victoria A. Graffeo* and *Aubrey A. Ohanian* of counsel), for appellant.
I. Marc A. Malfitano did not engage in a wrongful dissolution of the partnership because the partnership agreement lacked a definite term or a particular undertaking under Partnership Law § 62. (*People v Favor*, 82 NY2d 254; *Vandenbark v Owens-Illinois Glass Co.*, 311 US 538; *Matter of Americorp Sec. v Sager*, 239 AD2d 115; *Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184; *Gager v White*, 53 NY2d 475; *Tropeano*

v Dorman, 441 F3d 69.) II. The partnership is not entitled to recover counsel fees in this breach of contract action because neither the governing contract nor any statute allows for such recovery. (*Hunt v Sharp*, 85 NY2d 883; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12; *Alyeska Pipeline Service Co. v Wilderness Society*, 421 US 240; *Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28; *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1; *Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375; *Millman v Brownlee*, 133 AD2d 221; *National Union Fire Ins. Co. of Pittsburgh, PA v Odyssey Reins. Co.*, 143 AD3d 626; *Chicago Tit. Ins. Co. v LaPierre*, 140 AD3d 821; *Halstead v Fournia*, 134 AD3d 1269.) III. Section 69 of the Partnership Law does not entitle the partnership to diminish the value of Marc A. Malfitano's partnership interest by applying a minority discount, marketability discount, or goodwill reduction. (*Grunfeld v Grunfeld*, 255 AD2d 12; *Cohen v Cohen*, 279 AD2d 599; *Matter of Cinque v Largo Enters. of Suffolk County*, 212 AD2d 608; *Kaplan v Schachter & Co.*, 261 AD2d 440; *Matter of Brown*, 242 NY 1; *Dawson v White & Case*, 88 NY2d 666; *Saltzstein v Payne, Wood & Littlejohn*, 292 AD2d 585; *Siddall v Keating*, 8 AD2d 44, 7 NY2d 846; *Matter of Friedman v Beway Realty Corp.*, 87 NY2d 161; *Matter of Penepent Corp.*, 96 NY2d 186.)

***277** *Gibson, Dunn & Crutcher LLP*, New York City (*Caitlin J. Halligan* and *Lee R. Crain* of counsel), and *Goodwin Procter LLP*, New York City (*Anthony A. Fiotto* and *Emily Unger* of counsel), for respondents.

I. Partnership Law § 62 does not nullify the partnership agreement's detailed dissolution provisions by rendering the partnership dissolvable at will. (*Sterling v Sterling*, 21 AD3d 663; *Dawson v White & Case*, 88 NY2d 666; *Ederer v Gursky*, 9 NY3d 514; *Lanier v Bowdoin*, 282 NY 32; *Corr v Hoffman*, 256 NY 254; *Riviera Congress Assoc. v Yassky*, 18 NY2d 540; *In re Popkin & Stern*, 340 F3d 709; *Dental Health Assoc. v Zangeneh*, 34 AD3d 622; *Napoli v Domnitch*, 18 AD2d 707; *Gelman v Buehler*, 20 NY3d 534.) II. The Appellate Division correctly valued Marc A. Malfitano's partnership interest. (*Better Living Now, Inc. v Image Too, Inc.*, 67 AD3d 940; *Hooker Chems. & Plastics Corp. v International Mins. & Chem. Corp.*, 90 AD2d 991; *Scholastic, Inc. v Harris*, 259 F3d 73; *Cahill v Haff*, 248 NY 377; *Cohen v Cohen*, 279 AD2d 599; *Matter of Brown*, 242 NY 1; *Spaulding v Benenati*, 57 NY2d 418; *Dawson v White & Case*, 88 NY2d 666; *Matter of Cinque v Largo Enters. of Suffolk County*, 212 AD2d 608; *Matter of Murphy v United States Dredging Corp.*, 74 AD3d 815.) III. The Appellate Division properly affirmed the award of damages for costs directly occasioned by Marc A. Malfitano's breach of the partnership agreement. (*BGW Dev. Corp. v Mount Kisco Lodge*, 264 AD2d 433; *Aero Garage Corp. v Hirschfeld*, 185 AD2d 775; *City of Elmira v Larry Walter, Inc.*, 150 AD2d 129; *DePinto v Rosenthal & Curry*, 237 AD2d 482.)

Stroock & Stroock & Lavan LLP, New York City (*Claude G. Szyfer* and *Michele L. Pahmer* of counsel), for The Real Estate Roundtable and others, amici curiae.

I. Partnership agreements should be enforced in accordance with their express terms. (*Lanier v Bowdoin*, 282 NY 32; *Gelman v Buehler*, 20 NY3d 534.) II. Application of marketability and minority discounts is appropriate when valuing the interest of a partner who wrongfully withdraws. (*Matter of Murphy v United States Dredging Corp.*, 74 AD3d 815; *Matter of Giaimo v Vitale*, 101 AD3d 523; *Matter of Friedman v Beway Realty Corp.*, 87 NY2d 161; *Vick v Albert*, 47 AD3d 482.) III. The lower courts properly excluded Poughkeepsie Galleria Company's goodwill in valuing appellant's interest in recognition of the fact that shopping centers can have goodwill. (*Metropolitan Bank v St. Louis Dispatch Co.*, 149 US 436; *Haberle Crystal Springs Brewing Co. v Clarke*, 30 F2d 219.)

Holland & Knight LLP, New York City (*Martin P. Miner* and ***278** *Stosh M. Silivos* of counsel), and *Faegre Baker Daniels LLP*, Chicago, Illinois (*Barry B. Nekritz, J. William Callison* and *Melissa Economy* of counsel), for American College of Real Estate Lawyers, amicus curiae.

I. Partnership agreements govern the partnership relationship and the Uniform Partnership Act serves only as a gap filler which is inapplicable here. (*Silverman v Caplin*, 150 AD2d 673; *Cole v Macklowe*, 99 AD3d 595; *Dental Health Assoc. v Zangeneh*, 34 AD3d 622; *Ederer v Gursky*, 9 NY3d 514; *Gelman v Buehler*, 20 NY3d 534.) II. The dissolution and exit provisions in the Poughkeepsie Galleria Company partnership agreement are clear and should be enforced without the use of gap fillers. (*Gelman v Buehler*, 20 NY3d 534; *Kaufman v Cohen*, 307 AD2d 113.)

Whiteman Osterman & Hanna LLP, Albany (*John R. Dunne* of counsel), for Daniel Kleinberger and others, amici curiae.

I. A general partnership is fundamentally a voluntary association, with its internal affairs governed by a contract among the associated partners, and under the Uniform Partnership Act the partnership agreement is the primary source of rules governing the partners' inter se relationships. (*Martin v Peyton*, 246 NY 213; *Levy v Leavitt*, 257 NY 461; *Lanier v Bowdoin*, 282 NY 32.) II. Nothing in the text or comments to the Uniform Partnership Act supports appellant's consideration of the rightful/wrongful dissolution issue as an exception to the general rule that a general partnership is a voluntary business organization in which

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the relations inter se the partners are primarily governed by their partnership agreement. III. Appellant's "magic words" approach for displacing Uniform Partnership Act (UPA) default rules has no support in the UPA and does violence to the contractual nature of a UPA partnership. (*C.U. Annuity Serv. Corp. v Young*, 281 AD2d 292; *Schiffer v Slomin's*, 39 Misc 3d 414, 40 Misc 3d 884, 48 Misc 3d 15; *Wood v Duff-Gordon*, 222 NY 88; *Cooper v Isaacs*, 448 F2d 1202.) IV. The rightful/wrongful dissolution issue presents New York an important opportunity to advance the Uniform Partnership Act's goal of uniformity. (*Burger, Kurzman, Kaplan & Stuchin v Kurzman*, 139 AD2d 422; *In re Popkin & Stern*, 340 F3d 709.)

OPINION OF THE COURT

Fahey, J.

A partnership is a voluntary, contractual association in which persons carry on a business for profit as co-owners. In the agreement establishing a partnership, the partners can chart ***279** their own course. New York's Partnership Law creates default provisions that fill gaps in partnership agreements, but where the agreement clearly states the means by which a partnership will dissolve, or other aspects of partnership dissolution, it is the agreement that governs the change in relations between partners and the future of the business. We hold that the partnership agreement in this case dictates the conclusion that defendant Marc A. Malfitano, a partner, wrongfully dissolved the partnership, but we conclude that it was error to include the legal fees incurred by the remaining partners in the damages owed to them by defendant. In other respects, we uphold the Appellate Division's valuation of defendant's interest in the partnership.

I. **2

In 1985, defendant and seven others entered into a written agreement (the agreement) to form a general partnership known as "Poughkeepsie Galleria Company" (the Partnership), for the ownership, operation, and management of a shopping mall. The mall opened in 1987 and continues to operate today. Defendant initially had a 2.25% ownership interest in the Partnership, which increased to 3.08% by the mid-2000s. In addition to the minority partners, the Partnership had a majority owner, Moselle Associates, which controlled a little over 56% of the Partnership.

The agreement provided that the Partnership "shall continue until it is terminated as hereinafter provided." In a subsequent provision, the agreement stated that the Partnership would dissolve upon "[t]he election by the Partners to dissolve the Partnership" or "[t]he happening of any event which makes it unlawful for the business of the Partnership to be carried on or for the Partners to carry it on in Partnership."

The agreement further stated that "[a]ll decisions to be made by the Partners shall be made by the casting of votes at a meeting of such Partners" and that "[t]he affirmative vote of no less than fifty-one percent (51%)" of the partners "shall be required to approve any matter presented for decision." Day-to-day control of the Partnership was vested in a three-member Executive Committee, comprised of Robert J. Congel, Bruce A. Kenan, and James A. Tuozzolo, the plaintiffs in this case. The Executive Committee had "the exclusive right to manage the business of the Partnership," although a majority of partners had the authority to "overrule or modify" the Committee's decisions, ***280** "withdraw or modify" any power granted to the Committee, or remove its members.

In the mid-2000s, defendant decided to withdraw from the Partnership. Defendant asserts that certain conduct by plaintiffs related to the Partnership troubled him, and that when he challenged plaintiffs, they did not address his concerns. He explored the option of a buyout of his interest, but negotiations failed.

On November 24, 2006, defendant wrote to his partners: "[I]n accordance with Section 62 (1)(b) of the Partnership Law, and as a general partner of the Partnership I hereby elect to dissolve the Partnership and by this notice the Partnership is hereby dissolved."

Partnership Law § 62 (1) (b) states that a partner may unilaterally dissolve a partnership, without violating the partnership agreement, if "no definite term or particular undertaking is specified" in the agreement and the partnership is therefore "at will." Defendant insisted that his partners were compelled to liquidate. The Partnership was in the process of negotiating a mortgage refinancing, and defendant recorded a notice of pendency on the Poughkeepsie Galleria property.

The partners took the position that defendant had wrongfully dissolved the Partnership,[1] and they continued the business, in the same name as before, pursuant to Partnership Law § 69 (2) (b). That provision states, with certain conditions, that when dissolution is caused in violation of a partnership agreement, "[t]he partners who have not caused

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the dissolution wrongfully, if they all desire to continue the business in the same name . . . may do so, during the agreed term for the partnership and for that purpose may possess the partnership property." ****3**

In January 2007, plaintiffs, as the Partnership's Executive Committee and on behalf of the Partnership, commenced this breach of contract action, seeking a declaratory ruling that defendant had wrongfully dissolved the Partnership, as well as damages. Plaintiffs also moved for an order canceling the notice ***281** of pendency. It was only after the lawsuit was commenced that a mortgage lender was willing to proceed with refinancing of the mall.

Defendant answered and interposed several counterclaims, including the allegation that the dissolution precluded the Partnership from refinancing or taking any business actions other than winding up, and a claim for judicial dissolution under Partnership Law § 63 (1).[2] Defendant also cross-moved to dismiss the complaint under CPLR 3211 (a) (7) for failure to state a cause of action, insisting that the Partnership qualified as an "at-will" partnership, which can be dissolved without violation of the partnership agreement, under Partnership Law § 62 (1) (b).

After Supreme Court denied defendant's cross motion to dismiss and canceled the notice of pendency, plaintiffs moved for summary judgment on their wrongful dissolution and breach of contract claims, asserting that the agreement provided for only two methods whereby the Partnership would dissolve without violation of the agreement, and that defendant's unilateral dissolution breached the agreement. Defendant cross-moved for summary judgment.

Supreme Court granted summary judgment to plaintiffs, holding that the Partnership was not an "at-will" partnership, because it specified a "particular undertaking" within the meaning of Partnership Law § 62 (1) (b), and that defendant's dissolution of the Partnership breached the agreement. Supreme Court dismissed defendant's counterclaims, including his claim for judicial dissolution, and denied his cross motion for summary judgment.

In April 2009, the Appellate Division upheld Supreme Court's ruling on the wrongfulness of the dissolution, albeit on different grounds, finding that the agreement specified a "definite term" or temporal limit under Partnership Law § 62 (1) (b) (61 AD3d 807, 808-809 [2d Dept 2009]). In a separate order issued on the same date, the Appellate Division affirmed Supreme Court's order granting summary judgment to plaintiffs, holding that plaintiffs had satisfied their prima facie burden of ***282** showing that defendant had dissolved the Partnership in contravention of the agreement, and that defendant had failed to raise a triable issue of fact (61 AD3d 810, 811 [2d Dept 2009]). The Appellate Division also affirmed dismissal of defendant's counterclaims, including his judicial dissolution claim (61 AD3d at 812). The Appellate Division remitted for further proceedings on, among other things, the issue of damages for breach of contract (*id.*).

On remittal in Supreme Court, defendant moved for partial summary judgment, seeking a declaration that plaintiffs were not entitled to attorneys' fees related to their lawsuit. In response, plaintiffs contended that they were entitled to fees on any actions they were compelled to take so as to avoid liquidation. They sought $2,717,314.50 in attorneys' fees and $79,705.50 in experts' fees.

Supreme Court ruled that plaintiffs were entitled to attorneys' fees and experts' fees, as part of their damages, reasoning that those costs "are not incidental to the litigation" but instead are "damages caused by the defendant's breach" of the agreement. However, Supreme Court did not award the full amount of attorneys' fees sought, awarding $1,516,452 in attorneys' fees, as well as experts' fees in the requested amount.

Partnership Law § 69 (2) (c) (II) states that when a partner dissolves a partnership in contravention of the partnership agreement, and the remaining partners continue the business in the same name, the dissolving partner has

> ****4** "the right as against his copartners . . . to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered."

Consequently, in November 2011, Supreme Court conducted a bench trial to establish the value of defendant's interest in the Partnership, taking into account the value of goodwill, and the amount of damages, if any, that defendant owed to plaintiffs. At the outset of trial, the parties stipulated that the value of defendant's interest in the Partnership as of November 24, 2006 was $4,850,000.

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***283** Both parties offered expert witness testimony on the applicability and amounts of certain deductions in value, including whether the stipulated value of defendant's interest in the Partnership included a component of goodwill, for which a deduction would be required under Partnership Law § 69 (2) (c) (II), and whether defendant's interest should be reduced to account for lack of marketability, in light of the absence of a readily available market to sell the partnership interest, and to account for his status as a minority partner.

Plaintiffs' valuation expert testified that the value of the Partnership contained goodwill of 44%, by which amount the value of defendant's interest should be proportionately reduced, and that his interest should be further reduced by, successively, a marketability discount of 35% and a minority discount of 66%. In testifying that a minority discount was applicable, based upon defendant's lack of control in the Partnership, the expert witness emphasized what he described as "draconian" restrictions on transferability under the agreement, and in particular a provision, which the expert testified he had never before seen in his 40-year career, that if a partner sold his or her interest, then for five years after the date of sale, the partner would be jointly and severally liable, with the buyer, for any capital costs. The expert testified that this restriction was relevant not only to the marketability of defendant's interest, but also to the minority status of the interest, in that a minority owner has no say in whether there would be a capital call.

Defendant's valuation expert testified that the Partnership—as a real estate holding company—did not have goodwill, but conceded that he did not regularly value assets of that type. The expert witness further testified that he had been "advised, under the relevant statutes, that a minority discount was not applicable," adding that while a minority discount "would be applicable" if the court were determining "fair market value," it did not apply when determining "fair value." Because of this "advice," the expert witness did not argue, in the alternative, that the amount of the minority discount proposed by plaintiffs' expert, i.e., 66%, was unreasonable or in error.

Conversely, defendant's expert did not contest that a marketability discount would apply, but valued it at 25%, rather than 35%. Notably, in posttrial papers, defendant failed to preserve any general objection to the marketability discount as legally inapplicable, focusing instead on the amount of that discount.

***284** A second plaintiffs' witness testified about plaintiffs' legal fees, insisting that the fees had been incurred as a direct result of defendant's wrongful dissolution, including time and labor required to prevent the consequences that would have ensued if the dissolution had not been deemed wrongful. Defendant himself testified, and challenged the inclusion of plaintiffs' legal fees as damages.

Supreme Court ruled that the stipulated value of $4,850,000 would be reduced by 15% or $727,500 to represent the value of the Partnership's goodwill. The trial court reasoned "that the partnership does indeed possess goodwill of its own," because the mall "and its tenants attract regular, loyal shoppers, which point towards the existence of some goodwill." The trial court explained that "[a] potential purchaser of the Poughkeepsie Galleria would more than likely pay more for an established going concern that already has tenant retail stores that attract a loyal customer base," and in this manner "would pay extra for the acquisition of goodwill." However, the court disagreed with plaintiffs' figure of 44% for the goodwill deduction, and concluded that "the 'premium' a buyer would likely pay for goodwill under the facts of this case . . . is 15%." ****5**

Next, Supreme Court applied a 35% or $1,442,875 marketability discount, to the stipulated value as reduced by goodwill, to account for the limited marketability of defendant's interest, generating a discounted value of $2,679,625. The trial court explained that it had taken into consideration all factors inhibiting transfer of defendant's partnership interest "resulting from a limited market." However, the trial court declined to apply a minority discount, citing cases that have barred the use of a minority discount in evaluation of a minority shareholder's stock in a closely held corporation.

Finally, Supreme Court ruled that defendant owed damages in the amount of $1,516,452 in plaintiffs' attorneys' fees and $79,705.50 in plaintiffs' experts' fees. The trial court reasoned that the Partnership was required "to incur enormous legal fees" to avoid the "devastating consequence" of a forced liquidation, and wrote that, although "[b]oth parties contributed to the litigious nature of this case," defendant was "clearly much more responsible than the plaintiffs."

The net result was a judgment in favor of defendant and against plaintiffs in the amount of $1,083,467.50, to be reduced ***285** by prejudgment interest of 9% in favor

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of plaintiffs on the fees award.[3] Defendant appealed, and plaintiffs cross-appealed.

Defendant contended, among other things, that the Appellate Division should overturn its 2009 rulings holding that he had wrongfully dissolved the Partnership, in light of this Court's decision in *Gelman v Buehler* (20 NY3d 534 [2013]), which provides a detailed analysis of the nature of an "at-will" partnership.[4] For their part, plaintiffs contended, among other things, that a minority discount should have been applied to the valuation of defendant's interest in the Partnership.

In May 2016, the Appellate Division modified Supreme Court's judgment, by deleting the provision in favor of defendant and against plaintiffs, affirmed as modified, and remitted to the trial court for a new calculation incorporating a 66% minority discount, applied to the discounted value of defendant's interest in the partnership, and for entry of a new judgment (141 AD3d 64, 76 [2d Dept 2016]).

The Appellate Division adhered to its earlier determination that defendant had wrongfully dissolved the Partnership, noting that

> "[t]he facts of *Gelman*, involving an alleged oral partnership agreement which lacked a definite term of duration, are plainly distinguishable from the facts of this case. In contrast to *Gelman*, the written partnership agreement here specified that the ****6** partnership would continue until terminated by a majority vote of the partners, and was thus not dissolvable at will by a single partner" (141 AD3d at 70 [citation omitted]).[5]

With respect to the minority discount, the Appellate Division distinguished ***286** *Matter of Friedman v Beway Realty Corp.* (87 NY2d 161 [1995]), because that case involved the determination of the "fair value" of stock held by a dissenting shareholder under the Business Corporation Law, whereas "this case . . . involves the determination of the 'value' of the shares of a partner who has wrongfully caused the dissolution of a partnership pursuant to Partnership Law § 69 (2) (c) (II)" (141 AD3d at 73). The Appellate Division relied instead on *Anastos v Sable* (443 Mass 146, 819 NE2d 587 [2004]), in which the Massachusetts Supreme Judicial Court analyzed that state's equivalent of the Partnership Law provisions implicated here.

> "Here, as in *Anastos*, the partnership remains a going concern, and the defendant has no right to compel a liquidation sale of the partnership's shopping mall and receive a proportionate share of the liquidation value of that asset. Under these circumstances, a minority discount may properly be applied to account for the defendant's lack of control in the partnership as a going concern." (141 AD3d at 74-75.)

With regard to the goodwill discount, the Appellate Division held that the evidence at trial supported Supreme Court's determination that the Partnership "had goodwill in connection with the operation of the shopping mall that it owned" (141 AD3d at 75). The Appellate Division found the plaintiffs' expert's testimony that a 66% minority discount was appropriate to be credible and supported by the record (*id.*), and summarily rejected defendant's challenge to the marketability discount (*id.*). On the subject of attorneys' fees, the Appellate Division held that "the reasonable amount of certain legal expenses incurred by the plaintiffs" constituted "recoverable expenditures directly occasioned and made necessary by the defendant's breach of the partnership agreement, and were thus properly included as damages" (*id.*).

Upon remand, Supreme Court issued an amended judgment applying the minority discount and further reducing defendant's interest in the Partnership to $911,072.50; ruling that the plaintiffs were entitled to $1,822,460.25 in fees and statutory interest; and concluding that defendant owed plaintiffs $911,387.75.

We granted defendant leave to appeal, pursuant to CPLR 5602 (a) (1) (ii), from Supreme ***287** Court's amended judgment (28 NY3d 1129 [2017]). The appeal brings up for review the Appellate Division's 2009 and 2016 orders.

II.

The first issue, as framed by the parties, is whether defendant's unilateral dissolution of the Partnership violated the agreement. The trial court and the Appellate Division both ruled that the dissolution was wrongful, but focused on whether the agreement specified a "definite term" or "particular undertaking" under Partnership Law § 62 (1) (b). Defendant contends that the Partnership was "at will" because the agreement did not contain a "definite term" or "particular undertaking" under the statute. Plaintiffs urge us to affirm on an alternative ground, namely that because the agreement sets out the methods of dissolving the Partnership in accordance with the agreement, the wrongfulness of defendant's dissolution can be decided without recourse to the statute. We agree with plaintiffs on this issue. ****7**

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The governing law of partnerships in New York is the Partnership Law of 1919, which enacted into law the original Uniform Partnership Act (UPA). It is well established, however, that "[t]he Partnership Law's provisions are, for the most part, default requirements that come into play in the absence of an agreement" (*Ederer v Gursky*, 9 NY3d 514, 526 [2007]). The statutory scheme

> "applies only when there is either no partnership agreement governing the partnership's affairs, the agreement is silent on a particular point, or the agreement contains provisions contrary to law. Where an agreement addresses a particular issue, the terms of the agreement control, and the rights and obligations of the parties are determined by reference to principles of contract law. Thus, an agreement specifying the circumstances under which a partnership may be dissolved is not at will." (*BPR Group Ltd. Partnership v Bendetson*, 453 Mass 853, 863-864, 906 NE2d 956, 964 [2009] [internal quotation marks and citations omitted]; *accord e.g. In re Popkin & Stern*, 340 F3d 709, 714 [8th Cir 2003].)

Indeed, partners may, "absent prohibitory provisions of the statutes or of rules of the common law relating to partnerships, or considerations of public policy, . . . include in the partnership ***288** articles any agreement" the partners desire to include (*Cohen v Lord, Day & Lord*, 75 NY2d 95, 102-103 [1989] [internal quotation marks omitted]). "[T]he partners of either a general or limited partnership, as between themselves, may include in the partnership articles any agreement they wish concerning the sharing of profits and losses, priorities of distribution on winding up of the partnership affairs and other matters. If complete, as between the partners, the agreement so made controls" (*Lanier v Bowdoin*, 282 NY 32, 38 [1939]).

In short, parties to a partnership agreement generally have the right to contract around a provision of the Partnership Law, provided of course they do so in language that is "clear, unequivocal and unambiguous" (*Springsteen v Samson*, 32 NY 703, 706 [1865]; *see generally Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). No particular magic words need be recited, provided that the parties' intent is clear. With these principles in mind, we now summarize the Partnership Law provisions relied on by the lower courts, in order to assess whether they come into play or whether the agreement controls.

The Partnership Law provides that dissolution does not violate a partnership agreement if it occurs "[b]y the termination of the definite term or particular undertaking specified in the agreement" (Partnership Law § 62 [1] [a]). For example, if a partnership agreement provides that the agreement will terminate on a certain date, then the dissolution of the partnership on that date will be in accordance with the agreement. Moreover, if "no definite term or particular undertaking is specified" in the partnership agreement, then the partnership is said to be an "at-will" partnership, and a unilateral dissolution "[b]y the express will of any partner" does not violate the partnership agreement (Partnership Law § 62 [1] [b]). "[W]hen a partnership has no definite term or particular objective to be achieved, it may be dissolved at any time by the express will of one or more of the partners" (*Harshman v Pantaleoni*, 294 AD2d 687, 687 [3d Dept 2002]).

By contrast, the Partnership Law provides that a partnership is dissolved "[i]n 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" (Partnership Law § 62 [2]). In other words, "[w]hen the agreement specifies a durational term, or a defined project, an attempt unilaterally to dissolve the ***289** partnership would violate the partnership agreement" (*Scholastic, Inc. v Harris*, 259 F3d 73, 85 [2d Cir 2001]). While "partners are statutorily empowered to dissolve the partnership at any time, wrongfully dissolving partners may be liable to the expelled partner for breach of the partnership agreement" (*Dawson v White & Case*, 88 NY2d 666, 670 n 1 [1996] [citation omitted]; *accord Napoli v Domnitch*, 18 AD2d 707, 708 [2d Dept 1962], *affd* 14 NY2d 508 [1964]).

Partnership Law § 62 (1) (b) codifies common-law doctrine that "a contract of partnership, containing no stipulation as to the time during which it shall continue in force . . . may be dissolved by either partner at his own will, at any time" (*Karrick v Hannaman*, 168 US 328, 333-334 [1897]), unless the "partnership has for its object the ****8** completion of a specified piece of work, or the effecting of a specified result" (*Hardin v Robinson*, 178 App Div 724, 729 [1st Dept 1916]; *see Gelman*, 20 NY3d at 537).

(1) Here, the agreement stated that the Partnership "shall continue until it is terminated as hereinafter provided," and, in a subsequent provision, stated that the Partnership would dissolve upon "[t]he election by the Partners to dissolve the Partnership" or "[t]he happening of any event which makes it unlawful for the business of the Partnership to be carried on or for the Partners to carry it on in Partnership." The

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partners clearly intended that the methods provided in the agreement for dissolution were the only methods whereby the partnership would dissolve *in accordance with the agreement*, and by implication that unilateral dissolution would breach the agreement. In other words, the agreement contemplated dissolution only in two instances, leaving no room for other means of dissolution that would be in accordance with its terms.[6]

It follows that Partnership Law § 62 (1) (b) has no application here, because the parties to the agreement clearly specified under what terms it could be properly dissolved, i.e., what would constitute a dissolution under the agreement and what would constitute a dissolution in contravention of it. Accordingly, this was plainly not intended to be an "at-will" partnership.

***290** *Gelman*, therefore, does not apply. In that case, which involved an oral partnership agreement, with "a flexible temporal framework" and a "sequence of anticipated partnership events" that we described as "amorphous" (*Gelman*, 20 NY3d at 538), we applied the Partnership Law to conclude that the omission of an identifiable termination date and of a particular undertaking rendered the partnership "at will." We did so of necessity. An oral agreement generally does not "set forth the circumstances under which the partnership could be dissolved without breaching the partnership agreement" (*BPR Group Ltd. Partnership*, 453 Mass at 864 n 15, 906 NE2d at 964 n 15). Here, by contrast, we are not required to apply the pertinent Partnership Law provisions to determine whether the dissolution breached the agreement. The breach is clear from the agreement alone.[7]

Although the lower courts erred in applying Partnership Law § 62 (1) (b) to decide whether defendant violated the agreement, the conclusion they reached, i.e., that defendant's dissolution was wrongful, is correct.

III.

Plaintiffs contend that they are entitled to attorneys' and experts' fees, as part of their damages under Partnership Law § 69 (2) (a) (II). Defendant insists that, even assuming that this Court rules against him on the question of breach, he should not be required to pay plaintiffs' attorneys' or experts' fees. On this issue, we agree with defendant.

Under Partnership Law § 69 (2) (a) (II), "[w]hen dissolution is caused in contravention of the partnership agreement . . . [e]ach partner who has not caused dissolution wrongfully shall have . . . [t]he right, as against each ****9** partner who has caused the dissolution wrongfully, to damages for breach of the agreement." The lower courts in this case held that the damages owed by defendant to plaintiffs include fees.

(2) We conclude, however, that to award fees to plaintiffs would be to contradict New York's well-established adoption of the American Rule that "the prevailing litigant ordinarily cannot collect . . . attorneys' fees from its unsuccessful opponents" ***291** (*Hunt v Sharp*, 85 NY2d 883, 885 [1995]). Contrary to Supreme Court, the standard is not which party was "more responsible" for the litigation. Attorneys' fees are treated as "incidents of litigation" (*Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]), rather than damages. "In contrast with other legal systems, such as that in Great Britain, it has now long been the universal rule in this country not to allow a litigant to recover damages for the amounts expended in the successful prosecution or defense of its rights" (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]). The exception is when "an award is authorized by agreement between the parties or by statute or court rule" (*Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28, 39 [2012], quoting *A.G. Ship Maintenance Corp.*, 69 NY2d at 5), but plaintiffs point to no provision within the agreement or the Partnership Law authorizing such an exception to the American Rule here. In particular, plaintiffs fail to identify any counterpart in the Partnership Law to statutes such as CPLR 909, allowing recovery of attorneys' fees in class action lawsuits, or CPLR 5031, allowing recovery of attorneys' fees in medical malpractice actions.

Plaintiffs principally rely on *City of Elmira v Larry Walter, Inc.* (150 AD2d 129, 133 [3d Dept 1989], *affd* 76 NY2d 912 [1990]) and *Aero Garage Corp. v Hirschfeld* (185 AD2d 775, 776 [1st Dept 1992]). In *City of Elmira*, the Appellate Division held that certain legal expenses incurred by the winning party in a breach of contract case were recoverable because the charges were not "counsel fees" subject to the American Rule, but rather "recoverable expenditures directly occasioned and made necessary by the breach" (*City of Elmira*, 150 AD2d at 133 [internal quotation marks and citations omitted]). The expenses were legal fees expended in rebidding the contract following the breach, not in the breach of contract action itself. Similarly, in *Aero Garage*, the Appellate Division, citing *City of Elmira*, ruled that the trial

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court correctly "awarded attorney's fees incurred by plaintiff in obtaining [a] certificate of occupancy as an element of compensatory damages," because "[t]hese legal expenses were incurred by plaintiff in attempting by itself to fulfill defendants' obligations under the contract and were directly occasioned and made necessary by defendants' breach" (*Aero Garage*, 185 AD2d at 776 [internal quotation marks and citations omitted]).

Rather than supporting plaintiffs' analysis, the cited cases clearly rely on a distinction between, on the one hand, legal ***292** fees incurred in prosecuting or defending a successful civil lawsuit and, on the other hand, legal fees, in the nature of damages, incurred in carrying out separate acts necessitated by the breach. Plaintiffs' approach would mean that fees could be awarded to the victorious party in any breach of contract litigation, as long as that party persuaded a court that it had to litigate the issue in order to avoid the consequences of defendant's breach. Indeed, this purported exception would be so large as to swallow the American Rule.

The lower courts erred in awarding attorneys' fees and experts' fees to plaintiffs, with respect to plaintiffs' lawsuit. To this extent, we modify the amended judgment of Supreme Court from which defendant appeals, as well as the Appellate Division's 2016 order upholding the award of fees, and we remit to Supreme Court for recalculation of damages. Plaintiffs, if they so choose, may argue on remand that certain attorneys' fees, not related to their lawsuit, were incurred as a direct result of defendant's breach and should be included as damages.[8] ****10**

IV.

(3) With respect to the reduction for goodwill, Partnership Law § 69 (2) (c) (II) gives a partner who dissolves a partnership in contravention of the partnership agreement the right "to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, . . . but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered." In other words, any goodwill component in the value of the partner's interest must be deducted. Defendant argues that he should not have been assessed a goodwill deduction.

Goodwill is an intangible asset of a business, corresponding in this context to what a buyer would pay for the business, over and above its value as a mere sum of tangible assets, ***293** because of the patronage and support of regular customers. Goodwill consists in "every positive advantage . . . that has been acquired by a proprietor in carrying on [a] business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business" (*Spaulding v Benenati*, 57 NY2d 418, 424 n 3 [1982] [internal quotation marks and citation omitted]). It is, in Judge Cardozo's words, what people "will pay for any privilege that gives a reasonable expectancy of preference in the race of competition. Such expectancy may come from succession in place or name or otherwise to a business that has won the favor of its customers" (*Matter of Brown*, 242 NY 1, 6 [1926] [citation omitted]; *see also Spaulding*, 57 NY2d at 423).

Defendant argues that the Partnership lacked goodwill as a matter of law. He contends that goodwill does not exist in a real estate holding, citing *Cohen v Cohen* (279 AD2d 599 [2d Dept 2001]) and *Matter of Cinque v Largo Enters. of Suffolk County* (212 AD2d 608 [2d Dept 1995]) for the proposition that when holdings consist solely of real property and cash, no part of the value of the business is attributable to goodwill. Defendant misreads these cases. They do not hold that real estate holdings can never have goodwill value as a matter of law, but merely assert in each case that the subject real estate holding did not have a goodwill component as a matter of fact (*see Cohen*, 279 AD2d at 600; *Cinque*, 212 AD2d at 610).

Defendant also notes that no goodwill value was reflected in the books or financial statements of the Partnership. Lack of goodwill does not follow as a matter of law, however, from this circumstance. While defendant urges the Court to find an implied "agreement among partners . . . that goodwill not be considered an asset of the firm" (*Dawson*, 88 NY2d at 671), the precedent he relies on is clearly distinguishable. In *Dawson*, the partnership agreement of a law firm expressly provided that "no consideration has been or is to be paid for the Firm name or any good will of the partnership, as such items are deemed to be of no value" (*Dawson*, 88 NY2d at 672), a contractual provision not present here. Indeed, *Dawson* clarified that its holding was "based on the specific facts presented, and should not be construed as a prohibition against the valuation, in the appropriate case, of . . . goodwill" (*Dawson*, 88 NY2d at 672).

In short, the goodwill question is a factual one. "In a case such as this, with affirmed findings of fact, our scope of review ***294** is narrow. This court is without power to review

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findings of fact if such findings are supported by evidence in the record" (*Humphrey v State of New York*, 60 NY2d 742, 743 [1983]). Here, the trial court found, based on the expert testimony and other evidence, that the shopping mall and the mall's tenants attract regular, loyal shoppers, and there is record support for the affirmed finding that the value of the Partnership included, in addition to its real property and cash, a goodwill component.[9]

****11 V.**

(4) The next issue is whether the lower courts erred in applying a discount for lack of marketability, i.e., a deduction from the value of defendant's ownership interest reflecting the relative illiquidity or deficit in marketability of the interest. Defendant urges this Court to adopt the holding of the Louisiana Supreme Court that such "discounts must be used sparingly and only when the facts support their use" (*Cannon v Bertrand*, 2008-1073 [La 1/21/09], 2 So 3d 393, 396 [2009]). Defendant, however, failed to preserve any challenge to the applicability of a marketability discount to the value of a partnership interest after wrongful dissolution. At trial, his expert conceded that a marketability discount would apply and defendant did not depart from this in his posttrial motion papers. The parties' dispute before the trial court was over the percentage. Because the broader issue was not preserved, the application of the marketability discount is not properly before us.

VI.

The final question we must resolve is whether a minority discount may be applied in the calculation of the value of a wrongfully dissolving partner's interest in a partnership, pursuant to Partnership Law § 69 (2) (c) (II), when the remaining partners continue the business under Partnership Law § 69 (2) (b). A minority discount is a standard tool in valuation of a financial interest, designed to reflect the fact that the price an investor is willing to pay for a minority ownership interest in a ***295** business, whether a corporation or a partnership, is less because the owner of a minority interest lacks control of the business.[10]

Defendant contends that, as a matter of law, minority discounts are not applicable in the valuation of a minority partner's interest after the partner exits a business that remains a going concern. This issue is properly preserved, but we cannot agree with defendant on the merits.[11]

In requiring the minority discount, the Appellate Division relied on *Anastos v Sable* (443 Mass 146, 819 NE2d 587 [2004]), in which the Massachusetts Supreme Judicial Court interpreted a UPA-based statute that is identical in all relevant respects to our Partnership Law § 69 (2) (c) (II). There, the plaintiff dissolved a partnership in violation of the partnership agreement, and, as here, the other partners continued the partnership business, rather than liquidate. The trial court in *Anastos*, in determining the value of the plaintiff's interest, applied a minority discount to reflect that there was "no ready market for the purchase of an interest in a general partnership whose primary asset is real estate where the partnership agreement contains limitations and restrictions on the control that any minority owner can exercise" (*Anastos*, 443 Mass at 147-148, 819 NE2d at 589). The Supreme Judicial Court of Massachusetts upheld this decision, stating:

> "In this case, the remaining partners chose to exercise their statutory right to continue the partnership business for the remainder of the partnership term, so the partnership business is not 'winding up' and must therefore be treated as a going concern. Because the plaintiff cannot compel liquidation of the business at the point of dissolution, we read [Massachusetts General Laws, chapter 108A, § 38 (2) (c) (II)] as offering a ****12** nonliquidation based method of calculating the value of his partnership interest." (*Anastos*, 443 Mass at 152, 819 NE2d at 592.)

(5) ***296** Here, similarly, Partnership Law § 69 (2) (c) (II) contemplates a valuation of a wrongfully dissolving partner's interest based on treating the partnership as a going concern, rather than an asset to be liquidated. In other words, the statute does not contemplate a valuation of the entire business as if it were being sold on the open market, but rather a determination of the fair market value of the wrongfully dissolving partner's interest as if that interest were being sold piecemeal and the rest of the business continuing as a going concern.[12] Given that the focus is on one partner's interest in a persisting concern, we agree with the Massachusetts high court that a minority discount is applicable, because a minority interest is worth less to anyone buying that interest alone.

Notably, New York, like Massachusetts, has not adopted the 1997 Uniform Partnership Act commonly known as RUPA. The dissent's discussion of RUPA and of cases from states that have adopted RUPA does not illuminate the law in New York. In particular, while RUPA, "[b]y focusing on a top-down valuation keyed to a sale of all of the assets of the partnership, . . . directs the analysis away from a valuation of the interests of a particular partner," so that "a minority

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discount is inappropriate" (dissenting op at 302 [internal quotation marks and citation omitted]), we conclude that the same cannot be said of the UPA.

It is true, of course, that in the Partnership Law § 69 (2) (c) (II) context the wrongfully dissolving partner's interest may simply be absorbed by the remaining partners. In our view, this does not render the value generated by application of a minority discount an inaccurate valuation of the intrinsic worth of that partner's interest. To repeat, the exiting partner's interest may appropriately be valued in light of the fair market value of that minority interest given that the partner is departing and the partnership continuing.

As defendant observes, the closest this Court has come to examining the issue is *Matter of Friedman v Beway Realty Corp.* (87 NY2d 161 [1995]). There, we held that the use of a minority discount should be rejected in the context of valuing the interests of dissenting shareholders in a closely held ***297** corporation. That context, however, is clearly distinguishable from ours. *Friedman* involved a proceeding under Business Corporation Law § 623, which gives "minority stockholders the right to withdraw from a corporation and be compensated for the value of their interests when the corporate majority takes significant action deemed inimical to the position of the minority" (*Friedman*, 87 NY2d at 167). Business Corporation Law § 623 invokes a statutory term of art, "fair value," in requiring that a dissenting shareholder who exercises appraisal rights be paid the "fair value" of his or her shares (Business Corporation Law § 623 [e]), as opposed to their fair market value. The term "fair value" is not present in the statute under review here.

The terminological difference reflects an underlying difference in statutory scheme. As plaintiffs note, Business Corporation Law § 623 contemplates a significant change to a business that the majority of shareholders have adopted over the minority's dissent. The value of the corporation's stock will likely be very different from the value prior to dissent and appraisal. This provides the rationale for the statutory requirement that the dissenter be paid "fair value," as opposed to fair market value, as a remedial matter. By contrast, wrongful dissolution of a partnership may happen at any time, and valuation of a partner's interest occurs only if the remaining partners have agreed to continue their business as if nothing changed. Unlike shareholder dissent and appraisal, wrongful dissolution is not necessarily preceded by upheaval "inimical to the position of the minority" (****13** *Friedman*, 87 NY2d at 167), so trial courts need not substitute a "fair value" for the actual value a third party would pay. Indeed, here the upheaval took the form of an action by a minority partner inimical to the majority's interests.

In short, *Friedman* does not offer a rationale for rejecting the view that third-party market value is the compensation to which a wrongful dissolver is entitled, a view consistent with the use of a minority discount to capture any impact that a lack of control may have on that market price. While "[t]he application of minority discounts is a matter of some debate in close corporations" (1 Christine Hurt et al., Bromberg and Ribstein on Partnership § 7.13 [B] [1] at 7-168 n 17 [2d ed and 2017-2 Supp]), "courts usually allow the application of a minority discount" in determining the value of an interest in a partnership (*id.* § 7.13 [B] [1] at 7-167 n 17).

Defendant also draws our attention to a decision by the Maryland Court of Special Appeals, ***298** *East Park Ltd. Partnership v Larkin* (167 Md App 599, 893 A2d 1219 [2006], *cert denied* 393 Md 243, 900 A2d 749 [2006]). In that case, partners withdrew from a limited partnership under a statute providing that a partner could do so without dissolution, and "receive, within a reasonable time after withdrawal, the fair value of the partner's partnership interest in the limited partnership as of the date of withdrawal, based on the partner's right to share in distributions from the limited partnership" (Md Code Ann, Corps & Ass'ns § 10-604). Again, as in *Friedman*, it is clear that a different statutory scheme, involving cashing out an interest for "fair value," was at work. By contrast, the statute we are analyzing relates to wrongful dissolution, rather than a statutory right to withdraw, and it makes no mention of "fair value." Of course, this is not to say that the assessed value should not be fair. The point is simply that the statutory scheme in the Partnership Law is consistent with the application of a fair market value assessment of the particular partnership interest, and the use of standard valuation tools including a minority discount.

In sum, defendant provides no basis for concluding that a minority discount is inapplicable as a matter of law to the valuation of the interest of a wrongfully dissolving partner when the remaining partners continue the partnership.[13] We note, finally, that the parties to a partnership agreement may contract out of application of a minority discount to the valuation of their interests, just as they may contract around statutory provisions. Defendant does not assert that the agreement precluded use of a minority discount in this manner.

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VII.

For these reasons, Supreme Court properly determined the value of defendant's interest in the Partnership, but erred in awarding fees to plaintiffs as part of the statutory damages.

Accordingly, the judgment appealed from and the orders of the Appellate Division brought up for review should be modified, without costs, by remitting the case to Supreme Court for further proceedings in accordance with this opinion, and, as so modified, affirmed. ****14**

Feinman, J. (dissenting in part). I fully concur with the well- ***299** reasoned analyses in parts I through V of the majority opinion. I do not join part VI, the majority's holding that the trial court was required to apply a minority discount to the value of a partner's interests under Partnership Law § 69 (2) (c) (II). Except for a brief discussion of *Anastos v Sable* (443 Mass 146, 819 NE2d 587 [2004]), a Massachusetts case that I believe is inapposite, the majority's analysis of the minority discount issue consists almost exclusively of distinguishing the extensive authority adverse to its position. It does not, however, advance an affirmative rationale explaining why respondents' proposed interpretation ought to prevail over appellant's.

The consequences of a dissolution, including the dissolving and non-dissolving partners' respective liabilities, are governed principally by the partnership agreement (*see Ederer v Gursky*, 9 NY3d 514, 526 [2007]; *see also Seattle-First Natl. Bank v Marshall*, 31 Wash App 339, 345-347, 641 P2d 1194, 1198-1199 [1982], *review denied* 97 Wash 2d 1023 [June 30, 1982]). As the majority observes, where, as here, the agreement is silent as to the amount payable to a dissolving partner, we must look to the default rules contained in Partnership Law § 69.

Section 69 distinguishes between wrongful and non-wrongful dissolutions. If the partnership's dissolution was not wrongful, then "each partner . . . may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners" (Partnership Law § 69 [1]). In effect, "the withdrawing partner, unless otherwise agreed, has the right, upon dissolution, to compel the 'winding up' or liquidation of the company, and receive the value of [its] interest in the partnership" (*Estate of Watts v Commissioner of Internal Revenue*, 823 F2d 483, 486 [11th Cir 1987] [emphasis omitted] [construing substantially identical provisions of the Oregon Uniform Partnership Act]). Where dissolution is wrongful and the partners do not elect to continue the existence of the partnership under section 69 (2) (b), the result is the same, except that the wrongful dissolver's right to payment must be set off against "damages for breach of the agreement" (Partnership Law § 69 [2] [a] [I]-[II]; [c] [I]). If the partnership is continued, however, the Partnership Law states only that the wrongful dissolver is entitled to "the value of [the partner's] interest in the partnership," excluding goodwill and set off against contractual damages (*id.* § 69 [2] [c] [II]). Although this procedure results in a technical dissolution, its economic effect in most cases is that a partner is allowed ***300** to cash out of the partnership and withdraw at any time, subject to its obligation to compensate the remaining partners for any losses they incur as a result of the breach of the partnership agreement. In this context, whether the "value of [the partner's] interest in the partnership" is subject to a discount for that partner's lack of control is the issue now before us.

Here, the majority insists that the "value of [the partner's] interest in the partnership" could only mean "the price at which [the interest] would change hands between a willing buyer and a willing seller" "as if that interest were being sold piecemeal and the rest of the business continuing as a going concern" (majority op at 296 and 296 n 12). But the majority does not explain why this is so. It may be true that, *if* we were to adhere to this definition, it would lead to the conclusion that minority partnership interests should be discounted for lack of control (*see Estate of Andrews v Commissioner of Internal Revenue*, 79 TC 938, 951-956 [1982], *superseded on other grounds by statute as recognized in Estate of Jelke v Commissioner of Internal Revenue*, 507 F3d 1317 [11th Cir 2007], *reh and reh en banc denied* 277 Fed Appx 977 [11th Cir 2008], *cert denied* 555 US 826 [2008]; *see also* Sandra K. Miller, *Discounts and Buyouts in Minority Investor LLC Valuation Disputes Involving Oppression or Divorce*, 13 U Pa J Bus L 607, 612-614 [2011] [finding that the evidence "leads one to believe that the minority discount is a very real market phenomenon"]). However, it is not clear that this is what the legislature, or the drafters of the Uniform Partnership Act (1914) (UPA), meant by "value." The plain meaning of the word "value" does not unambiguously point to fair market value, let alone to the majority's hypothesized condition of a willing buyer, a willing seller, and a "piecemeal" marketing of only one slice of the partnership (*see BFP v Resolution Trust Corporation*, 511 US 531, 535-540 [1994] [rejecting a construction of "reasonably equivalent value" under 11 USC § 548 (a) (2) that would equate "value" with "fair market value"]). As the Supreme Court explained in *BFP*, "market

value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value" (*id.* at 537).[1] ****15**

***301** The UPA left it unclear how a wrongful dissolver's buyout price should be calculated or whether any discounts should be applied (*see* UPA § 38 [2] [c] [II]; Brian Tully, Comment, *Determining the "Fair Value" of a Withdrawing Partner's Partnership Interest: Exploring the Uncharted Alphabet Soup of Texas Partnership Law*, 54 Baylor L Rev 927, 945-949 [2002]). This ambiguity was explored during the process of drafting what would become the Uniform Partnership Act (1997) (Revised Uniform Partnership Act or RUPA), and attempts to arrive at an appropriate definition were made (*see* Allan Donn, Robert W. Hillman & Donald J. Weidner, *The Revised Uniform Partnership Act* § 701, Authors' Comment 2 [2017-2018 ed]). As the Reporters for the RUPA acknowledged:

> "The UPA says little about the buyout of a partner. UPA section 38(2) provides that, if there is a wrongful dissolution, the partners who have not dissolved wrongfully may continue the business 'during the agreed term' if they unanimously agree to do so. To do so, they must 'secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable . . . and in like manner indemnify him against all present or future partnership liabilities.' There is no further definition of the buyout in the statute and the case law leaves many uncertainties about how the UPA rules apply." (Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 Bus Law 1, 10-11 [1993].)

The RUPA resolved this ambiguity by explicitly defining the "buyout price" of a withdrawing partner as "the amount that would have been distributable to the dissociating partner . . . if, on the date of dissociation, the assets of the partnership ***302** were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern" (RUPA § 701 [b]).[2] In other words, a dissociating partner would be entitled to its proportionate share in the value of the business as a going concern, set off against ****16** contractual damages, but without an individualized inquiry into the marketability of its particular slice of the partnership. Consistent with this definition, the Official Comment stated that "[t]he notion of a minority discount in determining the buyout price is negated by valuing the business as a going concern" (*id.* § 701 [b], Comment). As one leading treatise on the RUPA explained, "[b]y focusing on a top-down valuation keyed to a sale of all of the assets of the partnership, [RUPA] directs the analysis away from a valuation of the interests of a particular partner. Because the valuation inquiry is not directed to the value of an individual interest, a minority discount is inappropriate" (Donn § 701, Authors' Comment 4).

Although New York has not adopted the RUPA, "[l]egislative inaction is a weak reed upon which to lean in determining legislative intent" (*Flanagan v Mount Eden Gen. Hosp.*, 24 NY2d 427, 433 [1969]). By excluding minority discounts, it does not appear that the drafters of the RUPA necessarily intended a change in the computation of the buyout price. The only departures from the UPA specifically noted in the Official Comment are the exclusion of the goodwill discount and the elimination of a partner's right to elect profits in lieu of interest under UPA § 42 (*see* RUPA § 701 [b], Comment). A 1986 report by the American Bar Association's UPA Revision Subcommittee stated that it was "unlikely that a different measure [of value] was intended" between UPA § 38 (2) (c) (II) and (1)—the amounts payable to wrongful and non-wrongful dissolvers, respectively—"and there is no reason for the terms to be different" (UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, *Should the Uniform Partnership Act Be Revised?*, 43 Bus Law 121, 174-175 and n 119 [1987], citing Judson Adams Crane & Alan R. Bromberg, Law of Partnership 476 n 54 [1968]). This would suggest that "value," under UPA § 38 (2) (c) (II), means a ***303** pro rata share of the partnership's value as a whole. As another commentator opined, while it was "not clear that the [UPA] mandates a pro rata share," "a strong argument can be made that the 'default' valuation under the [UPA] should be pro rata" (*see* Larry E. Ribstein, *A Statutory Approach to Partner Dissociation*, 65 Wash U LQ 357, 383 n 85 [1987]). As Professor Ribstein explains:

> "Partnership interests, unlike corporate stock, are not normally freely transferable. Giving each partner a right to sell his interest back to the firm, depending on how the buyout price is determined and the transaction costs of exercising the put, serves as a substitute for the efficient market for corporate stock in containing exploitation. In fact, a buyout price that represents the partner's pro rata share of the partnership is a better counter to exploitation than an efficient market price because the pro rata price prevents the controlling faction from taking advantage of

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its own exploitive conduct by purchasing the minority's interest at a discount." (*Id.* at 382-383 [footnotes omitted].) Because this valuation would simply entitle the dissolving partner to its allocable share of the value of the partnership as a whole, it would be incompatible with a minority discount (*see Vick v Albert*, 47 AD3d 482, 484 [1st Dept 2008], *lv denied* 10 NY3d 707 [2008]; Weidner & Larson, 49 Bus Law at 11-12).

In the context of corporate appraisals and judicial dissolutions, minority discounts have been soundly rejected in New York and in the vast majority of jurisdictions across the country (*see Matter of Penepent Corp.*, 96 NY2d 186, 194 [2001]; *Matter of Friedman v Beway Realty Corp.*, 87 NY2d 161, 167-170 [1995]; *Matter of Raskin v Walter Karl, Inc.*, 129 AD2d 642, 644 [2d Dept 1987]; *Brown v Arp & Hammond Hardware Co.*, 2006 WY 107, ¶¶ 28-30, 141 P3d 673, 683 [2006] [collecting cases]; Christopher Vaeth, *Propriety of Applying Minority Discount to Value of Shares Purchased by Corporation or its Shareholders from Minority Shareholders*, 13 ALR5th 840 [1993]). In most states, including New York, minority stockholders must receive their "proportionate interest in the going concern value of the corporation as a whole, that is, what a willing purchaser, in an arm's length transaction, would offer for the *corporation* as an operating business" (*Friedman*, 87 NY2d at 168 [internal quotation marks omitted], quoting ***304** *Matter of Pace Photographers [Rosen]*, 71 NY2d 737, 748 [1988]; *see Cavalier Oil Corp. v Harnett*, 564 A2d 1137, 1144 [Del 1989]; 2 American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.22 [a] [1994]). This valuation precludes a minority discount because "[a] minority discount would necessarily deprive minority shareholders of their proportionate interest in a going concern" (*Friedman*, 87 NY2d at 169; *Cavalier*, 564 A2d at 1145).

This wealth of corporate cases has produced a number of interlocking rationales for excluding minority discounts. Two primary rationales have emerged from the case law. First, many courts, including this one, have explained that the exclusion is partially motivated by a desire to deter unfair squeeze-outs and safeguard minority ****17** shareholders from oppression (*see Friedman*, 87 NY2d at 169-170; *Shawnee Telecom Resources, Inc. v Brown*, 354 SW3d 542, 552-556 [Ky 2011]; *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A2d 997, 1004-1005 [Me 1989]; *Lawson Mardon Wheaton, Inc. v Smith*, 160 NJ 383, 400-401, 734 A2d 738, 748-749 [1999]). The majority may be correct that these concerns are attenuated in the partnership context; a wrongful dissolution happens at the dissolving partner's initiative and is not necessarily triggered by a sale of the business or a determination that the partnership engaged in misconduct (*cf.* Business Corporation Law §§ 623, 1104-a; *Hansen v 75 Ranch Co.*, 288 Mont 310, 325, 957 P2d 32, 41 [1998] ["(D)iscounts at the shareholder level are inherently unfair to the minority shareholder who did not pick the timing of the transaction and is not in the position of a willing seller"]; *Cavalier Oil*, 564 A2d at 1145 ["(T)he appraisal process is not intended to reconstruct a *pro forma* sale but to assume that the shareholder was willing to maintain (its) investment position"]). Nevertheless, the dissenter-like status of a dissociating partner should not be completely ignored. By organizing their business as a general partnership, principals sacrifice limited liability and the free transferability of their equity interests in exchange for, among other things, a statutory right to cash out at any time, subject to their obligation to pay damages if the dissolution is wrongful (*see* Partnership Law § 69; Larry E. Ribstein, *The Evolving Partnership*, 26 J Corp L 819, 823-824, 849-850 [2001]). Imposing too great a punishment for exit "swings the pendulum toward permitting oppression of locked-in partners. Indeed, close corporations were long plagued by such problems" (Ribstein, 26 J Corp L at 851). ***305** "[T]he problem is one of finding the appropriate balance between these costs of exit and of continuity" (*id.* at 850). Again, although New York has not adopted the RUPA, it is noteworthy that "[t]he strong support for the statutory buyout [in the RUPA] was influenced by trends in corporate law providing liquidity for a minority participant who wanted out of the business" (Donn § 701, Author's Comment 2).

The second rationale transposes much more easily to the partnership context. As many courts have observed, there is an analytical flaw in applying a minority discount where the actual purchasers of the minority interest are the remaining shareholders, rather than a hypothetical "willing buyer." The purchasers are not entering into a noncontrolling position, but merely consolidating and increasing whatever degree of control they already have over the business. The Montana Supreme Court's analysis in *Hansen v 75 Ranch Co.* is commonly cited:

"Applying a discount is inappropriate when the shareholder is selling her shares to a majority shareholder or to the corporation. The sale differs from a sale to a third party and, thus, different interests must be recognized. When selling to a third party, the value of the shares is either the same as or less than it was in the hands of the transferor because the third party gains no right to control or manage

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> the corporation. However, a sale to a majority shareholder or to the corporation simply consolidates or increases the interests of those already in control. Therefore, requiring the application of a minority discount when selling to an 'insider' would result in a windfall to the transferee. This is particularly true since the transferring shareholder would expect that the shares would have at least the same value in her hands as in the hands of the transferee. . . . Since there is no 'market' involved in an inside transfer of shares, the minority discount should not be applied" (*Hansen*, 288 Mont at 325, 957 P2d at 41; *accord Brown*, 2006 WY 107, ¶ 41, 141 P3d at 687; *Arnaud v Stockgrowers State Bank of Ashland, Kan.*, 268 Kan 163, 169, 992 P2d 216, 220 [1999]; *see also Brown v Allied Corrugated Box Co.*, 91 Cal App 3d 477, 486, 154 Cal Rptr 170, 176 [1979] ["It has been noted . . . that the rule justifying the ***306** devaluation of minority shares in closely held corporations for their lack of control has little validity when the shares are to be purchased by someone who is already in control of the corporation. In such a situation, it can hardly be said that the shares are worth less to the purchaser because they are noncontrolling"]).

Therefore, when setting the strike price of a forced sale of stock to the majority shareholders, a minority discount would simply transfer wealth from those who do not control the corporation to those who do (*see In re Valuation of Common Stock of McLoon Oil Co.*, 565 A2d at 1005) and would "unfairly enrich[ ] the majority shareholders," allowing them to "reap a windfall" (*Friedman*, 87 NY2d at 169, quoting *Cavalier Oil*, 564 A2d at 1145).

Several courts have therefore held that a minority discount should not be applied in valuing a partner's interest, when the purpose of that valuation is to establish the price at which the interest would be sold back to the partnership. In *Vick v Albert*, an action for partition and sale of partnership assets and an accounting by surviving ****18** partners, the First Department held that a discount for minority lack of control would be unavailable (47 AD3d at 483-484). Although the Court acknowledged that the discount would not "undermine the remedial goal of the appraisal statutes to protect shareholders from being forced to sell at unfair values," it nevertheless held that "application of the discount[ ] . . . would deprive plaintiffs of the value of the decedent's proportionate interest in a going concern, since they would not receive what they would have received had the entire entity been sold on the open market unaffected by a diminution in value as a result of a forced sale" (*id.*). Critically, the case hinged on the Court's construction of Partnership Law § 73, which employs the same key phrasing as section 69 (*see* Partnership Law § 73 [providing that a partner who retires or dies, or such partner's legal representative, is entitled to "the value of (the partner's) interest in the dissolved partnership"]).

In *In re Marriage of Branscomb*, a marital dissolution, the court reversed a trial court's judgment applying a minority discount to a husband's interest in a partnership (*see* 201 Or App 188, 117 P3d 1051 [2005], *review denied* 339 Or 544, 125 P3d 750 [2005]). The court held that such a discount was inappropriate where, under the terms of the partnership agreement, the husband could not sell his interests on the open market, ***307** but would instead be required to sell it to his partners, or, if they did not want to buy it, to have the partnership's assets sold as a whole and the proceeds distributed pro rata (*see* 201 Or App at 198-199, 117 P3d at 1058). "In either case, the factual basis for a minority discount would not exist: no buyer would ever be put in the position of owning a minority interest and assuming a minority risk. If the other partners buy husband out, they simply augment their majority status; they would then become sole owners, neither majority nor minority" (201 Or App at 199, 117 P3d at 1058).

In *East Park Ltd. Partnership v Larkin*, the Maryland Court of Special Appeals determined that a minority discount should not be applied when valuing a withdrawing partner's interests under the Maryland Revised Uniform Limited Partnership Act (Md Code Ann, Corps & Ass'ns § 10-101 *et seq.*) (MRULPA) (*see* 167 Md App 599, 893 A2d 1219 [2006], *cert denied* 393 Md 243, 900 A2d 749 [2006]). The MRULPA provided that a limited partner could withdraw at any time, subject to certain conditions and six months' notice, and "receive, within a reasonable time after withdrawal, the fair value of the partner's partnership interest in the limited partnership" (167 Md App at 613, 893 A2d at 1227-1228 [emphasis omitted]; *see* MRULPA §§ 10-603 [b]; 10-604). Although "fair value" was not defined, the court looked to our decision in *Friedman*, as well as the RUPA, for guidance (*see East Park*, 167 Md App at 614-615, 893 A2d at 1228). The court noted that the purpose of the MRULPA provision at issue, like that of the dissenting shareholder statute, was to allow a partner to "cash out" their interests in order to avoid compelling them to "participate in a corporate course they find objectionable" (167 Md App at 620-621, 893 A2d at 1232). Moreover, the interests were not being sold to a hypothetical third party, but were to be "absorbed by the partnership entity" itself (167 Md App at 619, 893 A2d at 1231). Accordingly, the court found the corporate appraisal cases to be on point:

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> "In both situations, the individuals are exercising a statutory right to withdraw from an entity, and the entity is absorbing the interests of those individuals. . . .
> "The application of discounts is appropriate only under a fair market value analysis, that is, in determining what price a willing buyer would offer, ***308** and a willing seller would accept, on the open market. . . . Here, the application of discounts would unjustly enrich the remaining partners of East Park because they would receive the distributions attributable to the Withdrawing Partners' interests; yet, . . . the remaining partners would end up acquiring the interest[s] of the withdrawing partners for less than they were worth if those interests had remained in the hands of the withdrawing partners." (167 Md App at 620-621, 893 A2d at 1231-1232 [internal quotation marks omitted].)

In *Winn v Winn Enters., Ltd. Partnership*, the Arkansas Court of Appeals held that the trial court erred in applying minority discounts in valuing the interests of a withdrawing member of a family limited partnership (*see* 100 Ark App 134, 265 SW3d 125 [2007]). The court favorably cited *East Park* and the dissenting shareholder cases, noting that "[i]f discounts are applied, the entity obtains the withdrawing shareholder or partner's interest for less than that interest would be worth in the hands of the withdrawing shareholder or partner" (100 Ark App 139-140, 265 SW3d at 128).

Most recently, the Louisiana Supreme Court joined this line of cases when it held that a minority discount should not have been applied to the value of a withdrawing partner's interests in a limited liability partnership (*see Cannon v Bertrand*, 2008-1073 [La 1/21/09], 2 So 3d 393 [2009]). The court held that, while "[m]inority discounts . . . may have a place" ****19** under Louisiana law, "such discounts must be used sparingly" (2008-1073 [La 1/21/09], 2 So 3d at 396). Specifically, the court held that it was an abuse of discretion to apply the discount where "[t]he buyers of the partnership interest at issue are the two remaining partners in the partnership," who would "not be subject to a lack of control as would a third party," and where the remaining partners "opt[ed] to continue the partnership and avoid liquidation" (*id*.). Although *Cannon* eschewed a *per se* rule against minority discounts, and although Louisiana is not a UPA state, *Cannon*'s reasoning would appear to preclude discounts where, as here, the non-dissolving partners elect to continue the partnership and absorb the wrongfully-dissolving partner's interests.

Although the Supreme Judicial Court of Massachusetts embraced minority discounts under UPA § 38 (2) (*see Anastos*, 443 Mass 146, 819 NE2d 587), *Anastos* was focused on a different ***309** legal issue. The issue actually presented and analyzed in *Anastos* was whether the partnership should be valued at liquidation value or as a going-concern (*see* 443 Mass at 149-152, 819 NE2d at 590-592). The court correctly concluded that going-concern value, rather than liquidation value, was the appropriate measure, where the remaining partners elect to continue the partnership's existence under UPA § 38 (2) (b) (*see id*.). However, after concluding that the partnership should be valued as a going concern, the court's only discussion of the minority discount issue was its statement that the trial court's "use of a forty per cent minority shareholder discount [was] well supported by the evidence and therefore not clearly erroneous" (443 Mass at 152, 819 NE2d at 592). The *Anastos* court simply assumed that if the partnership were valued as a going concern, rather than at liquidation value, then the interest should be valued piecemeal, rather than as a proportionate share of the *business* as a going concern. The court never explained why this assumption should hold, and, as explained above, cases decided after *Anastos* have challenged it (*see Vick*, 47 AD3d at 483-484; *East Park*, 167 Md App 599, 893 A2d 1219; *Winn*, 100 Ark App 134, 265 SW3d 125).

A number of authorities have criticized the feasibility of applying a minority discount. In the corporate context, "[d]iscounting individual share holdings injects into the appraisal process speculation on the various factors which may dictate the marketability of minority shareholdings" (*Cavalier Oil*, 564 A2d at 1145; *accord HMO-W Inc. v SSM Health Care Sys.*, 234 Wis 2d 707, 720-722, 611 NW2d 250, 256 [2000]).

> "Courts have not . . . agreed on a clear standard for the proper discount figure, and they have applied considerably different discounts. Discounting thus complicates judicial [appraisals], and makes it even more difficult for private parties to anticipate likely appraisal practices. Denying a minority discount, on the other hand, comports with fairness, simplifies the valuation process, and facilitates negotiations between parties" (Robert B. Heglar, Note, *Rejecting the Minority Discount*, 1989 Duke LJ 258, 276 [1989]; *see also* Miller, 13 U Pa J Bus L at 635-636 [arguing against minority discounts in limited liability company (LLC) valuation proceedings, because "LLC jurisprudence should be developed in a way that maximizes certainty and ***310** predictability as much as possible" and "the

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minority discount creates substantial uncertainty in the setting of the LLC"]).

Minority discounts would essentially randomize the partnership's liability in many wrongful dissolution cases, hindering the dissolving partner's ability to settle the dispute out of court based on a reliable and predictable computation of the "value of [its] interest."

Finally, if the purpose of the minority discount is to deter or punish "wrongful" conduct, as the Appellate Division below implied (*see Congel v Malfitano*, 141 AD3d 64, 73 [2d Dept 2016]), then it is certainly a peculiar way to do so. The brunt of this penalty will fall disproportionately on minority partners, the class of partners whose withdrawal is *least* likely to cause a disturbance, but whose exit rights are *most* important, due precisely to their lack of control over the business. This would "inflict[ ] a double penalty" upon the minority partner (*Brown*, 2006 WY 107, ¶ 30, 141 P3d at 683, quoting *HMO-W*, 234 Wis 2d at 723, 611 NW2d at 257); the partner not only lacks control over operational decision-making, but would then receive less than a proportionate value *because* of that lack of control. Indeed, by the majority's own logic, if a wrongful dissolver is a majority or controlling partner—precisely the kind of partner whose dissociation will most damage the business—that partner may now be entitled to a *control premium* under Partnership Law § 69 (2) (c) (II), since this would reflect the amount that a willing third-party buyer would pay for a majority stake (*see* majority op at 296 and 296 n 12). The structure of Partnership Law § 69 (2) (c) (II) already deters wrongful dissolution in two ways: by requiring the dissolving partner to pay damages, and by discounting the value of its partnership interests attributable to goodwill. A further discount for a lack of control is cumulative and unnecessary in light of these other provisions.

In defining the "value of [the partner's] interest in the partnership," the question does not turn on whether a particular method of valuation is "accurate," but whether that valuation will lead to an allocation of wealth as between ****20** these partners that best advances the legislative scheme. "Value" can mean many different things, and the definition we embrace should be guided by the ends that the legislature sought to implement when it enacted the Partnership Law. Here, the court applied a minority discount of $1,768,552.50 to appellant's ***311** partnership interests, which were stipulated to be worth $4,850,000 without adjustments (*see* majority op at 284). The question is, in an action for wrongful dissolution, where the partnership is continued as a going concern, which party has the greater right to that $1,768,552.50 portion of appellant's interests—the controlling partners, or appellant himself? For the reasons discussed above, I believe this question should resolve in appellant's favor, and the order of the Appellate Division should be modified accordingly.

Judges Rivera, Stein, Garcia and Wilson concur; Judge Feinman dissents in part in an opinion in which Chief Judge DiFiore concurs.

Judgment appealed from, and orders of the Appellate Division brought up for review, modified, without costs, by remitting the case to Supreme Court, Dutchess County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

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Footnotes

1 Plaintiffs did not take the position that defendant's action had no legal effect and failed to dissolve the Partnership. On appeal, plaintiffs concede that the Partnership dissolved by operation of law. The dispute concerns whether the dissolution violated the agreement. Consequently, we have no occasion to consider whether plaintiffs would prevail if they had argued that under the agreement a purported unilateral dissolution is no dissolution at all.

2 The judicial dissolution statute, Partnership Law § 63, gives a partner the statutory right to seek court dissolution of a partnership, and provides that a court shall decree the dissolution, on a partner's application, in various situations, including circumstances that would "render a dissolution equitable" (Partnership Law §63 [1] [f]). Defendant did not seek judicial dissolution prior to unilaterally dissolving the partnership.

3 The trial court granted defendant postjudgment interest.

4 Addressing the question of when a partnership agreement specifies a "definite term" or "particular undertaking" within the meaning of Partnership Law § 62, this Court adopted the rule that "a 'definite term' . . . is intended to be durational in

nature and refers to an identifiable termination date," while "[a] 'particular undertaking' . . . require[s] a specific objective or project that may be accomplished at some future time, although the precise date need not be known or ascertainable at the time the partnership is created" (*Gelman*, 20 NY3d at 537-538 [citations omitted]).

5 In resolving whether *Gelman* required a reassessment of its earlier rulings, the Appellate Division alluded, in passing, to the "law of the case" doctrine, but proceeded to distinguish *Gelman*, rather than consider whether that decision introduced a change in the law (141 AD3d at 70). Contrary to defendant's assertion, the Appellate Division did not consider examination of *Gelman* to be foreclosed. Nor do we.

6 As we have noted (*see* footnote 1), plaintiffs do not argue that defendant's action had no legal effect and failed to dissolve the Partnership. Consequently, we have no occasion to consider whether the agreement left no room for *any* other means of dissolution, whether proper or wrongful.

7 Accordingly, there is no need for us to determine whether Supreme Court erred in deciding that the agreement contained a "particular undertaking" or whether the Appellate Division erred in deciding that the agreement contained a "definite term."

8 For example, the record contains a reference to $14,640 incurred in attorneys' fees for legal advice and attendance at partner meetings prior to the commencement of the lawsuit, to ensure "formal partnership action to make sure with clarity to the lender that all steps were being taken that were necessary to continue the business." This would correspond to a very small percentage—0.539% by our calculation—of the attorneys' fees plaintiffs originally requested, and defendant accordingly asserts that the great majority of the fees claimed by plaintiffs were related to the litigation of their action.

9 Defendant observes that the Partnership did not manage the mall, solicit tenants, negotiate leases, or have employees; that was the job of its agent, Pyramid Companies. Nevertheless, even though the Partnership was not directly responsible for day-to-day operations, it owned a shopping mall, with local reputational advantages, from which the Partnership derived goodwill value, just as Pyramid might have goodwill for responsible management of malls.

10 A minority discount is not relevant in valuing an asset, such as a publicly traded share, that is already priced as a minority holding, the fair market value of which can be determined simply by examining the market price of the stock.

11 Defendant has not preserved any objection to the percentage of the discount. Consequently, we do not address the lower courts' determination of the size of the minority discount.

12 "[T]he fair market value is the price at which [an asset] would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts" (*Estate of Godley v Commissioner of Internal Revenue*, 286 F3d 210, 214 [4th Cir 2002], quoting *United States v Cartwright*, 411 US 546, 551 [1973]).

13 Our holding is not "that the trial court was *required* to apply a minority discount" (dissenting op at 299 [emphasis added]). We need decide only whether the application of a minority discount in this case was contrary to law.

1 The federal tax refund cases from which the majority's "willing-buyer-willing-seller" methodology is appropriated are simply applying a definition of "value" promulgated by the United States Department of the Treasury (*see* 26 CFR 20.2031-1 [b], 25.2512-1; *United States v Cartwright*, 411 US 546, 550-551 [1973]). It is because of these regulations that tax courts permit a discount for lack of control in assessing the "value" of a minority interest (*see Estate of Andrews*, 79 TC at 954-955, [discussing *Bright's Estate v United States*, 658 F2d 999 (5th Cir 1981, en banc)]). "No purpose [would be] served by questioning the wisdom of the hypothetical party standard" in tax refund cases, "because that is the required measure as established by law, and so it will remain unless Congress changes it" (James Edward Harris, *Valuation of Closely Held Partnerships and Corporations: Recent Developments Concerning Minority Interest and Lack of Marketability Discounts*, 42 Ark L Rev 649, 668 [1989]).

2 RUPA § 701 is the "counterpart" to UPA § 38 (2) (*see* Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 Bus Law 45, 66 [1993]). The RUPA, like the UPA, requires this sum to be offset against any damages that a partner must pay for a wrongful dissociation (*see* RUPA § 701 [c]). Unlike the UPA, however, it contains no discount for goodwill (*see id.* § 701 [b], Comment).

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New York Official Reports

192 A.D.2d 636, 596 N.Y.S.2d 465

Elgem, Inc., et al., Respondents,
v.
National Gypsum, Inc., Defendants,
and Gerald Brandman, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
91-06107
(April 19, 1993)

CITE TITLE AS: Elgem, Inc. v National Gypsum

HEADNOTE

MOTIONS AND ORDERS
REARGUMENT OR RENEWAL

(1) In action for breach of contract, order which denied defendant's cross motion to renew his motion to dismiss complaint for lack of personal jurisdiction affirmed --- Supreme Court did not improvidently exercise its discretion in denying motion to renew, which was based on purportedly new evidence in form of affidavit by defendant's daughter-in-law denying she had been served with summons and complaint on behalf of defendant; although defendant contends renewal was warranted inasmuch as he was afforded no notice or opportunity to call daughter-in-law as witness at hearing to ascertain whether he had been properly served with process, he altogether fails to explain why he did not move for adjournment when it became obvious plaintiffs' attorney was attempting to establish through his examination of defendant and process server that it was daughter-in-law upon whom substituted service had been made; significantly, defendant has also failed to proffer explanation for 13-month delay in submitting affidavit to court.

In an action, *inter alia,* to recover damages for breach of contract, the defendant Gerald Brandman appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Ramirez, J.), entered March 7, 1991, as denied his cross motion to renew that portion of his motion which was to dismiss the complaint as asserted against him for lack of personal jurisdiction.

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

The Supreme Court did not improvidently exercise its discretion ***637** in denying the motion to renew *(see, Roseman v Goldberg,* 181 AD2d 873), which was based on purportedly new evidence in the form of an affidavit by the appellant's daughter-in-law, Deborah Madigan, denying that she had ever been served with a summons and complaint on behalf of the appellant. Although the appellant contends that renewal was warranted inasmuch as he was afforded no notice or opportunity to call Madigan as a witness at the hearing to ascertain whether he had been properly served with process, he altogether fails to explain why he did not move for an adjournment when it became obvious that the plaintiffs' attorney was attempting to establish through his examination of the appellant and the process server that it was Madigan upon whom substituted service had been made. Significantly, the appellant has also failed to proffer any explanation for his 13-month delay in submitting the affidavit to the court.

We have reviewed the appellant's remaining contentions and conclude that they are without merit.

Bracken, J. P., Miller, Lawrence, Copertino and Santucci, JJ., concur.

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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

151 A.D.3d 1896, 57 N.Y.S.3d 832, 2017 N.Y. Slip Op. 05337

**1 Peter Hammond, Appellant,

v

Bruce W. Smith, Respondent.

Supreme Court, Appellate Division, Fourth Department, New York
16-01498, 694
June 30, 2017

CITE TITLE AS: Hammond v Smith

HEADNOTE

Partnership
Existence of Relation
Documentary Evidence Did Not Indicate Shared Intent to Enter into Partnership—Two References to Partnership Did Not Raise Issue of Fact

Harris Beach PLLC, Pittsford (Douglas A. Foss of counsel), for plaintiff-appellant.
Barclay Damon, LLP, Rochester (Mark T. Whitford, Jr., of counsel), for defendant-respondent.
Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 27, 2016. The order granted defendant's motion for summary judgment dismissing the complaint. *1897

It is hereby ordered that the order so appealed from is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for breach of an alleged oral partnership between the parties to develop and market a new lithographic tool. Plaintiff appeals from an order that granted defendant's motion for summary judgment dismissing the complaint on the ground that no partnership existed between the parties. We affirm.

We conclude that defendant met his initial burden of establishing that no partnership existed (*see Fasolo v Scarafile*, 120 AD3d 929, 930 [2014], *lv dismissed* 24 NY3d 992 [2014]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "A partnership is an association of two or more persons to carry on as co-owners a business for profit" (Partnership Law § 10 [1]). Where, as here, there is no written partnership agreement between the parties, a court looks to the parties' conduct, intent, and relationship to determine whether a partnership existed in fact (*see Fasolo*, 120 AD3d at 929-930). The relevant factors are (1) the parties' intent, whether express or implied; (2) whether there was joint control and management of the business; (3) whether the parties shared both profits and losses; and (4) whether the parties combined their property, skill, or knowledge (*see Griffith Energy, Inc. v Evans*, 85 AD3d 1564, 1565 [2011]; *Kyle v Ford*, 184 AD2d 1036, 1036-1037 [1992]). No single factor is determinative; a court considers the parties' relationship as a whole (*see Fasolo*, 120 AD3d at 930; *Griffith Energy, Inc.*, 85 AD3d at 1565).

With respect to the first factor, we must consider whether the parties expressly or implicitly intended to become partners (*see generally Fasolo*, 120 AD3d at 930). Evidence concerning the parties' preliminary negotiations bears directly on their intent (*see Boyarsky v Froccaro*, 131 AD2d 710, 713 [1987]). In support of his motion, defendant submitted, inter alia, the deposition testimony of plaintiff, the affidavit of defendant, invoices, a lease, and the parties' correspondence documenting their contract negotiations. That evidence establishes that the parties never shared the intent to become partners. In June 2004, defendant wrote an email to plaintiff suggesting that they discuss "how [they] might be able to work together." Plaintiff responded that a partnership "might work" and expressed hope that the parties could come to a "workable agreement." Thereafter, the parties met in person and plaintiff explained that he wanted a 50% share in a partnership. Plaintiff later testified at his deposition that, upon hearing *1898 that proposal, defendant had "a look on his face like maybe he wasn't expecting that," and did not respond.

Although plaintiff testified that he interpreted defendant's silence as an agreement to an **2 equal partnership, the documentary evidence undermines any such assumption. In late September 2004, prior to meeting with defendant's attorney, plaintiff wrote an email to defendant stating: "I think we need to nail down the key terms of our agreement . . . Our attorney[s] and advisors should be able to help us come to a fair and equitable agreement." Defendant responded: "We should also keep open other ways to structure things. We

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initially discussed that your company might contract to build tools for my company. This could also be an option. Others may also exist." According to plaintiff's deposition testimony, the resulting meeting with defendant's attorney in October 2004 did not further the parties' business negotiations, and plaintiff left that meeting discouraged. Thereafter, plaintiff approached defendant and offered to take a reduced, 20% share in a partnership agreement, ostensibly to be a "good partner," further undermining any suggestion that the parties already had agreed to enter into an equal partnership. When plaintiff later testified about defendant's response to that proposal, plaintiff did not testify that defendant agreed to a partnership under the proposed terms; rather, he testified only that defendant appeared "happy" with plaintiff's change of heart. In May 2005, plaintiff wrote one last email to defendant asking to "finalize [their] business deal," but the parties ended their business relationship in or around August 2005 without having reduced it to writing. Thus, the evidence demonstrates that the parties never shared the intent to enter into a partnership, although they initially had explored the possibility of one.

We respectfully disagree with our dissenting colleague's view that plaintiff's deposition testimony raised triable issues of fact whether a partnership existed. Although plaintiff referred to the parties' business relationship as a partnership and testified that defendant acquiesced in plaintiff's initial proposal, it is well settled that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to create a material issue of fact (*Zuckerman*, 49 NY2d at 562).

With respect to the second factor, we must consider whether there was joint control and management, e.g., shared supervision of business operations and shared responsibility for handling financial affairs (*see Griffith Energy, Inc.*, 85 AD3d at 1566; *Kyle*, 184 AD2d at 1037). In his affidavit, defendant averred that he hired nine engineers, a technical writer, and a ***1899** bookkeeper, contracted with a payroll company and an accounting firm, paid bills, established relationships with vendors, developed management protocols, and directed all assembly and engineering decisions, and plaintiff's deposition testimony raised no issues of fact in that regard. In contrast, plaintiff contributed the services of one engineer whom he employed and paid, and defendant reimbursed plaintiff for that employee's services. Furthermore, plaintiff testified at his deposition that financial transactions were handled through a bank account belonging to defendant's corporation, and that defendant alone had the authority to write checks on that account. Thus, the evidence overwhelmingly demonstrates that defendant had sole control and management of the business.

With respect to the third factor, we must consider whether the parties shared profits and losses (*see Fasolo*, 120 AD3d at 930; *Ramirez v Goldberg*, 82 AD2d 850, 852 [1981]). Although a person's receipt of a share of profits is prima facie evidence that he or she is a partner (*see* Partnership Law § 11 [4]), there is no allegation or evidence that plaintiff received a share of profits.

It is well established that shared losses are an " 'essential element' " of any partnership agreement (*Prince v O'Brien*, 256 AD2d 208, 212 [1998]; *see Fasolo*, 120 AD3d at 930). Where there is "undisputed evidence that [a party] never made a capital contribution to the business[, such evidence] strongly suggests that no partnership existed" (*Kyle*, 184 AD2d at 1037; *see Fasolo*, 120 AD3d at 930). The documentary evidence and plaintiff's own deposition testimony establish that plaintiff made no capital contributions and did not share in the business venture's losses. At his deposition, plaintiff testified that he made no capital contributions to the venture, and contributed only "time, effort, good will, [and] expertise as the investment." Throughout the course of their business relationship, plaintiff sent defendant numerous invoices to recoup tens of thousands of dollars of his expenses, and there is no dispute that defendant reimbursed plaintiff for those expenses. When the parties were seeking office space to lease, plaintiff sent an email to defendant indicating that he did not wish to be liable under the lease, and, indeed, defendant alone signed the resulting lease and accepted all obligations thereunder. Defendant averred that he used his own personal credit, and there is no dispute that defendant alone was liable to creditors.

****3** Plaintiff contends, based on *Ramirez*, that he shared in losses because he offered his own services for a share of net profits and "risk[ed] losing the value of those services" (***1900** 82 AD2d at 852). We reject that contention. Although plaintiff's testimony supports an inference that he offered services to the venture for which he was never compensated, such services alone do not establish that a person shared in losses sufficient to raise an issue of fact concerning the existence of a partnership where, as here, that person invested no capital and was not liable to creditors (*see id.*).

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With respect to the fourth factor, we must consider whether the parties combined their property, skill, and knowledge. Although plaintiff testified to instances in which he contributed his skill and knowledge related to design and marketing in the engineering industry, that factor is not dispositive (*see generally Fasolo*, 120 AD3d at 930). Upon our review of the foregoing factors and the parties' business relationship as a whole (*see generally id.*; *Griffith Energy, Inc.*, 85 AD3d at 1565), we conclude that defendant met his initial burden of establishing that no partnership existed (*see Fasolo*, 120 AD3d at 930). The burden thus shifted to plaintiff to raise an issue of fact by submitting evidence in admissible form (*see generally Zuckerman*, 49 NY2d at 562).

We further conclude that plaintiff failed to raise an issue of fact whether a partnership existed between the parties (*see Fasolo*, 120 AD3d at 931; *see generally Zuckerman*, 49 NY2d at 562). In opposition to the motion, plaintiff submitted, inter alia, the affidavit of plaintiff and documents that included a business proposal and a cover letter in which the word "partnership" is used to refer to the parties' business relationship. As Supreme Court properly reasoned, however, " 'calling an organization a partnership does not make it one' " (*Kyle*, 184 AD2d at 1037; *see UrbanAmerica, L.P. II v Carl Williams Group, L.L.C.*, 95 AD3d 642, 644 [2012]). In light of the documentary evidence detailed above that the parties never shared the intent to become partners, those two references to a partnership in documents prepared by lay persons do not raise an issue of fact whether the parties in fact entered into a legal partnership. Finally, plaintiff's affidavit was insufficient to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

All concur except Whalen, P.J., who dissents and votes to reverse in accordance with the following memorandum.

Whalen, P.J. (dissenting). I respectfully dissent. In my view, plaintiff's deposition testimony raised triable issues of fact with respect to the existence of a partnership between the parties. Because that testimony was among defendant's own submissions in support of his motion for summary judgment, I ***1901** conclude that defendant failed to meet his initial burden on the motion, and that Supreme Court erred in granting it (*see Prince v O'Brien*, 234 AD2d 12, 12 [1996]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Bianchi v Midtown Reporting Serv., Inc.*, 103 AD3d 1261, 1261-1262 [2013]).

At his deposition, plaintiff testified that he and defendant reached an oral agreement to be partners in their business venture at some point prior to an October 2004 meeting with defendant's attorney, and that defendant acquiesced in his request for a 50% share of the partnership (*see generally Don v Singer*, 92 AD3d 576, 577 [2012]). Plaintiff further testified that he thereafter voluntarily reduced his share to 20% in recognition of defendant's greater contributions to the business, and that the two of them later agreed to bring a third person into the partnership, with plaintiff retaining his 20% share and the third person assuming a 10% share. In addition, plaintiff testified that defendant sought to end their business relationship by telling plaintiff that he "didn't want to be partners anymore," which suggests that defendant believed that they had been partners up to that point. Although the court characterized the evidence of an absence of mutual intent to be partners as "overwhelming," and the majority points to evidence that it views as "undermin[ing]" plaintiff's testimony, I conclude that plaintiff's testimony supports a reasonable inference that the parties shared the intent to form a partnership (*see A.G. Interiors Unlimited v DiMaggio*, 224 AD2d 466, 466 [1996]; *Boyarsky v Froccaro*, 131 AD2d 710, 712-713 [1987]; *see generally Don*, 92 AD3d at 577), and that the existence of contrary evidence merely raises an issue of credibility inappropriate for resolution on a motion for summary judgment (*see generally Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; *Harrington Group, Inc. v B/G Sales Assoc., Inc.*, 41 AD3d 1161, 1162 [2007]; *Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226 [2002]). Even assuming, arguendo, that the majority is correct that certain factors tending to establish the existence of a partnership are lacking in this case (*see generally Fasolo v Scarafile*, 120 AD3d 929, 929-930 [2014], *lv dismissed* 24 NY3d 992 [2014]), I conclude that those factors are not determinative (*see id.* at 930), and that the competing inferences regarding the intent of the ****4** parties should be resolved by the trier of fact (*see Cavezza v Gardner*, 176 AD2d 911, 911-912 [1991]).

In any event, I conclude that defendant submitted conflicting evidence concerning whether the parties shared profits and losses and whether the parties combined their property, skill, ***1902** and knowledge (*see Kyle v Ford*, 184 AD2d 1036, 1036-1037 [1992]). With respect to the latter factor, plaintiff testified that his contributions to the business included goodwill, design and engineering expertise, and access to vendors and suppliers. With respect to sharing of profits and losses, although it is undisputed that defendant paid plaintiff for some of his services, plaintiff testified that he contributed a significant amount of unpaid services to the business,

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and that he did so "as an investment," i.e., in anticipation of a share of future profits. In my view, that testimony is sufficient to establish that plaintiff may have been exposed to a risk of losses (*see Ramirez v Goldberg*, 82 AD2d 850, 852 [1981]; *see generally Don*, 92 AD3d at 577). Contrary to defendant's contention, the absence of other evidence corroborating that plaintiff in fact performed unpaid services affects only the evidentiary weight of plaintiff's testimony and does not warrant disregarding that testimony for purposes of defendant's motion (*see generally Alvarez*, 295 AD2d at 226).

In sum, I agree with plaintiff that the court improperly resolved issues of fact in granting defendant's motion (*see Patel v Patel*, 192 AD2d 357, 357-358 [1993]), and I would therefore reverse the order and deny the motion. Present—Whalen, P.J., Centra, Lindley, Troutman and Scudder, JJ. **[Prior Case History: 51 Misc 3d 1216(A), 2016 NY Slip Op 50670(U).]**

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New York
Official Reports

KeyCite Yellow Flag - Negative Treatment
Distinguished by Krivulya v. Bay Parkway Physicians P.C., N.Y.Sup., March 21, 2022

184 A.D.2d 1036, 584 N.Y.S.2d 698

Peter O. Kyle et al., Respondents,

v.

L. Brenton Ford et al., Appellants.

Supreme Court, Appellate Division,
Fourth Department, New York
461
(June 5, 1992)

CITE TITLE AS: Kyle v Ford

HEADNOTE

PARTNERSHIP
EXISTENCE OF RELATION

(1) In action for dissolution of partnership and accounting, both parties sought summary judgment on question whether business partnership existed; fact parties held themselves out as partners is not decisive; undisputed evidence that plaintiff had sole authority to write checks on business account, along with conflicting evidence regarding control over daily operations on farm, raise questions whether there was indeed partnership relation; further, undisputed evidence defendants never made capital contribution to business strongly suggests no partnership existed.

Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: In this action for dissolution of a partnership and an accounting, both parties sought, *inter alia,* summary judgment on the question whether a business partnership existed. Supreme Court erred in determining, as a matter of law, that a partnership existed. In deciding whether ***1037** a partnership exists, "the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was a sharing of the profits as well as a sharing of the losses, and whether there was a combination of property, skill or knowledge" *(Ramirez v Goldberg,* 82 AD2d 850, 852; *see also, Matter of Steinbeck v Gerosa,* 4 NY2d 302, 317, *appeal dismissed* 358 US 39; *Boyarsky v Froccaro,* 131 AD2d 710, 712). No one factor is determinative; it is necessary to examine the parties' relationship as a whole *(Martin v Peyton,* 246 NY 213, 218; *Brodsky v Stadlen,* 138 AD2d 662, 663). The fact that the parties held themselves out as partners is not decisive; "calling an organization a partnership does not make it one" *(Brodsky v Stadlen,* 138 AD2d 662, 663, *supra; see also, Ramirez v Goldberg,* 82 AD2d 850, *supra).*

Undisputed evidence that Kyle had sole authority to write checks on the business account, along with conflicting evidence regarding control over the daily operations on the farm, raise questions whether there was indeed a partnership relation *(see, Ramirez v Goldberg, supra).* Further, the undisputed evidence that defendants never made a capital contribution to the business strongly suggests that no partnership existed *(see, Brodsky v Stadlen,* 138 AD2d 662, 663, *supra; Azoulay v Cassin,* 128 AD2d 660; *M.I.F. Sec. Co. v Stamm & Co.,* 94 AD2d 211, 214, *affd* 60 NY2d 936).

Those portions of the order granting partial summary judgment to plaintiffs declaring that a partnership existed and ordering an accounting are reversed. Those parts of the order denying defendants' cross motion for summary judgment and permitting further discovery are affirmed. (Appeal from Order of Supreme Court, Cayuga County, Corning, J.--Summary Judgment.)

Present--Green, J. P., Pine, Boehm, Fallon and Davis, JJ.

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46 A.D.3d 759, 848 N.Y.S.2d
337, 2007 N.Y. Slip Op. 10109

****1** Michael Lardo, Appellant

v

Rivlab Transportation Corp. et al., Respondents.

Supreme Court, Appellate Division,
Second Department, New York
13299/05, 2007-07042
December 18, 2007

CITE TITLE AS: Lardo v Rivlab Transp. Corp.

HEADNOTE

Motions and Orders
Reargument or Renewal

Gary E. Rosenberg, P.C., Forest Hills, N.Y., for appellant.
Mintzer, Sarowitz, Zeris, Ledva & Meyers, Hicksville, N.Y. (Marc D. Sloane of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from stated portions of an order of the Supreme Court, Queens County (Cullen, J.), dated July 6, 2007, which granted that branch of the defendants' motion which was for leave to renew their opposition to his prior motion for summary judgment on the issue of liability, which had been granted in an order dated February 28, 2007, and upon renewal, inter alia, vacated the order dated February 28, 2007, and directed that the note of issue and certificate of readiness be stricken and the action marked off the trial calendar.

Ordered that the order dated July 6, 2007 is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs, that branch of the defendants' motion which was for leave to renew is denied, and the order dated February 28, 2007 is reinstated.

"A motion for leave to renew is addressed to the sound discretion of the court" (*Matheus v Weiss*, 20 AD3d 454, 454-455 [2005]). A motion for leave to renew must be based upon "new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]) and must contain "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]; *see Matter of Leyberman v Leyberman*, 43 AD3d 925 [2007]; *Worrell v Parkway Estates, LLC*, 43 AD3d 436, 437 [2007]; *O'Connell v Post*, 27 AD3d 631 [2006]; *Renna v Gullo*, 19 AD3d 472, 473 [2005]; *O'Dell v Caswell*, 12 AD3d 492 [2004]). A motion for leave to renew "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Matter of Weinberg*, 132 AD2d 190, 210 [1987]; *see Worrell v Parkway Estates, LLC*, 43 AD3d at 437; *Renna v Gullo*, 19 AD3d at 473; *O'Dell v Caswell*, 12 AD3d 492 [2004]).

Here, the Supreme Court improvidently exercised its discretion in granting that branch of the defendants' motion which was for leave to renew. While the defendants' submission of an ***760** affidavit from the defendant Lloyd G. Forbes presented new evidence setting forth Forbes' version of the events surrounding the occurrence of the accident, their purported justification for failing to submit those facts in opposition to the prior motion was not reasonable (*see Beyl v Franchini*, 37 AD3d 505, 506 [2007]; *Perez v Muller Mach. Co., Inc.*, 19 AD3d 468, 468-469 [2005]; *Falkowitz v Peters*, 294 AD2d 330, 331 [2002]).

The remaining contentions either are without merit or have been rendered academic by our determination. Rivera, J.P., Spolzino, Carni and McCarthy, JJ., concur.

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New York Official Reports

58 A.D.3d 727, 872 N.Y.S.2d 146, 2009 N.Y. Slip Op. 00377

**1 In the Matter of Allstate Insurance Company, Appellant
v
Liberty Mutual Insurance, Respondent.

Supreme Court, Appellate Division, Second Department, New York
January 20, 2009

CITE TITLE AS: Matter of Allstate Ins. Co. v Liberty Mut. Ins.

HEADNOTE

Motions and Orders
Reargument or Renewal

Robert G. Mazeau, New York, N.Y. (James Mermigis and Lisa G. Kim of counsel), for appellant.
Malapero & Priso LLP, New York, N.Y. (Dhruv A. Dhavan and Ian Forman of counsel), for respondent.

In a proceeding pursuant to CPLR article 75 to confirm an arbitration award, the petitioner appeals from an order of the Supreme Court, Rockland County (Garvey, J.), entered January 7, 2008, which denied its motion for leave to renew the petition to confirm the award, which was denied in an order of the same court dated November 22, 2006. *728

Ordered that the order is affirmed, with costs.

Although a motion for leave to renew generally must be based on newly-discovered facts, this requirement is a flexible one, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided that the movant offers a reasonable justification for the failure to submit the additional facts on the original motion (*see Matter of Gold v Gold,* 53 AD3d 485, 487 [2008]; *Matter of Surdo v Levittown Pub. School Dist.,* 41 AD3d 486 [2007]; *Heaven v McGowan,* 40 AD3d 583 [2007]; *Allstate Ins. Co. v Davis,* 23 AD3d 418 [2005]). Nevertheless, "[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Elder v Elder,* 21 AD3d 1055, 1055 [2005]; *see Lardo v Rivlab Transp. Corp.,* 46 AD3d 759 [2007]; *Matter of Leyberman v Leyberman,* 43 AD3d 925 [2007]).

Contrary to the petitioner's contention, the Supreme Court did not improvidently exercise its discretion in denying its motion for leave to renew. The petitioner's motion was based upon evidence that **2 either was in its possession at the time its petition to confirm the arbitration award was brought, or could have been obtained earlier with due diligence, and it did not sufficiently justify, inter alia, its failure to attach a copy of the award it was seeking to confirm to its petition. Moreover, the petitioner failed to offer a reasonable justification for its eight-month delay in moving for leave to renew to correct various deficiencies in the petition, which included the failure to submit a copy of the arbitration award (*see Christ v Solomon,* 6 AD3d 569 [2004]; *Matter of Tri-State Consumer Ins. Co. v Singh,* 297 AD2d 349 [2002]; *Cole-Hatchard v Grand Union,* 270 AD2d 447, 448 [2000]). Skelos, J.P., Dillon, McCarthy and Eng, 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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Distinguished by Dundes v. Fuersich, N.Y.Sup., December 22, 2004

4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1

In the Matter of John E. Steinbeck, Appellant,

v.

Lawrence E. Gerosa, as Comptroller of the City of New York, et al., Respondents.

Court of Appeals of New York
Argued February 20, 1958;

decided May 1, 1958.

CITE TITLE AS: Matter of Steinbeck v Gerosa

SUMMARY

Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered October 1, 1957, which unanimously confirmed a determination of respondent Lawrence E. Gerosa, as Comptroller of the City of New York, that petitioner is liable for the New York City General Business and Financial Tax for three periods of residence since January, 1943.

Matter of Steinbeck v. Gerosa, 4 A D 2d 855, affirmed.

HEADNOTES

Taxation
Gross Receipts Tax
Receipts from literary activities--Gross Receipts Tax (Administrative Code of City of New York, ch. 46, tit. B) properly imposed by City of New York upon petitioner, author of novels, plays, motion picture scripts, magazine articles and other literary works, who received income from licensing of such works--his literary activities constitute "trade, business, profession, vocation or commercial activity", within meaning of tax statute--receipts taxable although attributable to contracts made in prior taxable years--constitutional guarantee of freedom of press does not prohibit imposition of tax-- petitioner not engaged in interstate commerce although publisher may be-- relationship between petitioner and publisher is that of debtor and creditor.

(11) A Gross Receipts Tax (Administrative Code of City of New York, ch. 46, tit. B) is imposed by the City of New York pursuant to section 24-a of ***303** the General City Law which authorizes the city to impose "a tax * * * upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity * * * or making sales within such city". Petitioner, a resident of New York City, is an author of novels, plays, motion picture scripts, magazine articles and other literary works. Through his literary agents located in New York City, he negotiated for the licensing of certain rights in his literary works. The agents' principal function was to negotiate such contracts and they had complete authority and discretion in so doing, and had executed contracts on his behalf. As to books, the consideration to be paid to petitioner consists of a percentage of the amount charged by the publisher for all copies sold, less copies returned, but with no deduction for cash discounts or bad debts. This percentage is characterized as "royalties." As to motion picture scripts, magazine and newspaper articles, and plays, the consideration consists of a lump sum or a percentage or a combination of the two. Petitioner's activities in the city of New York constitute a "trade, business, profession, vocation or commercial activity" within the meaning of the tax statute.

(22) Petitioner's receipts are taxable although the receipts in any one taxable calendar year may be attributable to contracts made in prior taxable years. The tax is measured by the "receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year" in which the privilege period commences (Administrative Code of City of New York, § B46-2.0, subd. a). The statute requires merely that the receipts be attributable to the profession, vocation, trade, business, or commercial activity which the petitioner carried on in that year and not to any "particular activity". The fact that the contract may have been made in another year makes no difference. The receipt of income is as much a part of a business as the making of a contract that gives rise to such income.

(33) The constitutional guarantee of freedom of the press does not prohibit the City of New York from imposing a Gross Receipts Tax on the receipts of an author derived from the grant of licenses to his rights in his literary works. The tax applies not only to writers and publishers but to all businesses,

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professions, trades, vocations and commercial activities. It applies to all without discrimination. It is a general tax and not, in any sense, aimed at the press or at writers. The city does not seek, through the guise of this tax, to regulate those covered by its provisions or to interfere with freedom of the press. Its sole object is revenue notwithstanding the fact that the tax is called a privilege tax.

(44) While many sales may have been made by the publisher in other States and countries, and it may be that the publisher was engaged in interstate and foreign commerce as a result, it does not follow that petitioner was likewise engaged in interstate and foreign commerce. The relationship between petitioner and his publishers was that of debtor and creditor -- not that of joint venturers or partners. The sums paid to petitioner by way of "royalties" were merely the price for the licensing of certain of his literary rights. ***304**

(55) Petitioner's activities are not so closely related to interstate commerce and foreign commerce that they must be treated as though they were activities in interstate or foreign commerce. The formation of a contract between persons in different States is not within the protection of the commerce clause unless the performance thereof is within its protection. The writing by petitioner of books, plays, magazine articles, motion picture scripts and radio scripts, and the granting, within the city of New York, of licenses to certain of the rights therein is separate and distinct from the subsequent sale by others of books, magazines, etc., in interstate or foreign commerce even though the granting of the licenses may induce or occasion interstate commerce.

POINTS OF COUNSEL

Irwin Karp and *Harry Buchman* for appellant.

I. Here, the Gross Receipts Tax is levied on the privilege of writing, and, therefore, repugnant to the First and Fourteenth Amendments of the United States Constitution and section 8 of article I of the Constitution of the State of New York. (Matter of United Air Lines v. Joseph,282 App. Div. 48, 307 N. Y. 762; Follett v. McCormick, 321 U. S. 573; Murdock v. Pennsylvania,319 U. S. 105; Grosjean v. American Press Co., 297 U. S. 233; Winters v. New York,333 U. S. 507; Butler v. Michigan,352 U. S. 380; Puget Sound Co. v. Tax Comm.,302 U. S. 90; Joseph v. Carter & Weekes Co., 330 U. S. 422; Joseph Burslyn, Inc., v. Wilson,343 U. S. 495; People v. Wendling,258 N. Y. 451; Lovell v. Griffin,303 U. S. 444.) II. The taxation of all of appellant's income without allocation between the activities of writing and of licensing, is repugnant to the First and Fourteenth Amendments of the United States Constitution and section 8 of article I of the Constitution of the State of New York. (Hans Rees' Sons v. North Carolina,283 U. S. 123; Adams Mfg. Co. v. Storen,304 U. S. 307.) III. Taxation of royalties derived from interstate and foreign commerce without allocation is repugnant to section 8 of article I of the United States Constitution. (Puget Sound Co. v. Tax Comm., 302 U. S. 90; Howitt v. Street & Smith Pub.,276 N. Y. 345; ***305** April Prods. v. Schirmer, Inc.,308 N. Y. 366; Matter of Seeth v. Joseph, 276 App. Div. 188; Joseph v. Carter & Weekes Co.,330 U. S. 422; Bottlers Seal Co. v. Rainey, 225 N. Y. 369; Cohan v. Richmond,19 F. Supp. 771; Cory v. Commissioner of Internal Revenue,23 U. S. T. C. 775, 230 F. 2d 941; Ilyin v. Avon Pub.,144 F. Supp. 369.) IV. Petitioner is not engaged in any activity within the purview of the tax statute and the application of the tax to him is repugnant to the Fourteenth Amendment of the United States Constitution. (Wisconsin v. Penney Co.,311 U. S. 435; Provident Sav. Assn. v. Kentucky,239 U. S. 103; People ex rel. Nauss v. Graves,283 N. Y. 383; Howitt v. Street & Smith Pub.,276 N. Y. 345; April Prods. v. Schirmer, Inc.,308 N. Y. 366; Bottlers Seal Co. v. Rainey, 225 N. Y. 369; People ex rel. Voelkel v. Browne,268 App. Div. 596, 294 N. Y. 834; People ex rel. Johnson v. Browne,273 App. Div. 1041.)

Peter Campbell Brown, Corporation Counsel (*Isidore Friedman, Stanley Buchsbaum* and *Jacob Friedes* of counsel), for respondents.

I. The application of the Gross Receipts Tax to petitioner does not violate the First and Fourteenth Amendments to the United States Constitution or section 8 of article I of the New York Constitution. (Near v. Minnesota,283 U. S. 697; Patterson v. Colorado,205 U. S. 454; Winters v. New York,333 U. S. 507; Joseph Burstyn, Inc., v. Wilson,343 U. S. 495; Butler v. Michigan,352 U. S. 380; People v. Wendling,258 N. Y. 451; Roth v. United States,354 U. S. 476; Matter of Excelsior Pictures Corp. v. Regents of Univ. of State of N. Y.,3 NY2d 237; Associated Press v. Labor Bd., 301 U. S. 103; Mabee v. White Plains Pub. Co.,327 U. S. 178; Oklahoma Press Pub. Co. v. Walling,327 U. S. 186.) II. Petitioner was not engaged in either interstate or foreign commerce, and his receipts during the tax periods in question are not subject to allocation. (Smith v. Ogilvie,127 N. Y. 143; Karst v. Prang Educational Co.,132 App. Div. 197; Ehrlich v. Mills, Inc.,215 App. Div. 115, 248 N. Y. 598; Henderson v. Dougherty,95 App. Div. 346; Sinkwich v. Drew & Co.,2 A D 2d 788; Commonwealth ex rel. Luckett v. Radio Corp. of America,299 Ky. 44; Irvine Co. v. McColgan,26

Cal. 2d 160; Rainier Brewing Co. v. McColgan,26 Cal. 2d 160; Rainier Brewing Co. v. McColgan,94 Cal. App. 2d 118; Ingram v. Bowers,57 F. 2d 65; ***306** Ilyin v. Avon Pub.,144 F. Supp. 368.) III. The statutes authorizing and imposing the New York City Gross Receipts Tax were intended to embrace petitioner's activities. Those activities are sufficiently related to New York City to confer jurisdiction to tax. (Chaloner v. Helvering,69 F. 2d 571; Herwig v. United States,105 F. Supp. 384; Flint v. Stone Tracy Co.,220 U. S. 107; People ex rel. Tobacco & Allied Stocks v. Graves,250 App. Div. 149,277 N. Y. 723; Trustees of Columbia Coll. v. Lynch, 47 How. Prac. 273; Sloman v. Bender189 Mich. 258; Earle v. Commonwealth, 180 Mass. 579; Semple v. Schwarz,130 Mo. App. 65; People v. Alfani,227 N. Y. 334; Folker v. Johnson,230 F. 2d 906.)

OPINION OF THE COURT

Chief Judge Conway.

Petitioner is an author of novels, plays, motion picture scripts, magazine articles and other literary works. In April of 1952 he filed returns under the New York City General Business and Financial Tax Law (commonly known and hereinafter referred to as the "Gross Receipts Tax") covering the following periods: January 12, 1943 to December 31, 1944; October 1, 1945 to August 30, 1948; January 1, 1950 to June 30, 1950, and paid the tax and interest thereon. The comptroller denied a refund following which the present proceeding was instituted to review that determination. Thereafter, the parties stipulated that the total amount paid represented, in part, taxes and interest attributable to literary works of petitioner prior to the time he became a resident of New York City. They further stipulated that the city would pay petitioner the sum of $251.24 and that in the event the petitioner were fully successful in this proceeding the refund will be limited to the sum of $531.09 principal of tax and $133.73 interest or a total of $664.82.

It is conceded that petitioner was a resident of New York City and wrote numerous novels, motion picture scripts, plays, newspaper and magazine articles and radio scripts during the three periods here involved. Through his literary agents located in New York City, petitioner negotiated for the licensing of certain rights in his literary works. The agents' principal function was to negotiate such contracts for Mr. Steinbeck and they had complete authority and discretion in so doing. Indeed, they even executed contracts on his behalf. Certain of the author's rights were licensed by the agents orally as "a cash deal". He did ***307** not sell the copyright to his works. He merely licensed certain rights in them to others.

Respondents' Exhibits D, H and I are examples of the type of contract executed by petitioner in New York City. They purport to grant certain of his rights in his literary works. As to books, the consideration to be paid to him consists of a percentage of the amount charged by the publisher for all copies sold, less copies returned, but with "no deduction for cash discounts or bad debts". This percentage is characterized as "royalties". As to motion picture scripts, magazine and newspaper articles, and plays, the consideration consists of a lump sum or a percentage or a combination of the two. The agents would receive the royalty moneys, take their commission and deposit the balance in Mr. Steinbeck's bank account.

The Gross Receipts Tax (Administrative Code of City of New York, ch. 46, tit. B) is imposed pursuant to section 24-a of the General City Law which authorizes New York City to impose "a tax * * * upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity * * * or making sales within such city". The tax is to be "measured by the gross receipts from such activities carried on or sales made within the city * * *."

In his petition Steinbeck alleged that the tax levied on him, and paid under protest, was collected erroneously, illegally and unconstitutionally because

(a) his activities in New York City did not constitute a trade, business or other activity within the meaning of the tax statute;

(b) the Gross Receipts Tax is a tax on privileges secured by the First and Fourteenth Amendments to the Constitution of the United States and section 8 of article I of the Constitution of the State of New York;

(c) his activities in New York City other than writing were *de minimis* and not subject to tax; and

(d) the tax was levied, in part, on royalties derived from interstate and foreign commerce, in violation of section 8 of article I of the United States Constitution.

The Gross Receipts Tax applies to persons "carrying on or exercising for gain or profit within * * * [the city of New

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York] any trade, business, profession, vocation or commercial ***308** activity * * *" so long as the gross receipts therefrom exceed $10,000 per annum (Administrative Code, § B46-2.0). Insofar as the interpretation of a statute is concerned there are four kinds of terms or words, to wit, common, technical, legal, and trade or commercial (2 Sutherland on Statutory Construction [3d ed.], § 4919). Manifestly, the words found in the Gross Receipts Tax are common words. Moreover, it is well settled that a "tax law should be interpreted as the ordinary person reading it would interpret it." (Howitt v. Street & Smith Pub.,276 N. Y. 345, 351; Matter of Business Statistics Organization v. Joseph,299 N. Y. 443, 449.) Common words are to be given their commonly understood meaning unless another meaning is obviously intended (see McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 232). Since there is nothing in the Gross Receipts Tax to suggest -- even remotely -- that the lawmakers intended to confer a special or restricted meaning on the terms therein used, we may look to the legal dictionaries for the generally accepted common definition of such terms. The word "trade" has the broad definition of "Any sort of dealings by way of sale or exchange; commerce, traffic." (Bouvier's Law Dictionary [8th ed.], Vol. III, pp. 3290-3291.) "Business" has been described as a word of "large * * * import", a "very comprehensive term". It encompasses "That which occupies the time, attention and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. It embraces everything about which a person can be employed". (Bouvier's Law Dictionary [8th ed.], Vol. I, p. 406; Flint v. Stone Tracy Co.,220 U. S. 107, 171.) "Profession" has been defined as a "vocation, calling, occupation or employment involving labor, skill, education, special knowledge and compensation or profit, but the labor and skill involved is predominantly mental or intellectual, rather than physical or manual." (Black's Law Dictionary [4th ed.], p. 1375.) A "vocation" is "One's regular calling or business." -- "The activity on which one spends major portion of his time and out of which he makes his living." (Id., p. 1745.) "Commercial activity", of course, is activity relating to or connected with trade and traffic or commerce in general. (See Black's Law Dictionary [4th ed.], p. 337.) Thus, it will be seen that the broadest of terms have been employed in the Gross Receipts Tax. ***309** Indeed, it is difficult to conceive of a more all-embracing tax. The sweep of the statute is so great that it was deemed necessary to provide expressly that the phrase, exercising any profession, vocation, trade, business or commercial activity, "[d]oes not include labor or services rendered by an individual for a wage or salary." (Administrative Code, § B46- 1.0, subd. 5.)

Petitioner Steinbeck earns his livelihood as an author, reaping profits from the sale of his literary endeavors. It cannot be doubted that in so doing petitioner is carrying on or exercising for gain or profit a trade, business, profession, vocation or commercial activity as those terms are commonly understood.

In an effort to demonstrate that he is not engaged in "business", the petitioner cites People ex rel. Nauss v. Graves(283 N. Y. 383). The question there presented was whether the owners in common of certain realty were engaged in business within the meaning of article 16-A of the Tax Law which imposed a "Temporary emergency tax on net incomes of unincorporated businesses." The relators had inherited the subject real estate and had engaged another to manage it. After pointing out that the term "business" is of very broad significance and has a great variety of meanings, this court wrote (pp. 386-388): "When used in tax statutes similar to that involved in the case at bar, 'business' or 'doing business' connote something more than the ownership of property and the receipt of income derived from property. [Cases cited.] Although the very nature of the case does not permit an exact formula by which to determine when the activities of a property owner amount to the doing of business, there has been evolved the principle which distinguishes between a passive and an active owner or investor. One who allocates the active administration of the properties to others and himself performs only such acts as are appropriate to safeguard his ownership, is to be distinguished from one who himself actively participates in administering the management of the properties. The question is one which depends upon the facts of the particular case. [Case cited.] * * * If the activities of these appellants were deemed to be the doing of business, then the doing of business would comprise every instance where property is owned in common and the owners act but to safeguard their property. If there is to be maintained a distinction between ownership on the one hand and the doing of ***310** business on the other, a distinction established by the cases, and respondents do not suggest that the distinction be obliterated, then these appellants may not be regarded as having been engaged in the doing of business."

The *Nauss* case (*supra*) is not controlling for at least two reasons. First, Mr. Steinbeck is not a mere passive owner or investor. He actively creates the literary properties which bear his name. Second, and more important, or so it seems to us, the statute presently under consideration is considerably broader in its terms than the statute in the *Nauss* case. The only word in issue in the *Nauss* case was "business" as it appeared in

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the context of an unincorporated business tax statute. The issue in this case is not only whether petitioner is engaged in any "business" as that word appears in the context of a gross receipts tax statute, but also whether he is engaged in any "trade", "vocation", "profession" or "commercial activity" as those words appear in the context of such a statute -- a statute which was intended to be so broad in its operation that the lawmakers felt obliged to declare that the statute "[d]oes not include labor or services rendered by an individual for a wage or salary." (Administrative Code, § B46-1.0, subd. 5.)

Petitioner emphasizes that his receipts in any one taxable calendar year are attributable to contracts made in prior taxable years. The intimation is that these receipts were not taxable at all. Petitioner bases his argument on the wording of the statute which measures the tax by the "receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year" in which the privilege period commences (Administrative Code, § B46-2.0, subd. a). Petitioner urges that in order for the receipts to be taxable in any calendar year they must not only be received in that year but they must be derived from a "particular activity" carried on in that year. By "particular activity", petitioner seems to refer to the making of the contract which gave rise to the receipts. The statute, however, merely requires that the receipts be attributable to the profession, vocation, trade, business, or commercial activity which the petitioner carried on in that year and not to any "particular activity." The receipt of income is as much ***311** part of a business as the making of a contract that gives rise to such income.

That brings us to the principal question in the case, which is, "Does the constitutional guarantee of freedom of the press prohibit the City of New York from imposing a gross receipts tax on the receipts of an author derived from the grant of licenses to his rights in his literary works?"

The Gross Receipts Tax is expressly declared to be a privilege tax (Administrative Code, ch. 46, tit. B; Matter of United Air Lines v. Joseph, 282 App. Div. 48, 55, affd. 307 N. Y. 762). Petitioner does not contend that he is exempt from the general run of taxes. His contention is that his activities as an author are exempt from this form of taxation and that a privilege tax levied upon his activities impinges on the right of free press reserved to him by the United States and New York Constitutions and, so, is totally invalid. To sustain his position he refers us to the cases of Grosjean v. American Press Co. (297 U. S. 233 [1936]); Follett v. McCormick(321 U. S. 573 [1944]); Murdock v. Pennsylvania(319 U. S. 105 [1943]), and Jones v. Opelika(319 U. S. 103 [1943]).

The Supreme Court of New Jersey has aptly summarized the *Grosjean* case (*supra*) in these words: "In the *Grosjean* case * * * the court dealt with an infamous attempt to control Louisiana newspapers by the imposition of a gross receipts license tax on newspapers having a circulation of more than 20,000 copies per week. [There were 13 newspapers in Louisiana which had a circulation of more than 20,000 copies per week. There were 4 other daily newspapers each having a circulation of "slightly" less than 20,000 copies per week which were in competition with the larger newspapers and 120 weekly newspapers also in competition "to a greater or lesser degree" with the larger daily newspapers.] The court struck it down stating that although newspapers were not immune from ordinary forms of taxation, this was 'not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.' " (City of Absecon v. Vettese,13 N. J. 581, 585-586.) In writing the opinion of this court in Matter of Business Statistics v. Joseph(299 N. Y. 443, 453, supra), I made a comment similar to that of the New Jersey court concerning ***312** the *Grosjean* case, to wit, "There, as stated in Mabee v. White Plains Pub. Co.(327 U. S. 178, 184) '* * * the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation.' " The inapplicability of the *Grosjean* case to the present case is best illustrated, however, by the following language from the Supreme Court opinion in that case:

"* * * The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.

"* * * The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers. * * *" (297 U. S. 250-251.)

In the *Murdock, Jones* and *Follett* cases (*supra*) the Supreme Court of the United States held that a municipal

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ordinance which, as construed and applied, required religious colporteurs to pay a license tax as a condition to the pursuit of their activities, was invalid under the Federal Constitution as a denial of freedom of speech, press and religion. In the course of the opinions in the *Murdock* and *Follett* cases the court used broad language (relied on by petitioner Steinbeck) suggesting that license taxes may never be imposed for the exercise of constitutional privileges such as freedom of worship, speech and press. For example, it was said:

"Freedom of press, freedom of speech, freedom of religion are in a preferred position" (Murdock v. Pennsylvania, supra,p. 115).

"* * * a tax laid specifically on the exercise of those freedoms and would be unconstitutional" (Murdock v. Pennsylvania, supra,p. 108).

"The exaction of a tax as a condition to the exercise of the ***313** great liberties guaranteed by the First Amendment is * * * obnoxious" (Follett v. McCormick, supra,p. 577).

While such language has caused some uncertainty concerning the full scope of those three cases involving itinerant preachers, it seems clear from subsequent events that there is no serious constitutional objection to a tax law such as the New York City Gross Receipts Tax. In Tampa Times Co. v. City of Tampa(158 Fla. 589) the Supreme Court of Florida upheld a privilege tax, measured by gross receipts, on all wholesale and retail sellers of newspapers, magazines and periodicals published within the city of Tampa. Appeals taken to the Supreme Court were "dismissed for want of a substantial federal question." (332 U. S. 749 [1947].) We are told that a dismissal "for the want of a substantial federal question", as distinguished from a denial of certiorari, is a decision on the merits and has the force of precedent (Frankfurter and Hart, The Business of the Supreme Court at October Term, 1934, 49 Harv. L. Rev. 68, 77).

Much that was said by the Supreme Court of Florida in the *Tampa Times* case (*supra*) bears repetition here. We will content ourselves with the following excerpts (158 Fla. 592-594):

"The ordinance in question is for revenue. There is no claim that it is arbitrary or harsh in nature. The single question then is whether a newspaper is immune from the burden of taxation to maintain government. * * *

"Freedom of the press is almost as old as printing. It, like its older brother freedom of speech, is indispensable to free government. We cannot circumscribe or define it, yet great scholars and jurists have filled libraries with dissertations thereon. Freedom of the press is, in truth, an ideal to which all lovers of liberty may strive in order to maintain free government in an ever changing society. Its importance cannot be magnified too much. It is not enough to say that freedom of the press is a cornerstone of free government. *It is, in fact, a prerequisite to free government.* Yet, in view of all that, it is no governmental functionary. It exercises no governmental power * * * neither does it interpret, administer or enforce any although it may wield a great influence on all. It is clothed with no power to rule, yet it is and must remain a free institution. The press renders a public service although it is a private business which ***314** can only endure under the protection of free government. It may invoke constitutional protection in common with others. Government possesses power whereas the press wields influence. A free government and a free press are essential for either to survive. Government is charged with the duty of protecting the rights and liberties of all its citizens including 'the press.'

"A government must have revenue. It is not a producer. Its income must be derived by taxation in one form or another. Admittedly a tax, in any form or guise, is a burden yet that alone does not impair freedom of the press any more than an income or ad valorem tax will destroy freedom of speech to any other citizen. Many states rely entirely on ad valorem taxes for revenue. We have no knowledge of any case where a newspaper has been held immune from all forms of taxation. A state may choose to substitute a gross sales tax but in that case the relative burden on a newspaper would not be changed. In this case the City of Tampa has enacted a gross sales tax. Its application is general. The tax enacted is reasonable and its terms are not arbitrary."

In City of Corona v. Corona Daily Independent(115 Cal. App. 2d 382) the District Court of Appeal, Fourth District, California, upheld a flat license tax imposed by ordinance upon the doing of business within the city, including that of publishing a newspaper. After considering the *Murdock* case and other pertinent authorities, that court concluded that there was no constitutional inhibition against the tax. Among other things, that court wrote:

"The phrase 'power to tax is the power to destroy' is without application to the issue here presented. There is no allegation or showing by defendant that the amount levied was arbitrary

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or harsh in nature, or oppressive or confiscatory, or that defendant's freedom to disseminate news and comment has been actually curtailed or abridged by the requirement that it shall pay a tax of $8.00 per quarter for publishing its newspaper. Nor is there any showing that the imposition of the tax was for the purpose of regulating defendant's business.

"While the ordinary business tax here in issue is levied in form upon the privilege of engaging in or transacting business, it is, on its face and in fact, a tax for revenue purposes only, and does not grant or take away any right to do business, does not ***315** subject business to withdrawal or control by the city, is not regulatory in any manner, and in substance has been recognized and upheld by the weight of authority.

"We conclude that a nondiscriminatory tax, levied upon the doing of business, for the sole purpose of maintaining the municipal government, without whose municipal services and protection the press could neither exist nor function, must be sustained as being within the purview and necessary implications of the Constitution and its amendments." (115 Cal. App. 2d 389- 390.)

The Supreme Court of the United States denied certiorari (346 U. S. 833). Justices Black and Douglas dissented, stating, *inter alia,* that "The license tax involved here is a privilege tax in fact as well as in form -- 'a flat tax imposed on the exercise of a privilege granted by the Bill of Rights.' (319 U. S. at p. 113.) No government can exact a price for the exercise of a privilege which the Constitution guarantees."

In the light of all the foregoing, we are persuaded that the City of New York may constitutionally impose the Gross Receipts Tax upon petitioner Steinbeck. The tax applies not only to writers and publishers but to all businesses, professions, trades, vocations and commercial activities. It is measured by gross receipts and applies to all without discrimination. No tax is due and no return need be filed unless and until the gross receipts exceed $10,000 per annum. Thus, it is a general tax and one which is not, in any sense, aimed at the press or at writers. The city does not seek, through the guise of the Gross Receipts Tax, to regulate those covered by its provisions or, more particularly, to restrain or interfere with freedom of the press. Its sole object is revenue notwithstanding the fact that the tax is styled a "privilege tax." The Gross Receipts Tax is, like any tax, a burden. Nevertheless, it does not impair Mr. Steinbeck's right of freedom of the press any more than an income tax impairs such right. "The guaranties of the Constitution and Bill of Rights in favor of the freedom of the press, freedom of speech, and personal liberty, were never intended to restrict the right of taxation for the support of the government. If these guaranties did restrict the power of taxation, the government would soon be insolvent, and powerless to furnish the protection claimed." (City of Norfolk v. Norfolk Landmark Pub. Co.,95 Va. 564, 565.) ***316**

There is no claim and no showing by petitioner that the amount levied was arbitrary or harsh in nature, or oppressive or confiscatory, or that his freedom to write or disseminate his writings has been actually curtailed by the tax. What is more, petitioner has failed to demonstrate that the tax was imposed for the purpose of regulating his writing.

Petitioner next asserts that he is entitled to an allocation of tax even if the tax as applied to him is constitutionally valid. He contends that an allocation is required because part of the activity which gives rise to his receipts consists of the exercise of a constitutionally protected privilege, viz., "the creative activity of writing". Petitioner maintains that the "City must provide a basis for allocating to the creative activity of writing, constitutionally protected, a reasonable portion of the royalties earned by the appellant." There is no merit to this argument which, it will be observed, is, in reality, but a restatement of his principal argument that a privilege tax cannot be levied upon a writer at all. If petitioner were correct, it would be difficult to conceive of any business which would not be entitled to a similar allocation, since hardly any business can be carried on without speech or writing. However, no such suggestion is to be found in any of the cases. Indeed, the decisions involving the application of a privilege tax to newspapers stand for the proposition that the exercise of freedom of the press does not grant immunity from general taxation, not for the proposition that only selected incidents unconnected with such exercise may be taxed. The totality is subject to tax.

Mr. Steinbeck's final contention is that even if he is not totally exempt from the privilege tax, the city cannot reach royalties paid to him for his consent to sales and performances of his work in interstate and foreign commerce. The claim is that the grant of consent -- the license to publish -- constituted the commencement of or induced interstate commerce.

The contracts for licenses of petitioner's rights in his novels, plays and motion picture scripts call for the payment of a lump sum or a percentage or a combination of the two. The percentage payment, commonly referred to as "royalties", is made by the publisher on the basis of the number of copies

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that the publisher has sold. While many of the sales may have been made by the publisher in other States and other countries, and it may be that ***317** the publisher was engaged in interstate and foreign commerce as a result, it does not necessarily follow that petitioner was likewise engaged in interstate and foreign commerce. The relationship between Mr. Steinbeck and his publishers was that of debtor and creditor -- not that of joint venturers (cf. Broadcast Music v. Taylor,10 Misc 2d 9). Petitioner received no property rights in the books or magazines sold by the publishers nor in the films made by the motion picture companies. It is true that the word "royalty" is defined generally as a share of the profits reserved to the owner for permitting another to use his property (see 77 C. J. S., Royalty or Royalties, pp. 542-543) and that the sharing of profits is an element of a joint venture arrangement. However, there was to be no sharing of losses. For example, petitioner was to receive a percentage of the amount charged by the publisher for all copies sold, less copies returned, but with "no deduction for cash discounts or oad debts." An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business *and submit to the burden of making good the losses.* (Reynolds v. Searle,186 App. Div. 202, 203.) An agreement to distribute the proceeds of an enterprise upon a percentage basis does not give rise to a joint venture if the enterprise does not represent a joinder of property, skills and risks (Gordon Co. v. Garcia Sugars Corp.,241 App. Div. 155). "The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit * * *." (Hasday v. Barocas,10 Misc 2d 22, 28.) The present case does not reveal such an amalgam of property or interests as would create a joint venture. No one can deny that petitioner and the publishers had a community of interest and a common economic objective. However that may be, it is not "enough that two parties have agreed together to act in concert to achieve some stated economic objective. Such agreement, by itself, creates no more than a contractual obligation, otherwise every stockholders' agreement ***318** would give rise to a joint venture. The fiduciary obligation arises upon the coagulation of property, profits or other interests which the parties can then be said to hold jointly and which are made accessible to each other in terms of the confidential relationship which exists between joint associates." (Id., pp. 28-29.)

The sums payable to petitioner by way of royalties were merely the price for the licensing of certain of his literary rights. The sales made by the publishers and the gross receipts from the motion pictures were simply the means by which the price for the licensing of Mr. Steinbeck's literary rights were ultimately to be determined. The relationship between an author and a publisher is not that of joint venturers merely because the publisher is to pay the author on the basis of receipts from the sale of books. On the contrary, it must be said that the *source* of Mr. Steinbeck's income was not the sales made by the publisher, but the contracts made between him and his publisher in New York City (see Ingram v. Bowers,57 F. 2d 65).

Petitioner makes the further argument that his activities are so closely related to interstate commerce and foreign commerce that they must be treated as though they were activities in interstate or foreign commerce.

The commerce clause of the Constitution of the United States (U. S. Const., art. I, § 8) expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the States and with foreign nations. Foreign commerce, as well as interstate commerce, is governed by the commerce clause, and the same principles govern both (Joseph v. Carter & Weekes Co.,330 U. S. 422, 425). The purpose of the commerce clause is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile State laws, and to insure uniformity in regulation (11 Am. Jur., Commerce, § 2). Although the term "commerce" is employed in the Constitution it is not defined therein and it has been said that the term is not susceptible of exact and comprehensive definition (id., § 3). However, it is no longer open to question that the formation of a contract between persons in different States is not within the protection of the commerce clause unless the *performance* thereof is within its protection (Western Live Stock v. Bureau of Revenue,303 U. S. 250, 253; see, also, ***319** Matter of New Yorker Mag. v. Gerosa,3 NY2d 362, appeal dismissed by the Supreme Court of the United States on April 28, 1958, 356 U. S. 339). "Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation is induced or occasioned by the business." (Western Live Stock v. Bureau of Revenue,

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supra,p. 253.) In Ficklen v. Shelby County Taxing Dist.(145 U. S. 1, 24) the Supreme Court of the United States sustained a license tax measured by a percentage of the gross annual commissions received by brokers engaged in negotiating sales within the State of Tennessee for sellers without the State. In so doing, the court said: "This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce." In our judgment, the quoted language from the foregoing cases is applicable here. The writing by Mr. Steinbeck of books, plays, magazine articles, motion picture scripts and radio scripts, and the granting, within the city of New York, of licenses to certain of the rights therein is separate and distinct from the subsequent sale by others of books, magazines, etc., in interstate or foreign commerce even though the granting of the licenses may induce or occasion interstate commerce. The most Mr. Steinbeck can claim is that his receipts, insofar as their measure was based on the amount of subsequent interstate or foreign sales by other persons of books published by such other persons, are traceable to such interstate or foreign sales. That does not bring him within the coverage of the commerce clause. In the *Western Live Stock* case (303 U. S. 250, *supra*) the Supreme Court noted, as one reason for upholding the statute there under consideration, that a tax on the taxpayer's activity could not be levied elsewhere than in New Mexico where the taxpayer prepared, printed and published a magazine (the magazine was circulated within and without the State of New Mexico). Here, as in that case, a tax on Mr. Steinbeck's activities cannot be levied elsewhere than in New York. In the words of the *Ficklen* case (145 U. S. 1, 24, *supra*), "This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in ***320** any way it is incidentally, and so remotely as not to amount to a regulation of such commerce."

The order of the Appellate Division should be affirmed, with costs.

Judges Desmond, Dye, Fuld, Froessel, Van Voorhis and Burke concur.
Order affirmed.

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297 A.D.2d 349, 746 N.Y.S.2d 399
(Mem), 2002 N.Y. Slip Op. 06204

In the Matter of Tri-State Consumer Insurance Company, Respondent,
v.
Hardatt Singh, Respondent, and State Farm Mutual Automobile Insurance Company, Appellant. Granite State Insurance Company et al., Proposed Additional Respondents.

Supreme Court, Appellate Division,
Second Department, New York
(August 19, 2002)

CITE TITLE AS: Matter of Tri-State Consumer Ins. Co. v Singh

In a proceeding pursuant to CPLR article 75 to stay arbitration of an uninsured motorist claim, State Farm Mutual Automobile Insurance Company appeals from an order of the Supreme Court, Nassau County (McCarty, J.), entered September 24, 2001, which, upon an order of the same court (Adams, J.), dated January 22, 2001, granting the petition and staying the arbitration, denied its motion for leave to renew.

Ordered that the order is affirmed, with costs.

The Supreme Court properly denied the appellant's motion for leave to renew, as it offered no reasonable excuse as to why the evidence submitted with the motion was not previously submitted in opposition to the petition (*see* CPLR 2221 [e]; *Matter of Colonial Penn Ins. Co. v Nevelus,* 292 AD2d 381; *Matter of Allstate Ins. Co. v Taddeo,* 285 AD2d 503). Additionally, even if the appellant's excuse was reasonable, it failed to explain the nearly five-month delay in moving to renew (*see Cole-Hatchard v Grand Union,* 270 AD2d 447; *Dankner v Szurzan & Dorf,* 226 AD2d 669; *Elgem, Inc. v National Gypsum,* 192 AD2d 636).

Altman, J.P., Feuerstein, Friedmann, Schmidt and Townes, JJ., concur.

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New York Official Reports

144 A.D.3d 768, 40 N.Y.S.3d 568, 2016 N.Y. Slip Op. 07303

**1 German C. Pacheco, Respondent,

v

Halsted Communications, Ltd., Appellant, et al., Defendants. (And Two Third-Party Actions.)

Supreme Court, Appellate Division, Second Department, New York
2014-03617, 2014-03619, 30885/09
November 9, 2016

CITE TITLE AS: Pacheco v Halsted Communications, Ltd.

HEADNOTE

Labor
Safe Place to Work
Fall from Ladder

Marshall Dennehey Warner Coleman & Goggin, New York, NY (Richard Imbrogno of counsel), for appellant.
The Perecman Firm, PLLC, New York, NY (David H. Perecman and Peter D. Rigelhaupt of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Halsted Communications, Ltd., appeals, as limited by its brief, from (1) so much of an order of the Supreme Court, Queens County (McDonald, J.), entered September 21, 2012, as granted that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against it, and (2) so much of an order of the same court entered January 27, 2014, as denied that branch of its motion which was for leave to renew its opposition to that branch of the plaintiff's prior cross motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against it.

Ordered that the orders are affirmed insofar as appealed from, with one bill of costs.

The plaintiff allegedly was injured when he fell while descending a 28-foot ladder after installing equipment on the roof of a single-family home. The plaintiff commenced this action against the owners of the home and two subcontractors, Halsted Communications, Ltd. (hereinafter Halsted), and MobilPro Installation Services, LLC, alleging, inter alia, a violation of Labor Law § 240 (1). Halsted moved, among other things, for summary judgment dismissing the Labor Law § 240 (1) cause of action insofar as asserted against it, and the plaintiff cross-moved, inter alia, for summary judgment on the issue of liability on that cause of action insofar as asserted against Halsted. The plaintiff argued that Halsted violated Labor Law § 240 (1) by failing to provide him with proper protection for the job, namely, a 40-foot extension ladder. In an order entered September 21, 2012, the Supreme Court denied that branch of Halsted's motion which was for summary judgment dismissing the Labor Law § 240 (1) cause of action insofar as asserted against it, and granted that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on that cause of action insofar as asserted against Halsted.

**2 Halsted then moved, inter alia, for leave to renew its opposition to the subject branch of the plaintiff's prior cross motion. Halsted submitted an affidavit of its former employee and contended that it contained new facts not offered in opposition *769 to that branch of the prior cross motion that would require its denial. In an order entered January 27, 2014, the Supreme Court declined to grant Halsted leave to renew. Halsted appeals from portions of both orders. We affirm insofar as appealed from.

To establish liability pursuant to Labor Law § 240 (1), a plaintiff must "demonstrate a violation of the statute and that such violation was a proximate cause of his or her injuries" (*Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641, 642 [2006] [internal quotation marks omitted]). Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that he was injured when he fell while descending an unsecured, 28-foot ladder, and that he was not provided with a safety device to prevent him from falling (*see Przyborowski v A&M Cook, LLC*, 120 AD3d 651, 653 [2014]; *Grant v City of New York*, 109 AD3d 961, 962 [2013]; *Canas v Harbour at Blue Point Home Owners Assn., Inc.*, 99 AD3d 962, 963 [2012]). Contrary to Halsted's contention, it failed to raise a triable

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issue of fact as to whether the plaintiff's decision to use a 28-foot ladder, rather than a 40-foot ladder, was the sole proximate cause of his injuries. The record reveals that there were no 40-foot ladders readily available to the plaintiff on the date of his accident, and that a Halsted employee nevertheless instructed the plaintiff that he was required to complete his job, or be fired. Under these circumstances, the plaintiff's use of the 28-foot ladder cannot be said to be the sole proximate cause of his injuries (*see Gallagher v New York Post*, 14 NY3d 83 [2010]; *Rice v West 37th Group, LLC*, 78 AD3d 492 [2010]; *Zong Mou Zou v Hai Ming Constr. Corp.*, 74 AD3d 800 [2010]). Accordingly, the Supreme Court properly granted that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action.

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]; *see Nesterenko v Starrett City Assoc., L.P.*, 123 AD3d 1099, 1100 [2014]; *Lardo v Rivlab Transp. Corp.*, 46 AD3d 759, 760 [2007]). "[A] motion for leave to renew 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation' " (*Renna v Gullo*, 19 AD3d 472, 473 [2005], quoting *Rubinstein v Goldman*, 225 AD2d 328, 329 [1996]).

The Supreme Court providently exercised its discretion in ***770** denying that branch of Halsted's motion which was for leave to renew. Halsted submitted an affidavit of its former employee setting forth his version of events surrounding the accident, which included facts not previously considered by the court. However, the justification offered by Halsted for failing to submit those facts in opposition to the plaintiff's prior cross motion was not reasonable (*see Nesterenko v Starrett City Assoc., L.P.*, 123 AD3d at 1100; *Eskenazi v Mackoul*, 92 AD3d 828, 829 [2012]; *Lardo v Rivlab Transp. Corp.*, 46 AD3d at 760). Leventhal, J.P., Maltese, LaSalle and Brathwaite Nelson, JJ., concur. **[Prior Case History: 2012 NY Slip Op 32431(U).]**

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New York Official Reports

210 A.D.3d 715, 177 N.Y.S.3d 694, 2022 N.Y. Slip Op. 06152

**1 Shamila Seegopaul, Appellant,

v

MTA Bus Company et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York
2019-09937, 710920/15
November 2, 2022

CITE TITLE AS: Seegopaul v MTA Bus Co.

HEADNOTE

Motions and Orders
Reargument or Renewal
Leave to Renew—New Facts Not Offered on Prior Motion That Would Change Prior Determination—Law Office Failure Not Reasonable Excuse

Scott Baron & Associates, P.C., Howard Beach, NY, for appellant.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Joseph Risi, J.), entered July 30, 2019. The order denied the plaintiff's motion for leave to renew her opposition to the defendants' motion for summary judgment dismissing the complaint, which had been granted in an order of the same court dated September 10, 2018.

Ordered that the order entered July 30, 2019, is affirmed, without costs or disbursements.

The plaintiff allegedly was injured while riding a New York City bus driven by an employee of the New York City Transit Authority. The bus driver stopped the bus abruptly, causing the plaintiff to slide off her seat, resulting in injuries. The Supreme Court granted the defendants' motion for summary judgment dismissing the complaint. The plaintiff thereafter moved for leave to renew her opposition to the defendants' motion for summary judgment. In an order entered July 30, 2019, the court denied the plaintiff's motion. The plaintiff appeals.

As a general rule, we do not consider any issue raised on a *716 subsequent appeal that was raised, or could have been raised, in an earlier appeal that was dismissed for lack of prosecution, although we have the inherent jurisdiction to do so (*see* *Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750 [1999]). The plaintiff previously appealed from an order dated September 10, 2018, granting the defendants' motion for summary judgment dismissing the complaint, and that appeal was deemed dismissed for failure to prosecute. We decline to exercise our discretion to determine any issues which could have been raised on the prior appeal (*see* *Bray v Cox*, 38 NY2d 350, 354 [1976]; *Stallings v City of New York*, 82 AD3d 745, 745 [2011]; *Man Choi Chiu v Chiu*, 67 AD3d 975, 976 [2009]).

The Supreme Court did not improvidently exercise its discretion in denying the plaintiff'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]) and shall contain reasonable justification for the failure to present such facts on the prior motion (*see* *id.* § 2221 [e] [3]). While it may be within the court's discretion to grant leave to renew upon facts known to the moving party at the time of the prior motion, a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation. Thus, the court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion (*see* **2 *Makropoulos v City of New York*, 187 AD3d 885, 888 [2020]; *Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 1214 [2018]; *Caraballo v Kim*, 63 AD3d 976, 978-979 [2009]). While law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion, the movant must submit supporting facts to explain and justify the failure, and mere neglect is not accepted as a reasonable excuse (*see* *Lanzillo v 4 World Trade Ctr., LLC*, 195 AD3d 907, 909 [2021]; *Assevero v Rihan*, 144 AD3d 1061, 1063 [2016]; *Morrison v Rosenberg*, 278 AD2d 392 [2000]). Here, the plaintiff's counsel's explanation amounts to mere neglect and is not a reasonable justification for failing to present the alleged new facts on the prior motion (*see* *Assevero v Rihan*, 144 AD3d at 1063; *Cole-Hatchard v Grand Union*, 270 AD2d 447, 447 [2000]).

Furthermore, even if the plaintiff did have a reasonable justification for the failure to submit the alleged new facts on the prior motion, she failed to demonstrate that the new facts would have changed the prior determination (*see* ***717** *Amtrust-NP SFR Venture, LLC v Thompson*, 181 AD3d 762, 765 [2020]; *Carmike Holding I, LLC v Smith*, 180 AD3d 744, 747 [2020]; *Young Soo Chi v Castelli*, 112 AD3d 816, 817 [2013]).

Accordingly, the Supreme Court properly denied the plaintiff's motion for leave to renew. Connolly, J.P., Christopher, Wooten and Wan, JJ., concur.

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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

***273** Neil Corwin, Asst. U.S. Attorney, New York City, for plaintiff.

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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McKinney's Consolidated Laws of New York Annotated
Partnership Law (Refs & Annos)
Chapter 39. Of the Consolidated Laws (Refs & Annos)
Article 3. Relations of Partners to Persons Dealing with the Partnership (Refs & Annos)

McKinney's Partnership Law § 22

§ 22. Partnership bound by admission of partner

Currentness

An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership.

Credits
(L.1919, c. 408.)

Notes of Decisions (4)

McKinney's Partnership Law § 22, NY PARTNER § 22
Current through L.2024, chapters 1 to 315. Some statute sections may be more current, see credits for details.

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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 22. Stay, Motions, Orders and Mandates (Refs & Annos)

McKinney's CPLR Rule 2221

Rule 2221. Motion affecting prior order

Effective: July 20, 1999
Currentness

(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it, except that:

1. if the order was made upon a default such motion may be made, on notice, to any judge of the court; and

2. if the order was made without notice such motion may be made, without notice, to the judge who signed it, or, on notice, to any other judge of the court.

(b) Rules of the chief administrator of the courts. The chief administrator may by rule exclude motions within a department, district or county from the operation of subdivision (a) of this rule.

(c) A motion made to other than a proper judge under this rule shall be transferred to the proper judge.

(d) A motion for leave to reargue:

1. shall be identified specifically as such;

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(e) A motion for leave to renew:

1. shall be identified specifically as such;

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2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

(f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

Credits
(L.1962, c. 308. Amended L.1986, c. 355, § 5; L.1999, c. 281, § 1, eff. July 20, 1999.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Professor Patrick M. Connors

2023

Subdivision (a)

C2221:6 Timing of Motion to Vacate
Second Department Holds That CPLR 2221(a) Motion to Vacate an Order Is Not Subject to Any Specific Time Limitation

In *Bank of America, N.A. v. Ali*, 202 A.D.3d 726, 163 N.Y.S.3d 156 (2d Dep't 2022), a mortgage foreclosure action, supreme court issued a conditional order of dismissal for want of prosecution under CPLR 3216 at a status conference. The plaintiff took no further action, and the action was administratively dismissed. More than five years after the conditional order, and more than nine years after the action was commenced, plaintiff moved to vacate the conditional order of dismissal and to restore the action to the active calendar.

Supreme court denied the motion, but the Second Department reversed, holding that "[a] motion pursuant to CPLR 2221(a) to vacate an order is not subject to any specific time limitation." *Id.* at 732, 163 N.Y.S.3d at 163. The court rejected defendant's argument that plaintiff was required to move to restore the action within a specified time frame, ruling that the procedures in CPLR 3404 do not apply in actions where the note of issue has not yet been filed. The decision is discussed in further detail in Siegel & Connors, New York Practice § 375 (January 2024 Supplement) (discussing court's holding under CPLR 3216).

Subdivision (e)

C2221:9 Motion to Renew Under CPLR 2221(e); Nature and Effect; 1999 Amendments to Statute.
Second Department Affirms Order Granting Motion to Renew, Noting That Its Decision in *Brash* Constituted a "Clarification" of the Decisional Law Interpreting the COVID-19 Toll

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CPLR 2221(e)(2) states, among other things, that "[a] motion for leave to renew ... shall demonstrate that there has been a change in the law that would change the prior determination." As we note in the main Practice Commentary, "[a] clarification of the decisional law is a sufficient change in the law to support renewal." *Dinallo v. DAL Elec.*, 60 A.D.3d 620, 621, 874 N.Y.S.2d 246, 247 (2d Dep't 2009).

In *McLaughlin v. Snowlift, Inc.,* 214 A.D.3d 720, 185 N.Y.S.3d 212 (2d Dep't 2023), plaintiff alleged that his injuries occurred on January 4, 2018, but did not commence the action until January 13, 2021, more than three years after the personal injury claim accrued. Supreme court granted defendant's CPLR 3211(a)(5) motion to dismiss the complaint against it based on the 3-year statute of limitations governing the claim in CPLR 214(5). The court ruled that the COVID-19 Toll acted as an extension of the applicable statute of limitations, rather than as a toll, and therefore, the action was untimely commenced. *See* Siegel & Connors, New York Practice § 33 (July 2023 Supplement) (discussing the COVID-19 Toll).

Shortly after supreme court's order, the Second Department issued its decision in *Brash v. Richards*, 195 A.D.3d 582, 585, 149 N.Y.S.3d 560, 563 (2d Dep't 2021), holding that the COVID-19 Executive Orders did not simply extend time periods that would have expired during the disaster emergency, but rather implemented a tolling of the relevant periods. Plaintiff then moved for leave to renew his opposition to the prior motion to dismiss, contending that the *Brash* decision constituted a change in the law that would change the determination in the May 2021 order. *See* CPLR 2221(e)(2). Plaintiff argued that under the COVID-19 Toll, the statute of limitations on his claim was tolled for 228 days from March 20, 2020 until November 3, 2020, and, therefore, the action was timely commenced. Supreme court granted plaintiff's motion for renewal and, upon renewal, denied defendant's motion to dismiss the complaint.

Agreeing with supreme court's application of the COVID-19 Toll, the Second Department affirmed. The court noted once again that "[a] clarification of the decisional law is a sufficient change in the law to support renewal," and that its decision in *Brash* constituted such a clarification. *McLaughlin*, 214 A.D.3d at 721, 185 N.Y.S.3d at 213.

C2221:9B Combining Motion to Reargue and Motion to Renew.
Third Department Treats Motion Designated as Combined Motion for Leave to Reargue and Leave to Renew as Solely a Motion to Reargue and Dismisses Appeal

In *Reus v. ETC Housing Corp.*, 203 A.D.3d 1281, 164 N.Y.S.3d 692 (3d Dep't 2022), plaintiffs moved for renewal and reargument of their motion to amend the complaint, which had been denied. Supreme court denied the motion for renewal and reargument and plaintiff then appealed from that order.

The Third Department noted that:

> Although CPLR 2221(f) provides for a combined motion for leave to reargue and leave to renew, the requirements for a motion to reargue (*see* CPLR 2221[d]) and a motion to renew (*see* CPLR 2221[e]) are distinct, and, as such, each item of relief sought is to be identified and supported separately (*see* CPLR 2221[f]).

Reus, 203 A.D.3d at 1284, 164 N.Y.S.3d at 696-97. The Third Department reviewed the plaintiffs' motion and found that no new facts were offered in support of the motion, as is required for a motion for leave to renew that is not based on a change in the law. *See* CPLR 2221(e)(2). Although the motion was designated as a combined motion for leave to reargue and leave to renew, the Third Department determined it was solely a motion to reargue, and its determination was not appealable because it was denied. *See* Practice Commentary C2221:9C ("Appealability of Order on Motion to Reargue or Renew"). Therefore, the court dismissed the appeal from the order denying the motion.

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2022

C2221:9C Appealability of Order on Motion to Reargue or Renew.

As we note in the main Practice Commentary, an order denying a motion to reargue is not appealable. The point is made once again in *Wilmington Savings Fund Society, FSB v. Matamoro*, 200 A.D.3d 79, 94, 156 N.Y.S.3d 323, 336 (2d Dep't 2021); *see* Siegel & Connors, New York Practice § 532 (6th ed. 2018).

2021

Subdivisions (a) & (b)

C2221:4 Exception for Order Rendered on Default.

Where Order Is Entered on Default, Motion for Leave to Reargue or Renew Is Not Appropriate

We note in the main Practice Commentary that there have been several recent instances in which parties have sought to challenge orders issued on default through a motion to reargue or renew under CPLR 2221. The issue arose again, this time in the Second Department in *U.S. Bank, N.A. v. Blagman*, 188 A.D.3d 1284, 136 N.Y.S.3d 393 (2d Dep't 2020), where plaintiff's motion for summary judgment and for an order of reference was granted without opposition. The defendants then moved pursuant to CPLR 2221(e) for leave to renew or, in the alternative, under CPLR 2221(d) for leave to reargue. The supreme court granted defendants' motion for leave to renew and for leave to reargue, but adhered to its prior determination. *See* CPLR 2221(f).

The defendants then appealed from the order granting the motion for leave to renew and for reargument. The Second Department noted that "[t]he proper procedure to cure a default in opposing a motion for summary judgment is to move to vacate the default pursuant to CPLR 5015(a)(1), and to appeal that determination, if necessary." *Blagman*, 188 A.D.3d at 1285, 136 N.Y.S.3d at 394. The appellate division noted that the order granting summary judgment to plaintiff was entered on default and, therefore, the supreme court should have treated the defendants' motion pursuant to CPLR 2221(d) and (e) as a motion under CPLR 5015(a)(1) seeking to vacate the default. *See* CPLR 2001; Siegel & Connors, New York Practice § 6 (6th ed. 2018). The Second Department did so, and denied the motion.

Subdivision (e)

C2221:9 Motion to Renew Under CPLR 2221(e); Nature and Effect; 1999 Amendments to Statute.

Courts Hold that Retention of New Expert Cannot Supply Grounds for a Renewal Motion

In *Bank of America, N.A. v. Mancia-Parone*, 192 A.D.3d 739, 139 N.Y.S.3d 887 (2d Dep't 2021), a mortgage foreclosure action, the plaintiff bank was awarded summary judgment on the issue of standing in 2016, but was denied an award of summary judgment on the complaint. Plaintiff moved for leave to renew and the defendants in turn cross-moved for leave to renew their opposition to that branch of the plaintiff's prior motion for summary judgment in its favor on the issue of standing. In support of renewal, defendants relied upon the affidavit of a mortgage fraud and forensic analyst, asserting that it was only after the supreme court's prior order in 2016 that they became aware of the expert's existence. The Second Department reversed the supreme court's order granting defendants' renewal motion, holding that "[t]he retention of an expert not previously utilized ... is not a proper basis for renewal." *Id.* at 742, 139 N.Y.S.3d at 888; *see also Feurderer v. Vassar Bros. Med. Ctr.*, 185 A.D.3d 789, 791, 125 N.Y.S.3d 296, 297 (2d Dep't 2020); *Welch Foods, Inc. v. Wilson*, 247 A.D.2d 830, 831, 669 N.Y.S.2d 109, 110 (4th Dep't 1998) ("Nor is the recruitment of a new expert a legitimate basis for renewal.").

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C2221:9A Time to Make Renewal Motion.

CPLR 2221 Is Not a Proper Vehicle for Challenging a Final Judgment

In the main Practice Commentary under this section, we note that the Third Department has concluded that "a motion to renew pursuant to CPLR 2221 is not the proper procedural vehicle to address a final judgment." *Maddux v. Schur*, 53 A.D.3d 738, 739, 861 N.Y.S.2d 814, 815 (3d Dep't 2008); *see also Cruz v. Cruz*, 186 A.D.3d 1796, 1797, 130 N.Y.S.3d 559, 561 (3d Dep't 2020) ("CPLR 2221 is not an appropriate vehicle to 'challeng[e] a judgment entered after trial.'"). The Second Department reached the same conclusion in *Nationstar Mortgage, LLC v. Coglietta*, 189 A.D.3d 1435, 1437, 134 N.Y.S.3d 749, 750 (2d Dep't 2020), ruling that "a motion pursuant to CPLR 2221 was not 'the proper procedural vehicle to address [the] final judgment.'" The defendants in *Nationstar Mortgage* also moved under CPLR 5015(a)(3) to vacate the judgment based on "fraud, misrepresentation, or other misconduct" and under CPLR 5015(a)(4) based on lack of jurisdiction. *See* Siegel & Connors, New York Practice §§ 429-30 (6th ed. 2018 & January 2022 Supplement). Although a motion to vacate under CPLR 5015 is a proper procedural vehicle for attacking a final judgment, the defendants failed to provide any basis for vacatur on those grounds.

PRACTICE COMMENTARIES

by Professor Patrick M. Connors

2020
Subdivisions (a) & (b)

C2221:1. Motions to be Made to Same Judge, Listed.

C2221:2. Original Disposition Is Law of the Case.

C2221:3. Prior Order Made Without Jurisdiction.

C2221:4. Exception for Order Rendered on Default.

C2221:5. Exception for Ex Parte Order.

Subdivision (c)

C2221:6. Mandatory Transfer to Proper Judge Under CPLR 2221(c); Distinction from CPLR 2217(a).

Subdivision (d)

C2221:7. Motion to Reargue Under CPLR 2221(d); Nature and Effect; 1999 Amendments to Statute.

C2221:8. Time to Make Reargument Motion.

Subdivision (e)

C2221:9. Motion to Renew Under CPLR 2221(e); Nature and Effect; 1999 Amendments to Statute.

C2221:9A. Time to Make Renewal Motion.

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Subdivision (f)

C2221:9B. Combining Motion to Reargue and Motion to Renew.

C2221:9C. Appealability of Order on Motion to Reargue or Renew.

C2221:9D. Motion to Resettle Distinguished.

C2221:10. Appealing All Orders in Confusing Situations.

C2221:11. Proper Papers on Motions to Reargue or Renew.

Subdivisions (a) & (b)

C2221:1 Motions to Be Made to Same Judge, Listed.

A motion that attempts to affect a prior order must be made to the judge who rendered it. Such is the edict of CPLR 2221(a), which then lists the motions that potentially affect a prior order. They are the motions to renew, reargue, seek leave to appeal from, stay, vacate, or modify the prior order. That, in any event, is the formal CPLR 2221(a) list. Others of like import should also be treated as falling under CPLR 2221(a), such as a motion to amend or resettle the prior order. *See* Commentary C2221:9D ("Motion to Resettle Distinguished"), below; Practice Commentary CPLR 2220, C2220:4A ("Resettlement of Order"). In fact, any application to alter a prior order in such a way as might warrant the exercise of judicial judgment or discretion should be governed by the general rule of CPLR 2221(a).

The specific purpose of CPLR 2221(a) is to prevent one trial judge from effectively sitting in an appellate capacity over a colleague. It also accomplishes the administrative goal of sparing the time and effort of Judge Two on a matter already familiar to Judge One. CPLR 2221(a) recognized that under the master calendar system many judges may become involved in different aspects of the same case. The provision helps to prevent the conflict and embarrassment of having one judge undo or alter the determination of another.

Under the Individual Assignment System ("I.A.S.") that went into effect in January of 1986, the case goes to one judge at the outset and remains with that judge "from cradle to grave," as the expression goes, or at least from cradle to the filing of the note of issue. *See* Siegel & Connors, New York Practice § 77A (6th ed. 2018). The Uniform Rules, which can trump the CPLR in this realm, provide that "[a]ll motions shall be returnable before the assigned judge." 22 N.Y.C.R.R. § 202.8(a). In sum, the assigned judge will be hearing virtually all motions in the case, regardless of whether the application may affect a prior order. Therefore, a provision like CPLR 2221(a) becomes largely academic under I.A.S. practice. Indeed, subdivision (b), which was added to CPLR 2221 in 1986, is designed to assure that to whatever extent they may be inconsistent with the referral-back requirement of subdivision (a), any rules adopted by the court's administrators take precedence. To the extent that subdivision (a) does not conflict with the rules, however, it will govern.

There are indications, at least implicitly, that the policy underlying CPLR 2221(a) may have to give way to the policies of assigning one judge to do everything in the case under the I.A.S. *See Ministry of Christ Church v. Mallia*, 129 A.D.2d 922, 923, 514 N.Y.S.2d 563, 565 (3d Dep't 1987) (while holding that motion made to newly assigned judge did not affect prior order, the court "also note[d] that the CPLR 2221 requirement of referral of motions to a judge who granted an order on a prior motion has been modified to provide for consistency with the mandate of the Individual Assignment System that all motions in a case shall be addressed to the assigned judge"). The simple fact of the adoption of the I.A.S. may be deemed an across-the-board exclusion of the kind subdivision (b) contemplates, permitting the I.A.S. judge, whenever assigned, to entertain a motion for most, if not all, of the purposes that CPLR

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2221(a) has in mind. *See Dalrymple v. Martin Luther King Cmty. Health Ctr.*, 127 A.D.2d 69, 514 N.Y.S.2d 385 (2d Dep't 1987) (holding that "[j]udicial economy and the orderly administration of justice were best served" by having a motion for renewal decided by the assigned judge, rather than the judge who issued the order).

That procedure was carried out in *Quattrone v. Erie 2-Chautauqua-Cattaraugus Board of Cooperative Educational Services*, 148 A.D.3d 1553, 50 N.Y.S.3d 208 (4th Dep't 2017), where a supreme court judge ruled on a motion, but then had his cases within the county assigned to another judge by administrative order. The second judge entertained a motion to reargue, granted the motion, and dismissed the petition. The Fourth Department held that the motion was properly entertained by the newly assigned judge, even though it related to an order signed by the first judge, and affirmed the order. The court stressed that "[b]y the adoption of the IAS, 'the CPLR 2221[a] requirement of referral of motions to a Judge who granted an order on a prior motion has been modified to provide for consistency with the mandate of the [IAS] that all motions in a case shall be addressed to the assigned Judge.' " *Id.* at 1554, 50 N.Y.S.3d at 210; *see* CPLR 2221(b); *see also Pettus v. Board of Directors*, 155 A.D.3d 485, 486, 65 N.Y.S.3d 21, 22 (1st Dep't 2017) (fact that motion for reargument was decided by a justice who did not sign the underlying order did not warrant reversal "given that the CPLR permits sua sponte recusals and reassignments of such motions").

Similarly, in *Matter of New York State Urban Development Corp. (Fallsite, LLC)*, 85 A.D.3d 1723, 926 N.Y.S.2d 246 (4th Dep't 2011), a condemnation proceeding, the judge initially assigned to the matter ("Judge One") signed a stipulated vesting order pursuant to which respondents surrendered title to condemned property in return for an advance payment of $17 million, while reserving their right to receive additional compensation under Eminent Domain Procedure Law section 304(A)(3). Respondents subsequently sought the additional compensation and the matter proceeded to trial before a second judge ("Judge Two"), who conducted a lengthy bench trial and concluded that the advance payment exceeded the property's value by $120,523.55.

Respondents then moved before Judge One to vacate the vesting order, alleging that they were fraudulently induced to stipulate to it. Petitioner argued that the motion should have been made to Judge Two who presided over the lengthy valuation trial, rather than Judge One who was originally assigned to the matter. The Fourth Department noted that while CPLR 2221(a) generally requires a motion to vacate an order to be made to the judge who originally signed it, CPLR 2221(b) permits the Chief Administrator of the Courts to deviate from CPLR 2221(a)'s dictate by court rule. The court cited to Uniform Rule 202.3, entitled "Individual assignment system; structure," which provides that once a judge is assigned to a case after the filing of a request for judicial intervention, that judge becomes the " 'assigned judge' with respect to that matter and, except as otherwise provided in subdivision (c) ..., shall conduct all further proceedings therein." 22 N.Y.C.R.R. § 202.3(b). The court also referenced Uniform Rule 202.8(a), which provides that "[a]ll motions shall be returnable before the assigned judge."

The Fourth Department observed that the exceptions contained in Uniform Rule 202.3(c) were not applicable in this matter and that it could not discern why the proceeding was referred to Judge Two when the respondents opted to seek additional compensation. In that Judge Two presided over the proceeding without objection for several years, the Fourth Department was "compelled to conclude" that Judge Two "became and remains the IAS judge." *Matter of N.Y. State Urban Dev. Corp.*, 85 A.D.3d at 1724, 926 N.Y.S.2d at 248. Judge One's involvement with the matter was limited to having signed the stipulated vesting order, the court noted, and Judge Two was "intimately familiar with the underlying facts relevant to the vacatur motion." *Id.* In addition, virtually all of the issues raised in the vacatur motion were raised in a post-trial motion brought before Judge Two, who had not yet rendered a decision when respondents served the vacatur motion. Based on these conclusions, the Fourth Department vacated Judge One's order directing the parties to appear for a scheduling conference concerning respondents' motion to vacate the stipulated vesting order and the matter was remitted to Judge Two.

The result in *Matter of New York State Urban Development Corp.* appears to be more aligned with the practical aspects of the Individual Assignment System than the dictates of the CPLR and Uniform Rules, which do not (and

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maybe cannot) adequately address these situations. There is no hard and fast rule, however, and there are instances in which the assigned judge may properly exercise discretion to refer a motion affecting a prior order to the judge who issued the order. *See* *Carpenter v. Browning-Ferris Indus., Inc.*, 192 Misc.2d 793, 747 N.Y.S.2d 708 (Sup. Ct., Erie County 2002).

A motion affecting a prior order need not be made to the judge who signed the order if "he or she is for any reason unable to hear it." CPLR 2221(a). *Sparks v. Essex Homes of WNY, Inc.*, 20 A.D.3d 905, 906, 798 N.Y.S.2d 293, 294 (4th Dep't 2005) ("Contrary to the contention of Niagara Gutters, Justice Doyle properly considered the motion for leave to reargue because Justice Boniello was out of the country and 'unable to hear' the motion"). Presumably, it is the movant who would make the initial determination of whether Judge One is able to hear the motion, but it had best be established that it is "not feasible" for Judge One to hear it and that the circumstances are "exceptional." *Willard v. Willard*, 194 A.D. 123, 185 N.Y.S. 569 (2d Dep't 1920). If the movant does make the motion before Judge Two, it is now Judge Two who must decide whether Judge One is "unable" to entertain the motion. Judge Two would do well to note at the outset that it is the appellate court that will likely make the ultimate judgment on that matter and that appellate decisions consistently frown on Judge Two, directly or indirectly, reviewing what Judge One has done. This might prompt the movant to reconsider and make the motion before the judge who signed the order.

When a motion returnable at the time of, and germane to, the trial presumes to affect an earlier order, it may constitute an "exceptional" case because of the administrative problems that would be met in applying CPLR 2221(a) literally. *See* *Blasi v. Boucher*, 30 A.D.2d 674, 291 N.Y.S.2d 960 (2d Dep't 1968). It is doubtful that such a generous view would be taken, however, if it appears that the motion was needlessly deferred to the eleventh hour with the motive of frustrating CPLR 2221(a). No such motive appeared in the *Blasi* case.

In courts without the I.A.S., and occasionally even in courts that do have the I.A.S., the question sometimes arises whether a judge who heard a case while on assignment to a higher court retains jurisdiction of matters connected with the case even after the assignment has terminated and the judge has gone back. The question arose in *Prudential Lines, Inc. v. Firemen's Ins. Co. of Newark, N.J.*, 109 Misc.2d 281, 440 N.Y.S.2d 155 (Sup. Ct., New York County 1981). The court held that the judge's powers do continue, at least as to a motion to reargue or renew an earlier motion that the judge had heard during the assignment. This is not necessarily authority for the judge to act on a new piece of business in the case after the assignment is over, especially when another judge of the court can handle it as well. It addresses the situation in which the present application is so related to the earlier one that a different judge, if called upon to undo the earlier one in any measure, would run afoul of the policy against having one *nisi prius* judge sit in effect as an appellate judge over another.

In some instances, the original order may have been issued by a referee. In *Guaman v. Tran*, 52 A.D.3d 656, 860 N.Y.S.2d 197 (2d Dep't 2008), the supreme court, upon stipulation of the parties, referred defendant's motion to dismiss for lack of proper service to a referee for a hearing and determination. The referee issued an order denying the motion to dismiss and finding service proper. Defendant moved for reargument before the referee, but the motion was ultimately granted by the supreme court justice who originally referred the motion to the referee. The supreme court noted that it did not intend to refer the matter to a referee, but rather to a judicial hearing officer ("J.H.O."). *See* Siegel & Connors, New York Practice § 379 (6th ed. 2018). Hence, in granting the reargument motion, the court vacated the referee's order denying the motion to dismiss for improper service and set the matter down for a de novo hearing before a designated J.H.O.

Citing to CPLR 2221(a), the Second Department reversed and directed that the motion to reargue be submitted to the referee who decided the original motion to dismiss. In that a referee possesses "the same powers as a justice or judge on a matter referred to that referee for determination (*see* Judiciary Law § 117; CPLR 4301 ...)," a motion to reargue the determination of a referee should be submitted to the referee who signed the order. *Guaman*, 52 A.D.3d at 658, 860 N.Y.S.2d at 198. Once an issue is legitimately assigned to a referee to determine, in other words, that referee

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stands in the same shoes as a judge deciding the issue, invoking the rule in CPLR 2221(a) that, except in unusual circumstances, a motion to reargue must go to the judge who decided the original motion.

C2221:2 Original Disposition Is Law of the Case.

The disposition made in the original order by Judge One becomes, in effect, "the law of the case," a doctrine that operates like an intra-action collateral estoppel. Collateral estoppel technically operates only on a final judgment, and there is none involved when only interlocutory orders are the subject. *See* Siegel & Connors, New York Practice § 448 (6th ed. 2018). Under the law of the case doctrine, "[t]he decision being followed need not be reduced to an order before it can be given preclusive effect later in the proceeding." *In re Estate of Levinson*, 11 A.D.3d 826, 827, 784 N.Y.S.2d 165, 166 (3d Dep't 2004), *lv. denied*, 4 N.Y.3d 704, 792 N.Y.S.2d 1 (2005). When the law of the case doctrine is invoked, as it is when Judge One renders a decision, it makes the decision "binding upon all courts of co-ordinate jurisdiction and they may not arrogate to themselves powers of appellate review." *George W. Collins, Inc. v. Olsker-McLain Indus., Inc.*, 22 A.D.2d 485, 489, 257 N.Y.S.2d 201, 205 (4th Dep't 1965). CPLR 2221(a), in effect, implements the spirit of the law of the case doctrine by preventing a party who was heard on a motion from attempting to undo the order by an inconsistent ruling from Judge Two.

The proper means whereby the order of Judge One may be reviewed is either by motion to that judge, or through an outright appeal. If the motion involved is an ex parte one, however, the party who cannot get satisfaction from Judge One may turn to the appellate court or one of its judges under CPLR 5704. *See* Siegel & Connors, New York Practice §§ 244, 248, 331 (6th ed. 2018). Under that provision, it is not an appeal that is contemplated, with all of its cumbersome and expensive machinery, but a mere motion. In certain circumstances, CPLR 5704 allows an appellate judge to do to Judge One's order what CPLR 2221(a) precludes Judge Two from doing.

C2221:3 Prior Order Made Without Jurisdiction.

CPLR 2221(a) contemplates the situation in which Judge One's order, correct or not, is jurisdictionally valid. By this is meant that the court had jurisdiction of both the subject matter and of the parties sought to be bound by the order. If there was no jurisdiction, such as where notice of the motion was required but was not given, or a particular party had never been subjected to the court's jurisdiction in the action itself, CPLR 2221(a) does not apply. *See* Third Preliminary Report of the Advisory Committee on Practice and Procedure, 1959 N.Y. Legis. Doc. No. 17, at 184. The motion in these circumstances, which would usually be one to vacate the order entirely, may be made in any proper county or to any proper judge, absent any administratively adopted rules to the contrary. *See* CPLR 2212 (prescribing venue choices for motions in supreme court actions). The theory is that the order is void.

Such a motion is a "direct" attack on the order; usually an attack made before the same court that rendered the order, asking vacatur. *See* CPLR 5015(a)(4) (allowing court that issued order to vacate it based on lack of jurisdiction). But since the order is void, it is subject to the same principles that govern a void judgment, and these permit a "collateral" attack. That is, the aggrieved person, when confronted with the order in any other case or context, may there plead and prove its jurisdictional invalidity without having made a direct attack on it.

It should be noted that the direct attack is always more expeditious and prudent. If a court concludes that the order is jurisdictionally valid, it will not be open to a collateral attack. In most instances, therefore, it is best to assume that CPLR 2221(a) does apply to a motion to vacate. If the motion is made before the judge who signed the original order, relief can be sought in the alternative and the success of the motion will not rise or fall solely on whether Judge One's order is jurisdictionally valid.

C2221:4 Exception for Order Rendered on Default.

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If the order was made upon the party's default, CPLR 2221(a)'s first exception applies, permitting the motion to be made on notice to any judge of the court, i.e., to be made as any motion in the action could be made. CPLR 2221(a)(1); *see* CPLR 2212 (prescribing venue choices for motions in supreme court actions). The reason here is that Judge One, who made the order upon the default, usually has not passed on the merits of the motion and is therefore not being "reviewed" by a colleague, Judge Two. Notwithstanding that general rule, a merits review might necessarily follow a motion for summary judgment even where there is a default. *See Ramos v. City of New York*, 61 A.D.3d 51, 57, 872 N.Y.S.2d 128, 132-33 (1st Dep't 2009) ("[W]here a party fails to submit opposition to a motion for summary judgment, the court is required to 'assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law.' "); *Liberty Taxi Mgmt., Inc. v. Gincherman*, 32 A.D.3d 276, 277 n. 1, 820 N.Y.S.2d 49, 50 n. 1 (1st Dep't 2006) ("A summary judgment motion should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion (i.e., 'defaulted')"); Siegel & Connors, New York Practice § 281 (6th ed. 2018). In that latter scenario, any motion listed in CPLR 2221(a) should be made to Judge One.

A motion to vacate the order, rather than an appeal, is the remedy for the defaulting party. *See* CPLR 5015(a)(1) (granting court authority to vacate order based on excusable default); Siegel & Connors, New York Practice § 427 (6th ed. 2018). If the motion to vacate the default order is denied, however, the order of denial may be appealed, as long as the vacatur motion was made on notice. *See* CPLR 5701(a)(2).

The exception for the default recognized by paragraph (1) of CPLR 2221(a) is, of course, subject to any court rules that speak to the contrary. *See* CPLR 2221(b). As noted in the Practice Commentary to C2221:1, above, the Uniform Rules provide that "[a]ll motions shall be returnable before the assigned judge." 22 N.Y.C.R.R. § 202.8(a). Therefore, the assigned judge will be hearing virtually all motions in the case, regardless of whether the application may affect a prior order made upon a default. Thus, a provision like CPLR 2221(a)(1) becomes largely academic under I.A.S. practice. If, however, an action has been transferred to the New York City Civil Court pursuant to CPLR 325(d), "a Civil Court Judge may, pursuant to the exception in CPLR 2221(a)(1), vacate a prior order issued by a Supreme Court Justice where ... the prior order was issued upon default." *Zhai v. Chem. Bank*, 180 Misc.2d 442, 445, 689 N.Y.S.2d 366, 368 (N.Y. City Civil Ct. 1999).

As noted above, the proper vehicle to challenge an order entered on default is CPLR 5015(a)(1). *See* Siegel & Connors, New York Practice § 427 (6th ed. 2018). There have been several recent instances in which parties have instead sought to challenge orders issued on default through a motion to reargue or renew under CPLR 2221. *See, e.g., Zhang Hua Lin v. Zhang Li Lin*, 52 Misc.3d 229, 29 N.Y.S.3d 777 (Sup. Ct., Queens County 2016) (defendant sought to "reargue and/or reconsider" order striking the answer, entered on default). For example, in *Country Wide Home Loans, Inc. v. Dunia*, 138 A.D.3d 533, 28 N.Y.S.3d 319 (1st Dep't 2016), the supreme court granted defendant's motion pursuant to CPLR 3215(c) to dismiss plaintiff's foreclosure action because plaintiff failed to move for a default judgment within one year of defendant's default. This is the classic "default within the default" scenario in which a plaintiff who fails to "take proceedings" to enter a default judgment within one year after the default occurs forfeits the right to proceed with the action. *See* Siegel & Connors, New York Practice § 294 (6th ed. 2018). Remarkably, with the stakes seemingly so high, the defendant's motion was granted on default without any opposition. Plaintiff then moved for renewal under CPLR 2221.

The First Department affirmed the denial of plaintiff's motion to renew. In that the order was granted on default, the court held that the proper remedy for plaintiff was a motion to vacate under CPLR 5015(a)(1), not a motion to renew under CPLR 2221. *See also Atl. Radiology Imaging, P.C. v. Metro. Prop. & Cas. Ins. Co.*, 2016 WL 1064657 (App. Term, 2d Dep't 2016).

C2221:5 Exception for Ex Parte Order.

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If the initial order was made ex parte, the movant now has a choice of procedures for a second motion affecting it. If the second motion is also ex parte, it must be made to the judge who signed the original order. If it is made on notice, it may be made like any motion, i.e., as governed by CPLR 2212, which prescribes venue choices for motions in supreme court actions. *See* Siegel & Connors, New York Practice § 245 (6th ed. 2018). This is all, once again, subject to any court rules to the contrary because the rules supersede these CPLR provisions to the extent of any inconsistency. *See* CPLR 2221(b).

The purpose of CPLR 2221(a)(2) is to offer a broader range of choices for the second motion when the first one has been made ex parte, and might have been made in any part of the state. *See* CPLR 2212(b); Practice Commentary, CPLR 2212, C2212:8 ("Venue of Ex Parte Supreme Court Motion"). This, in turn, suggests the possible inconvenience of seeking out the same judge who made the original order. The movant on round two who is content to make the second motion on notice need not look for the first judge.

A party aggrieved by an initial ex parte order can do no better than move to vacate it, because it is not appealable. CPLR 5701(a)(2). The second order may be appealed if the court denies the motion to vacate, but there too only if the second motion was made on notice. *See* CPLR 5701(a)(3). Thus, the movant in round two who has visions of appealing the second order had best opt under CPLR 2221(a)(2) for the notice route rather than the ex parte procedure.

If the second motion is also made ex parte, the one aggrieved by the result would still seem to have no appeal. The remedy there may be to try CPLR 5704, which is yet another ex parte motion, this time to an appellate court or judge. *See* Siegel & Connors, New York Practice §§ 244, 248, 331 (6th ed. 2018).

Subdivision (c)

C2221:6 Mandatory Transfer to Proper Judge Under CPLR 2221(c); Distinction from CPLR 2217(a).

CPLR 2221(a) contemplates that the motion to affect a prior order will initially be made to the judge who signed the order. If it is not, however, the judge who does get the motion must transfer it to the proper judge unless, of course, the first judge "is for any reason unable to hear it." CPLR 2221(a). That qualification in the opening language of CPLR 2221(a) would logically apply as well to the dictates in CPLR 2221(c), which require that a motion made before an improper judge under CPLR 2221 be transferred to a proper one. Prior to the 1999 amendments to CPLR 2221, which created a new subdivision (c), this language was the last sentence in CPLR 2221(b).

Distinguish this transfer requirement in CPLR 2221(c), which is mandatory, from the discretionary transfer of CPLR 2217(a). CPLR 2221(a) involves a second motion that seeks to affect a prior order directly; hence the mandatory transfer provision in CPLR 2221(c). CPLR 2217(a) contemplates transferring a second motion to a judge who heard an earlier one in the case, not because of any relationship that the second motion has to the first, but merely to take advantage of the familiarity the first judge may have gained about the case in general from the first motion. Hence its discretionary nature. *See* Practice Commentary CPLR 2217, C2217:1 ("Optional Referral of Motion").

If the second motion does seek to affect the first determination directly, making it the business of CPLR 2221(a), the transfer to the first judge should be made notwithstanding that no formal order was entered on an earlier decision. *See George W. Collins, Inc. v. Olsker-McLain Indus., Inc.*, 22 A.D.2d 485, 257 N.Y.S.2d 201 (4th Dep't 1965); *see also Spahn v. Griffith*, 101 A.D.2d 1011, 476 N.Y.S.2d 676 (4th Dep't 1984).

Subdivision (d)

C2221:7 Motion to Reargue Under CPLR 2221(d); Nature and Effect; 1999 Amendments to Statute.

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The various rules governing a motion to reargue an order entered on an earlier motion were largely the product of caselaw until 1999, when an amendment added a new subdivision (d) to CPLR 2221 that specifically addresses "[a] motion for leave to reargue." The 1999 amendments to CPLR 2221 also added new subdivisions (e), governing the motion to renew, and (f), addressing the motion that seeks to combine both. We treat subdivision (d) here and in Practice Commentary C2221:8, and reserve the other subdivisions for Practice Commentaries C2221:9 through C2221:9B, below.

CPLR 2221(d) is largely a codification of the principles that evolved through the caselaw, enabling us to conclude that the pre-1999 decisions on reargument motions are generally relevant today. In one important particular, however, noted in the Practice Commentary to C2221:8, below, special attention must be paid to the time for making the motion in a situation in which an appeal has already been taken from the prior order, and is pending.

CPLR 2221(d)(1) requires that a motion to reargue be "identified specifically as such." This is designed to relieve the court as well as the other parties from guessing what kind of motion is being made. It is sometimes hard to determine whether a given motion is one to renew or merely to reargue. The distinction, made clear in the caselaw and now embodied in the statute, is that the motion to renew involves new proof while the motion to reargue does not; it merely seeks to convince the court that it overlooked or misapprehended something the first time around and ought to change its mind.

CPLR 2221(d)(2) articulates the standards previously outlined in the caselaw. A motion to reargue, it says:

shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion....

The offering of new matters of fact makes the motion one to renew under CPLR 2221(e), not one to reargue under CPLR 2221(d). Furthermore, a motion for reargument "is not available where the movant seeks only to argue 'a new theory of liability not previously advanced.' " *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 718, 800 N.Y.S.2d 679, 862 (1st Dep't 2005) (citations omitted); *see Frisenda v. X Large Enters.*, 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dep't 2001).

Under the caselaw existing prior to the 1999 amendments, a motion for reargument was often used when there was a change in the law after the prior order. CPLR 2221(e)(2) now clarifies that the motion to renew, not the motion to reargue, is the proper expedient when the motion is based on a change in the law that occurs while the case is still sub judice, such as a new statute taking effect or a definitive ruling on a relevant point of law being handed down by an appellate court that is entitled to stare decisis. *See* Siegel & Connors, New York Practice § 449 (6th ed. 2018) (discussing binding effect of appellate division decisions on trial courts in other departments). Renewal motions made on these grounds are explored in further detail in Practice Commentaries C2221:9 ("Motion to Renew Under CPLR 2221(e); Nature and Effect; 1999 Amendments to Statute") and C2221:9A ("Time to Make Renewal Motion"), below.

Since CPLR 2221(d)(1) requires a proper identification of the motion right up front, calling it one thing while actually structuring it as another will violate the statute. What consequence should be visited upon a motion with an improper labeling? It is tempting to say that the court should ignore labels and simply treat the motion as what it really is, getting on with its merits as soon as possible. But if the court makes it a regular habit to do that, it will obviously undermine the purpose of the labeling requirement. Perhaps the court should entertain the motion only after asking the movant for a clarification of a mysterious labeling, putting all parties on notice of the inquiry. A brief adjournment of the motion until the matter is clarified would ensure that a party's response time is not reduced due to the mislabeling of the motion, and that prejudice to other parties is avoided.

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Most courts facing the problem have ignored a mislabeling of a motion for reargument or renewal and simply treated the motion under the proper umbrella. *See, e.g., Weiss v. Deloitte & Touche, LLP*, 63 A.D.3d 1045, 1047, 882 N.Y.S.2d 229, 232 (2d Dep't 2009) (treating motion denominated as one for leave to renew and reargue as "in actuality, one for leave to reargue"); *Kudrov v. Kudrov*, 12 Misc.3d 205, 212, 820 N.Y.S.2d 405, 410 (Sup. Ct., Kings County 2005) ("Although, the defendant has termed the motion one for reargument, this particular aspect of the motion is actually one for renewal and the court shall deem it as such."). The labeling, and ultimate treatment, of motions to reargue and renew will have a significant impact on appealability because the denial of a motion to reargue is not appealable. *See* Commentary C2221:9C ("Appealability of Order on Motion to Reargue or Renew"), below; Siegel & Connors, New York Practice § 532 (6th ed. 2018).

If a rigid approach is taken to the requirement of labeling, and motions for reargument are denied based solely on a mislabeling, forfeitures will append to the violations. Given the short period within which to make a motion for reargument, *see* CPLR 2221(d)(3), in many cases it will be too late to make the motion anew with the proper labeling. *See* Commentary C2221:8, below. Furthermore, nothing in CPLR 2221 specifically purports to extend the time for making a new motion after the earlier one is rejected for improper labeling. The draconian approach of dismissal for a violation of the labeling requirement in CPLR 2221(d)(1) will result in a punishment disproportionate to the crime and, incidentally, contradict the liberal construction edict in CPLR 104.

Perhaps the labeling requirement should be treated similarly to the signature-of-all-papers requirement that became effective on March 1, 1998, with the amendment of the sanctions rule, Part 130. *See* 22 N.Y.C.R.R. 130-1.1a(a); Siegel & Connors, New York Practice § 201 (6th ed. 2018). That rule provides that the absence of a required signature shall be called to the offending party's attention, and the paper stricken only if "the omission ... is not corrected promptly after being called to the attention of the attorney or party." *Id.*; *see* Siegel's Practice Review 66:3-4 (January 1998).

While CPLR 2221(d) unfortunately does not allude to them, the original motion papers and underlying order are almost always germane on a motion to reargue. This important issue is discussed in Commentary C2221:11 ("Proper Papers on Motions to Reargue or Renew"), below.

Note that we have been referring all this while simply to a "motion to reargue." The actual description in CPLR 2221(d) is a "motion for leave to reargue," but in this context the two things are essentially the same. Stressing the word "leave" might suggest that two motions are necessary, one to get "leave" to make the motion to reargue and then another for the motion to reargue proper. All can be contained in one motion. Appellate practice, in which a motion for leave to appeal does generate two steps--first the motion, and then, if it's granted, the appeal proper--should be distinguished. There was no intent to require such a two-step process on a motion for reargument. The language in CPLR 2221(d) merely acknowledges that the court may grant leave to reargue based on the fact that it overlooked or misapprehended something, yet still adhere to its prior determination. *See* CPLR 2221(f); Commentary C2221:9B ("Combining Motion to Reargue and Motion to Renew"), below. As noted below, this outcome will have an effect on the appealability of the order denying the motion. *See* Commentary C2221:9C ("Appealability of Order on Motion to Reargue or Renew"), below.

C2221:8 Time to Make Reargument Motion.

The 1999 amendment to CPLR 2221 addresses the time for making a motion to reargue, a matter that had previously been left to the caselaw. CPLR 2221(d)(3) now provides that the motion to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."

Here, again, the statute would seem to be doing no more than codifying the prior caselaw, by assimilating the time to move to reargue to the time for taking an appeal, both periods running from the time of the service of the objectionable order with written notice of its entry. *See* CPLR 5513(a) (detailing time to take appeal as of right); Siegel & Connors,

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New York Practice § 533 (6th ed. 2018). There are some important open questions in this area, however, that will likely need resolution by the Court of Appeals.

Prior to the 1999 amendment adding the time periods in CPLR 2221(d)(3), the caselaw was generally in agreement that a motion to reargue could not be made after the period for appealing the prior order expired. *See, e.g., Liberty Nat. Bank & Trust Co. v. Bero Const. Corp.*, 29 A.D.2d 627, 286 N.Y.S.2d 287, 288 (4th Dep't 1967) ("A motion to reargue cannot be used to extend the time to appeal and such a motion must therefore, be made before the time to appeal has expired."). An exception to the general rule developed, allowing a motion for reargument to be made "after the time to appeal has expired if a notice of appeal has been timely filed and the motion is brought prior to the submission of the appeal or at the latest before the appeal is determined." *Bray v. Gluck*, 235 A.D.2d 72, 74, 663 N.Y.S.2d 725, 726 (3d Dep't 1997); *see Lachman v. Lachman*, 258 A.D.2d 875, 684 N.Y.S.2d 743 (4th Dep't 1999); *Bermudez v. N.Y.C. Hous. Auth.*, 199 A.D.2d 356, 357, 605 N.Y.S.2d 352, 354 (2d Dep't 1993). In these circumstances, a motion for reargument cannot be viewed as an attempt to circumvent the time within which to take an appeal. Moreover, allowing the motion for reargument to be entertained by the judge who signed the order, as long as it is made prior to the submission of the appeal, may avoid the time and expense that accompanies a full-blown appeal.

Since the 1999 amendment, there is conflict on whether this judicially-crafted exception is overruled by the new CPLR 2221(d)(3). The statutory subdivision, addressing the time period for a motion to reargue, refers only to the 30-day period itself, making no reference to the time during which an appeal from the order is pending. Several trial level decisions have concluded that the legislature's failure to specifically include the exception in CPLR 2221(d) amounts to a rejection of it. *See, e.g.*, *Guillet v. Willard*, 2009 WL 565296 (Sup. Ct., Monroe County 2009); *Kern v. City of Rochester*, 3 Misc.3d 948, 775 N.Y.S.2d 505 (Sup. Ct., Monroe County 2004). These decisions, both emanating from courts within the Fourth Department, distinguish that court's opinion in *Millson v. Arnot Realty Corp.*, 266 A.D.2d 918, 697 N.Y.S.2d 435 (4th Dep't 1999), which held that "a motion for reargument may be brought after the time to appeal has expired if a notice of appeal has been timely filed and the motion is brought prior to the submission of the appeal or at the latest before the appeal is determined." The *Guillet* and *Kern* courts both concluded that the Fourth Department was not applying the newly added CPLR 2221(d)(3) in its 1999 *Millson* decision and, therefore, that the decision should not be controlling on a motion for reargument made after the effective date of the amendment. Curiously, the *Millson* court does not mention CPLR 2221.

The First and Second Departments have reached a different conclusion, allowing a motion for reargument to be made after the statutory time frames in CPLR 2221(d)(3) have expired if a timely notice of appeal has been served and filed. *See Itzkowitz v. King Kullen Grocery Co.*, 22 A.D.3d 636, 804 N.Y.S.2d 350 (2d Dep't 2005); *Garcia v. Jesuits of Fordham, Inc.*, 6 A.D.3d 163, 774 N.Y.S.2d 503 (1st Dep't 2004); *see also Dugas v. Bernstein*, 5 Misc.3d 818, 826-27, 786 N.Y.S.2d 708, 714-15 (Sup. Ct., New York County 2004) (outlining the history of amendment to CPLR 2221, the court concluded "that a motion for leave to reargue, untimely under CPLR 2221(d)(3), may be considered where a timely taken yet unsubmitted appeal is pending").

It seems to us that if a strong case is made out for reargument, indicating the likelihood of an overturning of the result on appeal, it should not be the law's policy to force the appeal through by tying the trial judge's hands. Furthermore, allowing the reargument motion during the appeal's pendency does not violate the general policy of finality that underlies the time period in CPLR 2221(d)(3). The very taking of the appeal keeps the matter open for review, in light of which allowing the reargument motion to the trial court can be seen as furthering, rather than impeding, finality.

The reference to "service of a copy of the order determining the prior motion and written notice of its entry" in CPLR 2221(d)(3) presumably refers to service by the prevailing party on the motion. *See* CPLR 2220(b); Siegel & Connors, New York Practice § 250 (6th ed. 2018). There are, however, situations in which the loser draws and serves the order on the winner with notice of entry. That will start the appeal time running under CPLR 5513(a), which serves as a model for the time provision in CPLR 2221(d)(3). *See* Siegel & Connors, New York Practice § 533 (6th ed. 2018).

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When the order, with notice of entry, is served via mail by the prevailing party upon the loser, an extra 5 or 6 days under CPLR 2103(b)(2) get added to the 30-day period within which the loser must serve and file the notice of appeal. *See* Siegel & Connors, New York Practice § 202 (6th ed. 2018) (discussing various add-ons in CPLR 2103(b)).

A 1999 amendment adding a subdivision (d) to CPLR 5513 provides that the add-ons in CPLR 2103(b)(2) will also be added when the loser serves the order with notice of entry via regular mail. Note, however, that the subdivision applies only to the period in which to appeal. CPLR 2221(d)(3) has no similar counterpart provision, suggesting that the loser who serves the order with notice of entry should not rely on any extra time from CPLR 2103(b)(2) for making the motion to reargue.

Lawyers representing parties in e-filed actions need to be careful when planning to make a motion for reargument. *See* Siegel & Connors, New York Practice § 63A ("Commencement of Actions by Electronic Filing ('E-Filing')") (6th ed. 2018). In *Mazario v. Snitow Kanfer Holtzer & Millus LLP*, 2018 WL 6739091 (Sup. Ct., New York County 2018), plaintiffs moved to reargue a motion decided in an order dated May 24, 2018, which was served by defendants with notice of entry by e-filing on May 29, 2018. Plaintiffs moved to reargue on July 3, 2018, within 35 days after service of the order with notice of entry. CPLR 2103(b)(2)'s 5-day add-on generally does not apply in e-filed actions because the interlocutory papers are served via the NYSCEF site, and not via regular mail. *See* Siegel & Connors, New York Practice § 202 (6th ed. 2018). Therefore, the motion was 5 days late. The court noted that the fact that defendants subsequently mailed the order with notice of entry after e-filing it did not change the result.

Similarly, in *Nolte v. Bridgestone Associates LLC*, 2018 WL 3729562 (Sup. Ct., New York County 2018), the court ruled that a motion for reargument was untimely by 5 days in an action subject to mandatory e-filing. The fact "[t]hat plaintiff also elected to serve a copy of the notice of entry by regular mail did not extend defendant's deadline to file a motion for reargument" under CPLR 2103(b)(2).

The mischief in cases like *Mazario* and *Nolte* is likely created by 22 N.Y.C.R.R. section 202.5-b(h)(2), which allows a party, as an alternative to e-filing and electronically serving an order or judgment with notice of its entry, to "serve a copy of the order or judgment and written notice of its entry in hard copy by any method set forth in CPLR 2103(b)(1) to (6)." *See also* 22 N.Y.C.R.R. § 202.5-bb(a)(1) (noting that rules for consensual e-filing program govern in actions subject to mandatory e-filing, unless the rules for mandatory e-filing provide otherwise). If a party chooses to serve a hard copy of the order or judgment, proof of that service must be filed electronically. *See* 22 N.Y.C.R.R. § 202.5-b(f)(2)(ii).

These provisions seemingly permit an odd opt-out of sorts from the general rule requiring a party to electronically serve documents in an e-filed action. The decisions in *Mazario* and *Nolte* appear to take the position that if, for example, a party serves an order or judgment with notice of entry both electronically and through the United States Postal System, the latter service will not afford 5 additional days to perform a procedural act. But not all courts have agreed. *See, e.g.*, *Glob. Custom Integrations, Inc. v. JDP Wholesale Enters., Inc.*, 40 Misc.3d 909 (Sup. Ct., Westchester County 2013) (holding that when service is made by first-class mail after service by e-filing, the 5-day extension to respond in CPLR 2103(b)(2) applied). These issues are treated more extensively in Patrick M. Connors, *Problems to Avoid in E-Filed Actions*, N.Y. L.J., July 26, 2019, at 4.

CPLR 2221(d)(3) excludes from its scope "motions to reargue a decision made by the appellate division or the court of appeals." It applies, of course, to *nisi prius* decisions, but it would presumably apply as well to decisions of an appellate term of the supreme court and of a county court, even when sitting as an appellate court over a city, town, or village court. In specifically excluding only the appellate division and the Court of Appeals, CPLR 2221(d)(3)'s timing provision should be deemed to embrace all other courts.

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A party moving for reargument in the Court of Appeals or appellate division needs to be attentive to the distinct rules governing the timeliness of a motion for reargument in those forums. For example, the 30-day time period to move for reargument in the Court of Appeals runs from the date of the decision, and not its service. 22 N.Y.C.R.R. § 500.24(b). The statewide Practice Rules of the Appellate Division, housed in 22 N.Y.C.R.R. Part 1250, were adopted by the four judicial departments and became effective on September 17, 2018. *See* Siegel & Connors, New York Practice § 11 (July 2020 Supplement). The new rules address, among other things, the timing for reargument motions. Pursuant to 22 N.Y.C.R.R. section 1250.16(d)(1), such motions must be made within 30 days of service of the appellate court's order, with notice of entry, which is the same time constraint for motions for leave to appeal. Previously, the 30-day period began to run from the date of the appellate court order in the First Department, and no clear time constraint for reargument motions existed in the Third Department.

Subdivision (e)

C2221:9 Motion to Renew Under CPLR 2221(e); Nature and Effect; 1999 Amendments to Statute.

The rules governing the motion to renew an order entered on an earlier motion, like those governing a motion for reargument, were primarily the product of caselaw until the 1999 amendments to CPLR 2221. CPLR 2221(e) now governs the "motion for leave to renew." While largely a codification of the principles that have evolved through the caselaw on renewal motions, there are some special points to take note of under the new statutory subdivision.

The first of the newly articulated requirements, in CPLR 2221(e)(1), is that a motion to renew "shall be identified specifically as such." As noted in treating the parallel requirement for motions to reargue contained in CPLR 2221(d)(1), *see* Commentary C2221:7, above, the purpose of the labeling mandate is to avoid any ambiguity about whether the motion is one to reargue, which does not involve any new proof, or a motion to renew, which does.

Paragraph 2 to CPLR 2221(e) provides that a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination."

It was always clear that renewal, rather than reargument, was the proper procedure when new facts were the basis for the motion. In that respect, the statute makes no change. But the new statute offers the further clarification that the motion to renew, not the motion to reargue, is also the proper expedient when the motion is based on a change in the law that occurs while the case is still sub judice, such as a new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis. *See* Siegel & Connors, New York Practice § 449 (6th ed. 2018). Furthermore, "[a] clarification of the decisional law is a sufficient change in the law to support renewal." *Dinallo v. DAL Elec.*, 60 A.D.3d 620, 874 N.Y.S.2d 246 (2d Dep't 2009); *see Opalinski v. City of New York*, 164 A.D.3d 1354, 1355, 84 N.Y.S.3d 499, 501 (2d Dep't 2018). The important point is that the case must still be "sub judice" to take advantage of this rule and permit a motion for renewal. *See* Commentary C2221:9A ("Time to Make Renewal Motion"), below.

In reviewing the caselaw, sometimes one finds the terminology of "rehear" instead of, or alternatively with, "renew." Some lawyers' understanding is that one refers to where the prior motion was denied and the other to where it was granted. Others say that "renew" is what the movant tries when the motion was denied and "rehear" is the term the opposing party uses when the motion was granted. Nothing of consequence appears to attach to the distinction. Both contemplate new proof, both carry the same appellate implications, and a poll of bench and bar would probably reveal few who have ever stopped to dwell on the point. In light of the 1999 amendments to CPLR 2221(e), however, it is advisable to abandon the "rehear" terminology when labeling motions that are essentially motions to renew.

Caselaw prior to the 1999 amendments to CPLR 2221 had indicated that when new facts are offered on a motion to renew, an explanation should be included about why the new facts were not contained in the earlier motion. While

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decisions noted that the new proof need not necessarily be newly discovered, the motion always stood a better chance if a good reason was shown why the new and presumably decisive proof was not discovered prior to the submission of the first motion. *See Poag v. Atkins*, 2004 WL 1326611 (Sup. Ct., New York County 2004) (discussing judicially-crafted rules regarding the motion for leave to renew); Siegel & Connors, New York Practice § 254 (6th ed. 2018). CPLR 2221(e)(3) now explicitly requires that the motion to renew contain "reasonable justification for the failure to present such facts on the prior motion." The caselaw indicates that this requirement applied strictly.

The Second Department has consistently ruled that "[t]he Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion." *Sobin v. Tylutki*, 59 A.D.3d 701, 873 N.Y.S.2d 743 (2d Dep't 2009) (citing *Worrell v. Parkway Estates, LLC*, 43 A.D.3d 436, 437, 840 N.Y.S.2d 817, 818 (2d Dep't 2007)). For example, in *Serviss v. Incorporated Village of Floral Park*, 164 A.D.3d 512, 82 N.Y.S.3d 495 (2d Dep't 2018), the petitioner commenced an Article 78 proceeding to review respondent's determination terminating his employment as a senior tree pruner. The petitioner claimed that his due process rights were violated because he was not provided a hearing prior to the termination of his employment, which he was allegedly entitled to because he was also a volunteer fire fighter. *See* Civil Service Law § 75. The respondent moved to dismiss the petition on the grounds that it was deficient as a matter of law because petitioner failed to allege that he was an "exempt" firefighter as defined in General Municipal Law section 200. The supreme court granted the motion and dismissed the proceeding.

Rather than appealing from that order, the petitioner moved under CPLR 2221(e) for leave to renew his opposition to respondent's motion to dismiss the petition. In support of the motion, petitioner submitted a certificate and supporting documentation to establish that he was an "exempt" firefighter as defined by General Municipal Law section 200. The supreme court denied the motion, holding that petitioner failed to offer a reasonable justification for initially failing to submit the certificate in opposition to the motion to dismiss.

The Second Department affirmed. The court observed that a motion for renewal can be supported by new or additional facts not known to the movant at the time of the original motion, or be based on facts that were known at the time of the original motion, such as petitioner's position as a firefighter. "However, in either instance, a 'reasonable justification' for the failure to present such facts on the original motion must be presented." *Serviss*, 164 A.D.3d at 513, 82 N.Y.S.3d at 497; *see Carmike Holding I, LLC v. Smith*, 180 A.D.3d 744, 747, 120 N.Y.S.3d 141, 144 (2d Dep't 2020); *Braxton v. Plaza Housing Development Fund Company, Inc.*, 163 A.D.3d 756, 82 N.Y.S.3d 58 (2d Dep't 2018). The court went on to note once again that in a situation like that in *Serviss*, "the supreme Court lacks discretion to grant renewal...." *Serviss*, 164 A.D.3d at 513, 82 N.Y.S.3d at 496; *see also Armstrong v. Armstrong*, 162 A.D.3d 621, 622, 79 N.Y.S.3d 299, 301 (2d Dep't 2018).

The Second Department appears to impose an even heavier burden if the renewal motion is made after the underlying order or judgment has been subject to appellate review. For example, in *Priant v. New York City Transit Auth.*, 142 A.D.3d 491, 36 N.Y.S.3d 201 (2d Dep't 2016), the plaintiff was in a desperate spot: appealing from an order of supreme court denying his motion for leave to renew that branch of his prior motion which was for leave to serve a late notice of claim. The appellate division had already weighed in on the matter by reversing supreme court's original order and denying plaintiff's motion to serve a late notice of claim. Unless the plaintiff could successfully apply for leave to appeal to the Court of Appeals, this was the end of the line. The Second Department observed, as it had on many prior occasions, that "[o]n a postappeal motion for leave to renew, the movant bears a heavy burden of showing due diligence in presenting the new evidence to the Supreme Court." The plaintiff did not meet that burden in *Priant*, as it "failed to establish that the new evidence offered in support of his motion for leave to renew could not have been discovered earlier through the exercise of due diligence." *See* CPLR 2221(e)(3).

The Third Department, citing to CPLR 2221(e), has concluded that "a motion to renew must be based upon newly discovered evidence which existed at the time the prior motion was made, but was unknown to the party seeking

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renewal, along with a justifiable excuse as to why the new information was not previously submitted." *Tibbits v. Verizon N.Y., Inc.*, 40 A.D.3d 1300, 1302-03, 836 N.Y.S.2d 727, 730 (3d Dep't 2007).

The Fourth Department has observed that while "a court has discretion to 'grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made' ... it may not exercise that discretion unless the movant establishes a 'reasonable justification for the failure to present such facts on the prior motion'." *Robinson ex rel. Estate of Robinson v. Consol. Rail Corp.*, 8 A.D.3d 1080, 778 N.Y.S.2d 387 (4th Dep't 2004). Therefore, in *Foxworth v. Jenkins*, 60 A.D.3d 1306, 875 N.Y.S.2d 366 (4th Dep't 2009), an auto accident case, the Fourth Department reversed the supreme court and granted defendant owner's motion to renew an order denying a motion to vacate a default based on the affidavit of the codefendant driver. The affidavit presented new facts with respect to the cause of the collision, but the defendant offered a reasonable excuse for failing to submit the affidavit in support of his prior motion because the codefendant could not be located for approximately one year from the time defendant learned of the default judgment against him. While defendant may have been aware of the facts contained in the affidavit when he made his original motion to vacate the default judgment, he provided a reasonable justification for failing to present those facts on the prior motion, thereby satisfying CPLR 2221(e)(3).

The First Department appears to have adopted the most flexible approach in applying CPLR 2221(e)(3). In *Mejia v. Nanni*, 307 A.D.2d 870, 763 N.Y.S.2d 611 (1st Dep't 2003), for example, defendant moved for a change of venue from the Bronx. On the original motion, the defendant failed to submit any proof that he was a resident of Westchester County. Only on the motion to renew--which was erroneously labeled a motion to reargue--was his Westchester residence shown. The court entertained the renewal motion and granted it, even though the defendant could not explain why the newly adduced facts, known or in any event easily accessible all the while, were not included in the original motion. The First Department ruled that while "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." *Id.* at 871, 763 N.Y.S.2d at 612; *see Sirico v. F.G.G. Prods., Inc.*, 71 A.D.3d 429, 433, 896 N.Y.S.2d 61, 65 (1st Dep't 2010); *Poag v. Atkins*, 2004 WL 1326611 (Sup. Ct., New York County 2004) (discussing disagreement among the courts in applying CPLR 2221(e)).

It is helpful to contrast the First Department's generous holding in *Mejia* with the Second Department's more restrictive approach in *HSBC Bank USA, National Association v. Nemorin*, 167 A.D.3d 855, 90 N.Y.S.3d 270 (2d Dep't 2018). In *Nemorin*, supreme court denied defendant's CPLR 2221(e) motion for leave to renew her prior motion to vacate a judgment of foreclosure and sale and to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction. *See* CPLR 5015(a)(4); Siegel & Connors, New York Practice § 430 (6th ed. 2018). The motion for renewal was based upon the submission of "new" documentary evidence pertaining to defendant's residence to controvert the plaintiff's affidavit of service. To provide a justification for the failure to present the documentary evidence on the original motion, the defendant submitted an affidavit of her prior attorney who claimed that the failure to submit the evidence on the original motion was due to "law office failure because at the time of the prior motion, he was distracted, stressed, and depressed about an attorney disciplinary proceeding against him which thereafter resulted in his suspension from the practice of law." *Nemorin*, 167 A.D.3d at 856, 90 N.Y.S.3d at 270; *see* Siegel & Connors, New York Practice § 108 (discussing the relevance of "law office failure" on motion to vacate default judgment). This did not constitute a "reasonable justification" under CPLR 2221(e)(3) and, therefore, the Second Department affirmed the denial of the motion for renewal.

While a renewal motion may be based on "new facts not offered on the prior motion," CPLR 2221(e)(2), there is no requirement in the statute that the facts be "newly discovered," as some of the decisions indicate. Rather, the motion for renewal must provide a "reasonable justification" for the failure to present the facts, newly discovered or not, on the prior motion. In *Foxworth*, 60 A.D.3d at 1307, 875 N.Y.S.2d at 367, the Fourth Department apparently made this distinction, stressing that the party moving for renewal offered a reasonable excuse for failing to submit the affidavit in support of his prior motion to vacate the default. Similarly, in *In re Defendini*, 142 A.D.3d 500, 502,

35 N.Y.S.3d 495, 497 (2d Dep't 2016), the Second Department observed that "[t]he requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion 'if the movant offers a reasonable excuse for the failure to present those facts on the prior motion.'" The respondents in *In re Defendini* did provide a reasonable excuse for their failure to present "new facts" in opposition to a motion for summary judgment in surrogate's court. Therefore, the appellate division granted leave to renew and, upon renewal, ruled that the surrogate's court should have denied the motion for summary judgment on the petition because the new facts created a triable issue. *See also Family Care Acupuncture, PLLC v. Ameriprise Auto & Home*, 2016 WL 3636759 (App. Term 2016) (granting motion for renewal, and reversing order of summary judgment for plaintiff, where nonparty driver and mother had not testified before first return date of motion and the transcripts of their examinations under oath were not yet available in admissible form on final return date of motion).

The renewal motion that seeks to adduce new proof so as to affect a prior order is roughly analogous to the motion under CPLR 5015(a)(2) to undo a judgment or order on the basis of "newly-discovered evidence." *See* Siegel & Connors, New York Practice § 428 (6th ed. 2018). Unlike the language in CPLR 2221(e), however, CPLR 5015(a)(2) expressly requires that the evidence submitted be "newly-discovered."

While it is difficult to reconcile the appellate division caselaw interpreting CPLR 2221(e), a clear lesson emerges from this discussion. The party moving in the first instance must not be lazy about gathering up the required proof on the assumption that if worse comes to worst, and the motion fails, she can make a tighter gathering later and use the additional proof on a motion to renew. The renewal motion will not have easy sailing and it will be an exceedingly rare situation in which a party can satisfy the standards in CPLR 2221(e)(3) if the new facts submitted on the motion were discovered prior to making the original motion. Therefore, it is always advisable to make a thorough and diligent effort to gather proof on the initial motion, so that all reasonably accessible proof will be submitted to the court at that juncture. If the motion is denied and additional facts turn up later, a party who can prove that a diligent effort was made to assemble the proof for the first motion will be in a far better position to establish a "reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(3).

While CPLR 2221(e)(3) requires a party seeking renewal based on new facts to provide a reasonable justification for failing to present the facts on the prior motion, it does not require a similar justification when moving for renewal based on a change in the law. Logically construed, however, CPLR 2221(e)(2) can be deemed to require that the change in the law occur after the prior determination, or at least close in time to it. If the change in the law occurred prior to the original determination, the party seeking renewal should be able to establish why the law was not submitted to the court on the earlier motion. Any other approach would run roughshod over the doctrines of preservation and law of the case.

Note that we have been referring simply to a "motion to renew" here. Its actual description in subdivision (e) is a "motion for leave to renew," but the two are essentially the same. Stressing the word "leave" might suggest that two motions are necessary, one to get "leave" to make the motion to renew and then another for the motion to renew proper. All can be contained in one motion. In appellate practice, a motion for leave to appeal does generate two steps--first the motion, and then the appeal proper if the motion for leave is granted. There was no intent to require such a two-step process for motions to renew. The language in CPLR 2221(e) merely acknowledges that the court may grant leave to renew based on new facts or a change in the law, yet still adhere to its prior determination. *See* CPLR 2221(f); Commentary C:2221:9B ("Combining Motion to Reargue and Motion to Renew"), below.

Curing Procedural Defects with Motion to Renew under CPLR 2221(e)

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There have been numerous decisions in which a party has used a motion to renew under CPLR 2221(e) to cure a procedural defect in papers submitted on the first go around. So many, in fact, that the subject warrants its own subheading in this section of the Practice Commentaries under CPLR 2221(e).

In *Kalir v. Ottinger*, 2011 WL 6968334 (Sup. Ct., New York County 2011), for example, plaintiff attorney sued another attorney and his professional corporation for the legal fees allegedly due him for services provided to the defendants. Plaintiff moved for summary judgment and defendant attorney opposed the motion with an attorney's affirmation. Under CPLR 2106, an attorney is entitled to submit an affirmation when subscribed and affirmed by him or her to be true under the penalties of perjury, "with the same force and effect as an affidavit." *See* Siegel & Connors, New York Practice § 205 (6th ed. 2018). That provision was not available to defendant in the action because the statute, by its terms, does not permit the submission of affidavits by someone who is a party to the action. *Id.* The lack of a proper notarization rendered the defendants' opposition papers insufficient and the court, therefore, granted plaintiff summary judgment on liability.

A procedural defect of this nature is not uncommon. *See, e.g.*, *John Harris P.C. v. Krauss*, 87 A.D.3d 469, 928 N.Y.S.2d 295 (1st Dep't 2011) (concluding that affirmation submitted by attorney who was defendant in action was not sufficient to permit vacatur of default judgment under CPLR 5015(a)(1)). In *Kalir*, defendants sought to correct the defect with a CPLR 2221 motion for leave to renew and/or reargue plaintiff's prior motion for summary judgment. The court denied that motion because defendants failed to provide a copy of the prior order they sought to reargue in the motion papers. *See* CPLR 2214(c) (requiring the moving party to supply the court with "all other papers not already in the possession of the court necessary to the consideration of the questions involved"); Commentary C2221:11 ("Proper Papers on Motions to Reargue or Renew"), below; Siegel & Connors, New York Practice § 246 (6th ed. 2018).

Defendants then made a second motion for leave to renew and/or reargue. Plaintiff argued that the motion should be denied because of a lack of new facts not offered in opposition to the prior motion for summary judgment. *See* CPLR 2221(e)(2). The *Kalir* court concluded, however, that courts "have broad discretion to grant renewal and may in appropriate circumstances do so even upon facts known to the movant at the time of the earlier motion." The court observed that the Second Department appears to take a somewhat rigid position on such renewal motions, denying them regardless of the lack of prejudice if the defendant fails to provide a reasonable justification for the defects in the documents originally submitted. *See, e.g. Singh v. Mohamed,* 54 A.D.3d 933, 934, 864 N.Y.S.2d 498, 500 (2d Dep't 2008).

By contrast, the *Kalir* court noted, "the First Department ... allows the trial court the discretion to grant renewal in the absence of prejudice, even where the original failure was due to the movant's mistake." *See, e.g., B.B.Y. Diamonds Corp. v. Five Star Designs, Inc.*, 6 A.D.3d 263, 775 N.Y.S.2d 34 (1st Dep't 2004) ("Renewal may be granted where the failure to submit an affidavit in admissible form was inadvertent and there is no showing by the opposing party of any prejudice attributable to the delay caused by the failure."). The Third Department appears to apply a similar rule. *See Wilcox v. Winter*, 282 A.D.2d 862, 722 N.Y.S.2d 836 (3d Dep't 2001) (granting motion for renewal was entirely appropriate remedy to excuse "simple procedural error").

Applying the First Department's rule, the *Kalir* court granted the motion for renewal, despite the fact that defendants submitted defective documents on two prior motions. It further concluded that, based on the submissions now properly before it, the prior award of summary judgment to the plaintiff could no longer stand. It is difficult to reconcile the holding in *Kalir* with CPLR 2221(e)'s requirements. That provision mandates that the proponent of a motion for renewal show "new facts not offered on the prior motion ... and ... [a] reasonable justification for the failure to present such facts on the prior motion." CPLR 2221(e)(2), (3). The facts submitted on the renewal motion in *Kalir* were certainly not "new," and the failure to adhere to the statutory language in CPLR 2106 can hardly be described as a "reasonable justification" for not submitting them in a proper form on the earlier motion. While it is difficult to satisfy CPLR 2221(e)'s requirements in this setting, it may be possible to cure defects of this sort under CPLR 2001,

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which permits the court, "[a]t any stage of an action, ... [to] permit a mistake, omission, defect or irregularity ... to be corrected, upon such terms as may be just." *See Bhim v. Dourmashkin, MD*, 2013 WL 10408685 (Sup. Ct., Nassau County 2013) (noting that while renewal motion would not likely be successful, CPLR 2001 could be invoked to allow plaintiff to cure a defective affirmation with an affidavit); Siegel & Connors, New York Practice § 6 (6th ed. 2018).

As noted above, the Second Department has taken a somewhat strict position on renewal motions where a party attempts to cure procedural deficiencies, often denying them regardless of the lack of prejudice if the movant fails to provide a reasonable justification for the defects in the documents originally submitted. *See, e.g., Austin v. McPherson*, 111 A.D.3d 610, 974 N.Y.S.2d 281 (2d Dep't 2013); *Singh*, 54 A.D.3d at 935, 864 N.Y.S.2d at 500; *see also* Siegel & Connors, New York Practice § 254 (6th ed. 2018) (discussing pertinent caselaw and conflicting approaches in various departments). More recent caselaw may demonstrate that the court is now more permissive in this area. For example, in *Defina v. Daniel*, 140 A.D.3d 825, 33 N.Y.S.3d 421 (2d Dep't 2016), plaintiff submitted an unnotarized statement of a chiropractor in opposition to defendant's motion for summary judgment. The supreme court granted defendant's motion, finding that the statement of the plaintiff's chiropractor had not been submitted in admissible form. *See* CPLR 2106; Siegel & Connors, New York Practice § 205 (6th ed. 2018) (discussing professionals who can affirm under penalties of perjury, rather than swear before a notary). The plaintiff then moved for leave to renew, submitting a notarized affidavit of the chiropractor and an attorney's affirmation explaining that he mistakenly included the unnotarized copy of the chiropractor's statement with the plaintiff's opposition papers instead of the notarized affidavit. The supreme court denied the motion.

The Second Department reversed, ruling that the supreme court "improvidently exercised its discretion in denying the plaintiff's motion for leave to renew." The court reiterated that "CPLR 2221(e) has not been construed so narrowly as to disqualify, as new facts not offered on the prior motion, facts contained in a document originally rejected for consideration because the document was not in admissible form." The Second Department ruled that the lawyer's mistake in not including the notarized affidavit constituted law office failure and provided "a reasonable justification for the plaintiff's failure to provide the affidavit to the court in opposing the original motion." *See* CPLR 2221(e)(3); *Trigoso v. Correa*, 150 A.D.3d 1041, 1043, 55 N.Y.S.3d 130, 133 (2d Dep't 2017) (defendants failure to submit signed copies of deposition transcripts with original summary judgment motion "was tantamount to law office failure, which constituted a reasonable justification" for the court to grant the renewal motion); *Rivera v. Queens Ballpark Co., LLC*, 134 A.D.3d 796, 22 N.Y.S.3d 106 (2d Dep't 2015) (submitting copy of stipulation extending parties' time to file motion for summary judgment, rather than the "so-ordered" version, constituted law office failure providing basis for motion to renew). Upon granting renewal, the *Defina* court considered the affidavit and concluded that it created a question of fact, necessitating a reversal of the order granting defendant summary judgment. *See also Green v. Canada Dry Bottling Co. of New York, L.P.*, 133 A.D.3d 566, 20 N.Y.S.3d 94 (2d Dep't 2015) (reversing, and holding that supreme court improvidently exercised its discretion in denying plaintiff's motion to renew where plaintiff submitted affirmation that corrected deficiencies in affirmation submitted on prior motion).

It is interesting to contrast the holding in *Defina* with the 2015 decision in *Cioffi v. S.M. Foods, Inc.*, 129 A.D.3d 888, 10 N.Y.S.3d 620 (2d Dep't 2015), which was an appeal from an order granting a motion to renew. In *Cioffi*, the Second Department emphasized that the supreme court "lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion." *Id*. at 891, 10 N.Y.S.3d at 625. In this regard, the court held that a "[r]easonable justification does not exist where 'the "new evidence" consists of documents which the [moving party] knew existed, and were in fact in his own possession at the time the initial motion was made'." *Id.* The record in *Cioffi* established that the materials relied upon by the plaintiffs in support of their motion for renewal "were either in their possession prior to the date on which they filed their opposition to [defendant's] motion or were reasonably available to them." *Id.* Therefore, the Second Department reversed the order granting leave to renew.

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The decision in *Defina*, and the generosity it bestowed on a moving party who failed to include the proper documents with its motion papers, should not be embraced by the practicing bar. If the documents are in the possession of the moving party, or are reasonably available, great pains should be taken to ensure that they are included in the original motion in admissible form. An attempt to introduce such documents once again on a subsequent motion to renew, with procedural defects cured, may lead to a result similar to that in *Cioffi*.

C2221:9A Time to Make Renewal Motion.

CPLR 2221(e) does not prescribe a specific time period for making a motion to renew. There are, however, several time limitations recognized in the caselaw that a party moving for renewal must consider.

As noted above, CPLR 2221(e)(2) clarifies that the motion to renew, not the motion to reargue, is the proper expedient when the motion is based on a change in the law, such as a new statute taking effect or a definitive ruling on a relevant point of law issued by an appellate court that is entitled to stare decisis. *See* Siegel & Connors, New York Practice § 449 (6th ed. 2018). A change in the law coming about while an action is pending, even if now in its appellate phase, will ordinarily be applied in that action. The general rule is that an appellate court will decide a matter based on the law as it is at the time the court is called upon to render its decision, rather than as it was at the time of the lower court decision.

The important point is that the case must still be "sub judice" to take advantage of this rule. A change in the law occurring after the case has gone to final judgment, with the appeal time having expired, cannot as a general rule be made the basis to change the result of the case. *See Dinallo v. DAL Elec.*, 60 A.D.3d 620, 621, 874 N.Y.S.2d 246, 247 (2d Dep't 2009) ("[A] motion for leave to renew based upon a change in the law must be made prior to the entry of a final judgment or before the time to appeal has expired."). Allowing a motion for renewal in these circumstances would provide an end run around the time period for taking an appeal and upset the rule of finality applicable to final dispositions. *See* Siegel & Connors, New York Practice § 544 (6th ed. 2018). As the Court of Appeals explained in *Matter of Huie [Furman]*, 20 N.Y.2d 568, 572, 285 N.Y.S.2d 610, 612 (1967), denying as untimely a motion for renewal based on a change in the law "might at times seem harsh, [but] there must be an end to lawsuits...."

In *Redeye v. Progressive Insurance Company*, 158 A.D.3d 1208, 1209, 71 N.Y.S.3d 233 (4th Dep't 2018), the court tracked the caselaw preceding the 1999 amendment adding CPLR 2221(e) and concluded that "there is no indication in the legislative history of an intention to change the rule regarding the finality of judgments." In that the action was no longer pending when the plaintiff in *Redeye* made the motion for leave to renew based on a change in the law, the court ruled it was untimely. *See Glicksman v. Bd. of Educ.*, 278 A.D.2d 364, 366, 717 N.Y.S.2d 373, 374-75 (2d Dep't 2000) (noting legislative history and holding that "because the plaintiffs' motion was made after judgment was entered and the time to appeal had expired, it should have been denied as untimely"). The *Redeye* court also affirmed the denial of plaintiff's CPLR 5015(a) motion to vacate the prior order granting defendant summary judgment, "reject[ing] plaintiff's contention that there [were] sufficient reasons to vacate the prior order in the interests of substantial justice." *Id.* at 1209, 71 N.Y.S.3d at 233.

We note above that while CPLR 2221(e)(3) requires a party seeking renewal based on new facts to provide a reasonable justification for failing to present the facts on the prior motion, it does not require a similar justification when moving for renewal based on a change in the law. *See* Commentary C2221:9 ("Motion to Renew Under CPLR 2221(e); Nature and Effect; 1999 Amendments to Statute"), above. Nonetheless, a party seeking renewal based on a change in the law that would change the earlier determination should act expeditiously and explain why the legal argument was not made earlier. In *Bray v. Gluck*, 235 A.D.2d 72, 663 N.Y.S.2d 725 (3d Dep't 1997), the plaintiff lost and appealed to the appellate division. Before oral argument in the appellate division, the Court of Appeals clarified the point of law in a different case, which was favorable to the plaintiff. Plaintiff did not initially make a motion for renewal before the supreme court and failed to advise the appellate division of the Court of Appeals ruling. After the Third Department issued its decision and order, plaintiff moved for reargument in both that court and in the supreme court based on

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the Court of Appeals decision. (The motion was made prior to the 1999 amendments to CPLR 2221, and would be properly classified as a motion to renew under the current version of CPLR 2221(e)(2). *See* Commentary C2221:9, above.) The Third Department denied the motion. The court also reversed the order of supreme court granting the motion for reargument.

Should the "sub judice" requirement be imposed on a motion for renewal based on new facts not offered on the prior motion? That's an interesting question. If an action has gone to final judgment, a court might conclude that CPLR 2221 is limited to motions affecting prior orders and cannot be invoked to affect a prior judgment. *See Maddux v. Schur*, 53 A.D.3d 738, 739, 861 N.Y.S.2d 814, 815 (3d Dep't 2008) ("[A] motion to renew pursuant to CPLR 2221 is not the proper procedural vehicle to address a final judgment."). Furthermore, allowing motions for renewal based on new facts at any point after a final judgment could seriously impair the rule of finality applicable to final dispositions. *See* Siegel & Connors, New York Practice § 544 (6th ed. 2018).

After a final judgment has been entered, a party can still resort to CPLR 5015(a)(2) and move for relief from the judgment based on "newly-discovered evidence." *See Maddux*, 53 A.D.3d at 739, 861 N.Y.S.2d at 815 (noting that supreme court properly treated CPLR 2221(e) motion for renewal as motion for relief from judgment under CPLR 5015(a)(2)); *see* Siegel & Connors, New York Practice § 428 (6th ed. 2018). As noted above, the requirements for a motion under CPLR 5015(a)(2) appear to be more stringent than those governing motions for renewal under CPLR 2221(e). *See* Commentary C2221:9 ("Motion to Renew Under CPLR 2221(e); Nature and Effect; 1999 Amendments to Statute"), above.

Subdivision (f)

C2221:9B Combining Motion to Reargue and Motion to Renew.

CPLR 2221(f), added with the 1999 amendments, permits the movant to combine in one motion both a reargument and renewal request, but requires the movant to "identify separately and support separately each item of relief sought." Perhaps the movant can best implement this requirement by separately labeling each segment of the motion and by referring to the separate segments in any accompanying memorandum. The courts are not bound by the label appended to the motion by a party and can designate a motion for renewal as one for reargument if it presents neither new facts nor a change in the law. *See* Commentary C2221:7 ("Motion to Reargue Under CPLR 2221(d); Nature and Effect; 1999 Amendments to Statute"), above. As noted below, the nature of the motion will determine whether an order resolving it is appealable. *See* Commentary C2221:9C ("Appealability of Order on Motion to Reargue or Renew"), below.

The segment seeking reargument would rely more heavily on a memorandum than on affidavits, since it contends, without adducing new facts, that the court overlooked or misapprehended facts or law submitted with the prior motion. The segment seeking renewal based upon new facts would rely heavily on affidavits and other factual proof as well as on a memorandum, with the memo arguing for a changed result based on the new proof. The affidavits documenting the new proof should also include, as already indicated, a "reasonable justification" why the new facts were not presented earlier. CPLR 2221(e)(3); *see* Commentary C2221:9 ("Motion to Renew Under CPLR 2221(e); Nature and Effect; 1999 Amendments to Statute"), above. If the motion seeks renewal based on a change in the law, it will rely most heavily on a memorandum of law arguing that the new law requires a "change [in] the prior determination." CPLR 2221(e)(2).

The court is directed to decide the combined motion "as if [each part was] separately made," i.e., as if the movant had made distinct motions for reargument and for renewal, and dispose of it in like manner. The denial of the motion is self-explanatory, but the grant of the motion can carry different implications. The grant can change the result of the earlier motion, or, as subdivision (f) states, "the court may adhere to the determination on the original motion."

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Adherence to the earlier determination might appear to turn the whole procedure into a nullity, but that's not so. The difference can have significant implications for purposes of appeal. *See* Commentary C2221:9C, below. The requirement that the court decide each portion of the motion as if it were separately made will facilitate appellate review.

C2221:9C Appealability of Order on Motion to Reargue or Renew.

The rules about the appealability of the motion to reargue and the motion to renew were also codified in 1999 in a new subparagraph (viii) added to CPLR 5701(a)(2). *See* Siegel & Connors, New York Practice § 526 (6th ed. 2018); Practice Commentary CPLR 5701, C5701:4a ("Appeals Involving Motions to Reargue or Renew"). These rules must be carefully analyzed and understood by the practitioner.

An order granting reargument, even if it adheres to the original decision, is appealable. CPLR 5701(a)(2)(viii). An order denying reargument is not. The party who hopes, through a reargument motion, to get a new period in which to appeal will be severely disappointed if the motion is denied. *See* Commentary C2221:10 ("Appealing All Orders in Confusing Situations"), below. This relates also to the time within which a reargument motion may be made, *see* CPLR 2221(d)(3), a subject treated in Practice Commentary C2221:8 ("Time to Make Reargument Motion"), above. If no appeal has been taken from the original order, there may be no appeal at all, at least not for the time being. Review may be possible at the end of the case in conjunction with an appeal from an unfavorable final judgment, *see* CPLR 5501(a) (allowing review of certain interlocutory orders on appeal from final judgment); Siegel & Connors, New York Practice § 530 (6th ed. 2018), but the prospect of an interlocutory appeal has been lost.

A motion to renew can be based on new proof, which distinguishes it from a motion to reargue. It also differs from the motion to reargue in its appellate consequences. On a motion to renew, any order is appealable, regardless of whether it grants or denies the motion. CPLR 5701(a)(2)(viii). But here the lawyer must expect that the appellate court will pierce through any apparent subterfuge whereby the renewal motion is at root only a reargument motion doctored up to make its denial appealable. If the movant really has nothing new to offer the court except arguments dependent on the same proof that grounded the original motion, the appellate court is not likely to be fooled; and if the "renewal" motion was denied, it may be treated as a "reargument" motion denied, which means it is unappealable. *See Weiss v. Deloitte & Touche, LLP*, 63 A.D.3d 1045, 1047, 882 N.Y.S.2d 229, 232 (2d Dep't 2009)(treating motion denominated as one for leave to renew and reargue as "in actuality, one for leave to reargue"); *Lewis v. Williamsville Towers Assocs.*, 144 A.D.2d 923, 534 N.Y.S.2d 243 (4th Dep't 1988); *Conrad v. Conrad*, 109 A.D.2d 772, 486 N.Y.S.2d 285 (2d Dep't 1985).

The lawyer who has taken the precaution of appealing the original order, *see* Commentary C2221:10 ("Appealing All Orders in Confusing Situations"), below, should have little or no need to appeal a later order denying reargument. *See* Siegel & Connors, New York Practice § 532 (6th ed. 2018). The problem arises when the party has failed to take such a precautionary appeal, and when the later motion can be seen as an attempted subterfuge to avoid the consequences of that omission.

Conversely, if the motion is labeled one for "reargument," but is in fact based on new proof, the courts will ordinarily treat it as a "renewal" motion, thus preserving the right to appeal from an order denying it. *See Daniel Perla Assocs. v. Ginsberg*, 256 A.D.2d 303, 681 N.Y.S.2d 316 (2d Dep't 1998).

Occasionally, when the equities seem to warrant it, the appellate court may elect to treat a denied motion to reargue as one that was granted with the original determination adhered to, so as to preserve the appeal. *See Jones v. City of New York*, 146 A.D.3d 690, 690, 46 N.Y.S.3d 57, 59 (1st Dep't 2017); *HSBC Mortg. Corp. (USA) v. Johnston*, 145 A.D.3d 1240, 43 N.Y.S.3d 575 (3d Dep't 2016). The court did that in *Corey v. Gorick Constr. Co.*, 271 A.D.2d 911, 706 N.Y.S.2d 512 (3d Dep't 2000). The Third Department commented that the trial court, in denying the motion to reargue, did review the merits of the application. That was apparently the decisive equity. In *Lewis v. Rutkovsky*, 153

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A.D.3d 450, 453, 58 N.Y.S.3d 391, 394 (1st Dep't 2017), the First Department ruled that while the supreme court "purported to deny the motion to reargue," it nonetheless considered the merits of the defendants' contention that inclement weather on the due date for summary judgment motions provided good cause for the delay in making the motion. *See* CPLR 3212(a); Siegel & Connors, New York Practice § 279 (6th ed. 2018). Therefore, the *Lewis* court ruled that supreme court, "in effect, granted reargument, then adhered to the original decision." That paved the way for the First Department to not only deem the order appealable, but to reverse the supreme court's determination that the motion for summary judgment was untimely.

If the appellant is truly intent on an interlocutory appeal, it would be unwise to take the above caselaw as any kind of invitation. It is always wiser, and far easier, to take an appeal from the original order and then make the motion to reargue. If the latter fails, the appeal from the original order can go forward to the review the appellant desires.

C2221:9D Motion to Resettle Distinguished.

A motion to resettle is sometimes confused with one to reargue or renew. It should not be. A motion to resettle an order is a procedure designed to correct errors or omissions as to the form of an order, or for clarification of the decision. *Foley v. Roche*, 68 A.D.2d 558, 566, 418 N.Y.S.2d 588, 593 (1st Dep't 1979); *see* Siegel & Connors, New York Practice § 250 (6th ed. 2018). A motion for resettlement "may not be used to effect a substantive change in a prior decision." *Able v. Able*, 209 A.D.2d 972, 972, 619 N.Y.S.2d 461, 462 (4th Dep't 1994). Rather, a motion to resettle contemplates an endeavor to reflect the disposition more accurately. Consistent with this principle, CPLR 5517(a)(2), the only provision in the CPLR to expressly recognize the procedure, provides that the granting of a motion for resettlement of an order does not affect an appeal from the original order. *See* Siegel & Connors, New York Practice § 532 (6th ed. 2018). Furthermore, an order on a motion to resettle is not appealable. *See also Zari v. Zari*, 155 A.D.2d 452, 547 N.Y.S.2d 112 (2d Dep't 1989) ("[N]o appeal lies from an order denying resettlement of the decretal paragraphs of a prior order."); *Banat v. Banat*, 41 A.D.2d 960, 344 N.Y.S.2d 12 (2d Dep't 1973) (holding that an order denying a motion to resettle a judgment is unappealable).

If a significant item has appeared in the judgment or order that is inconsistent with the decision, the general rule of nonappealability of motions to resettle presupposes that the party will discover it and seek resettlement promptly so that the time in which to appeal the original order is still open. The lesson to the lawyer is to keep an eye on the period to appeal, as measured from service of the original order, while the resettlement motion is being made. Any doubt should prompt the simple expedient of taking an appeal from the original order while the resettlement motion pends.

A motion to resettle should be made to the judge who signed the order. CPLR 2221(a); *see* Commentary C2221:1, above. In most circumstances, it is not "necessary for an independent application to be made for resettlement of an order, either by notice of motion or by order to show cause." *Foley*, 68 A.D.2d at 566, 418 N.Y.S.2d at 593. All other parties to the action must still be placed on notice of the application for the resettlement. *Id.*

In *Khan ex rel. Khan v. Karolides*, 3 Misc.3d 791, 778 N.Y.S.2d 836 (Sup. Ct., Queens County 2003), a motion for resettlement of an infant's compromise order was required because the original settlement papers were inadequate. The court observed that a resettlement application endeavors to reflect the original disposition more accurately. Unlike an application for reargument or renewal, the resettlement procedure "may not be used to amplify the prior decision or to effect a substantive change in the original order." *Khan*, 3 Misc.3d at 792, 778 N.Y.S.2d at 837; *see* Siegel & Connors, New York Practice § 250 (6th ed. 2018).

The lawyer's missteps in *Khan* resulted in the infant's funds being withheld for an extra 14 months. Thus, the *Khan* court ultimately reduced the lawyer's fee for prolonged and inexcusable inattention to the resettlement, and gave the proceeds to the infant. The task had apparently been assigned to a paralegal or secretary in the lawyer's office, and much time and effort was wasted until the thing got done right. The fact that an infant's compromise was involved is, of course, what gave the court some control of the fee. In an ordinary tort case, in which the court lacks equivalent

discretion, it would be difficult or impossible for the court to punish things like resettlement delays with fee reductions in the absence of an independent application by the party. But such conduct can rise to the level of "frivolous," invoking Part 130-1 of the Uniform Rules, under which the court has ample power to impose money sanctions. *See* Siegel & Connors, New York Practice § 414A (6th ed. 2018).

C2221:10 Appealing All Orders in Confusing Situations.

It frequently happens that an order or judgment will be followed by one or more motions seeking to affect it, whether through reargument, renewal, resettlement, amendment, or anything else. The party of a mind to keep all grievances alive for appellate review may confront a maze in trying to decide which of the plethora of resulting orders is appealable. Does a reargument motion supersede the original order? Does it depend on whether it is granted or denied? *See* Commentary C2221:9C ("Appealability of Order on Motion to Reargue or Renew"), above. If it does supersede, will the record underlying the original order be preserved for review upon an appeal from a superseding order?

If the appellant's purpose is to bring before the appellate court everything underlying the original as well as the related subsequent orders, the soundest procedure, to avoid any inadvertent oversight, is to timely take an appeal from each and every one of the orders. That entails only the service and filing, for each of them, of a "notice" of appeal, and nothing more. *See* CPLR 5515; Siegel & Connors, New York Practice § 531 (6th ed. 2018). Then, when the time comes around for perfecting the appeal and the record is being drawn up, the lawyer must simply see to it that the record contains all of the orders and all of the notices of appeal from them.

The appellate court sees situations like this from time to time and is understanding about the problem. It will usually single out the order it deems the appropriate appealable one and hear the whole appeal on the merits through review of that order, dismissing the appeals from other orders as academic. Doubtful cases should be resolved that way. The alternative may be to guess wrong, and forfeit the appeal entirely by appealing the wrong order. Appealing the original order is usually the key step, since it preserves for appellate review some of the subsequent ones as well. CPLR 5517(b). But if there is any doubt whatsoever about whether the original appeal also covers the later steps, an appeal should be taken from all of the resulting orders. An important caveat is where a judgment has been entered after an appeal from an order. In those situations, an appeal from the judgment is necessary because when the judgment is entered, the earlier appeal from the order will be dismissed. *See* Siegel & Connors, New York Practice § 530 (6th ed. 2018).

The point is highlighted in *Serviss v. Incorporated Village of Floral Park*, 164 A.D.3d 512, 82 N.Y.S.3d 495 (2d Dep't 2018), discussed in Practice Commentary C2221:9 ("Motion to Renew Under CPLR 2221(e); Nature and Effect; 1999 Amendments to Statute"), above. In *Serviss*, the Second Department affirmed the denial of petitioner's motion for leave to renew his opposition to respondent's motion to dismiss the petition. The petitioner also argued that the supreme court should have denied respondent's motion to dismiss the petition, but that determination could not be reviewed by the court because petitioner never appealed from the original order. *See* Siegel & Connors, New York Practice § 532 (6th ed. 2018). Rather, the only appeal was from the order denying the motion for leave to renew.

It is assumed in the foregoing discussion that whatever second motion was made was itself made timely. *See* Commentaries C2221:8 ("Time to Make Reargument Motion"), C2221:9A ("Time to Make Renewal Motion"), above. Lawyers must also remember that even a timely motion for reargument or renewal will not extend the time to appeal from the original order. The lesson has been learned in many cases, including *Eaton v. State of New York*, 76 N.Y.2d 824, 824-25, 559 N.Y.S.2d 981 (1990), where the Court dismissed a motion for leave to appeal as untimely, noting that "[c]laimants' motion for reargument at the Appellate Division did not extend their time to move for leave to appeal to this Court." Nonetheless, the problem persists in recent caselaw. *See also Bush v. Stevenson Commons Assocs., LLP, Esqs.*, 32 N.Y.3d 1034, 88 N.Y.S.3d 391 (2018); *Hoeg Corp. v. Peebles Corp.*, 31 N.Y.3d 926, 72 N.Y.S.3d 23 (2018); Siegel & Connors, New York Practice § 533 ("Time to Appeal or Move for Leave") (6th ed. 2018).

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C2221:11 Proper Papers on Motions to Reargue or Renew.

In *Biscone v. JetBlue Airways Corp.*, 103 A.D.3d 158, 957 N.Y.S.2d 361 (2d Dep't 2012), the Second Department concluded that the moving papers on a motion for reargument/renewal were insufficient because plaintiff failed to furnish a complete set of the papers relied upon in making the original motion, as required by CPLR 2214(c). The decision is explored in greater detail in Siegel & Connors, New York Practice § 246 (6th ed. 2018) and in the Practice Commentaries to CPLR 2214, but we note it here because the problem seems to arise most frequently in motions for reargument or renewal under CPLR 2221, which does not clearly specify the papers that need to be submitted. *Compare* CPLR 3212(b) (specifying the papers to be submitted on motion for summary judgment). A party moving for reargument or renewal should also be sure to furnish a copy of the underlying order. *See Kalir v. Ottinger*, 2011 WL 6968334 (Sup. Ct., New York County 2011) (noting that the court had denied prior motion for leave to reargue because defendants failed to furnish a copy of the prior order from which they sought reargument in the motion papers).

In sum, the party moving for reargument or renewal should have at least three items: (1) the original motion papers, (2) the order issued on the original motion, and (3) the reargument and/or renewal motion. *See Lower Main St. v. Thomas Re & Partners*, 2005 WL 6760926 (Sup. Ct., Nassau County 2005) (holding that reargument was unavailable because of defendants' failure to submit relevant documents, court noted that "it is the responsibility of the moving parties to assemble complete papers which document the procedural history of the application and provide a proper foundation for the relief requested," and that the court should not be compelled to retrieve files from the clerk's office); Siegel's Practice Review 162:4 (June, 2005). All three items will be especially necessary on a motion for reargument because the moving party will need to identify what the judge "allegedly overlooked or misapprehended" in the original motion papers.

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

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

The limited application and utility of this amendment is discussed in detail in the Practice Commentaries to CPLR 2214, C2214:23 ("Furnishing Papers to the Court").

Notes of Decisions (1261)

McKinney's CPLR Rule 2221, NY CPLR Rule 2221
Current through L.2024, chapters 1 to 315. Some statute sections may be more current, see credits for details.

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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

2024
C3211:8 *Sua Sponte* Dismissals

Each year, these Supplemental Practice Commentaries discuss the extent to which trial courts improperly dismiss actions *sua sponte*. Each year, these commentaries discuss how the practice, when it occurs, violates due process. It is a problem that is noticed far more in the Second Department than elsewhere in the state, and more so in the area of residential mortgage foreclosure actions than in other areas of litigation.

A recent opinion rendered in the case of *Wells Fargo Bank, N.A. v St. Louis*, __ A.D. __, 2024 WL _____ (2d Dep't. ___, __ 2024) (Opinion by Dillon, J.) addressed the issue in greater detail. The opinion provided statistics about *sua sponte* dismissals, demonstrating that the improper practice has not abated from year to year despite almost-universal reversals of trial courts engaging in the practice. The rate of appellate reversals of *sua sponte* dismissals has been particularly noticeable in the Second Department. The opinion discussed various constitutional and statutory reasons as to why *sua sponte* dismissals have no place in New York jurisprudence. Chief among them is the notion of due process, that parties be given notice and an opportunity to be heard on issues that affect tangible litigation rights, particularly those that are dispositive to the outcome of a case. Beyond that, CPLR 2211 requires that notice motions and orders to show cause be served upon parties to a litigation, that CPLR 2214 and 2215 reflect the timetable for the service of opposition papers to motions and cross-motions, and that CPLR 2214(a) requires the moving party to set forth the "relief demanded and the grounds therefor." A court's determination of a dispositive issue that has not been noticed or briefed falls outside of the plain directives of CPLR 2211, 2214 and 2215, which safeguard the due process rights of parties. The opinion in *St. Louis* also noted that general relief clauses in motions--that the court grant such other and further relief as it may deem just and proper--cannot be permissibly used to grant relief that is *dispositive* to an action, citing *inter alia* an earlier opinion of the court in *Rosenblatt v St. George Health and Racquetball Assoc., LLC*, 119 A.D.3d 45, 984 N.Y.S.2d 401 [2d Dep't. 2014] [Opinion by Leventhal. J.]). It remains to be seen whether the Second Department's issuance of a signed opinion on the issue will have more impact on trial courts going forward than its prior slip decisions on the subject.

Nevertheless, the law on *sua sponte* dismissals is that they not occur except where there are extraordinary circumstances warranting them (*Anonymous v Anonymous*, 217 A.D.3d 619, 192 N.Y.S.3d 115 [1st Dep't. 2023]; *Bank of N.Y. Mellon v Stewart*, 216 A.D.3d 720, 190 N.Y.S.3d 80 [2d Dep't. 2023]; *Newrez, LLC v City of Middletown*, 216 A.D.3d 657, 188 N.Y.S.3d 606 [2d Dep't. 2023]). Until now, almost no reported decision rendered by appellate courts in the State of New York, outside the scope of CPLR 3215(c) where it is uniquely permissible, has ever recognized the existence of extraordinary circumstances justifying dismissal. That is a remarkable track record. But the case of *Morris v Zimmer,* 227 A.D.3d 696, 211 N.Y.S.3d 414 (2d Dep't. 2024) appears to be an example of where extraordinary circumstances did exist to justify the *sua sponte* dismissal of a complaint. The action presents an unusual history, as the reader might suspect. In *Morris*, the plaintiffs failed to receive from their attorney certain funds that were to be paid to them in settlement of a prior matter. The attorney who failed to pay the settlement proceeds pleaded guilty in a criminal action, and the clients, as plaintiff, commenced an action in federal court for various related causes of action, and they ultimately received a judgment in their favor which was affirmed at the Second Circuit. While the federal action was pending, the plaintiffs sought to enter a state judgment by confession in New York County, as permitted by CPLR 3218, for the net amount owed by the former attorney. Thereafter, the plaintiffs commenced an action in the Supreme Court, Westchester County, asserting the

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same causes of action as had been asserted in the federal action, plus a fresh claim under Judiciary Law 487. The plaintiffs sought to consolidate their CPLR 3218 confessed judgment from New York County with their Westchester action, and thereafter moved for a CPLR 3215(c) default judgment against the attorney for having failed to appear and answer in the Westchester action. The default motion included a copy of the federal judgment. The attorney, as the defendant, moved for a CPLR 3211(a) dismissal of the state action but the dismissal motion was denied as untimely. Nevertheless, the court denied the plaintiff's default motion and dismissed the action, on the ground that "orderly procedure and judicial economy require that the action be dismissed" which was, in effect, a *sua sponte* dismissal. The basis for the dismissal, notwithstanding the untimeliness of the attorney's dismissal motion, was that the federal action, which had by then resolved, operated as *res judicata* on the state action involving the same parties, transactions, and subject matter, and overrode the attorney's default. Further, the plaintiff's assertion in state court of a claim under Judiciary Law 487 could have been litigated in the federal forum had it been earlier asserted, and therefore, was also barred. The dismissal on *res judicata* grounds was affirmed on appeal. In *Morris,* the circumstances leading to the complaint's dismissal were truly unusual and extraordinary, and not representative of the *sua sponte* dismissals that prompt the much higher volume of appellate reversals.

C3211:10 Defenses Based on "Documentary Evidence"

Letters, e-mails, and affidavits do not qualify as documentary evidence for purposes of CPLR 3211(a)(1) (*Old Republic National Title Insurance Company v 1152 53 Management, LLC*, 227 A.D.3d 824, 212 N.Y.S.3d 345 [2d Dep't. 2024] [certain letters insufficient in action for fraudulent conveyance]). Text messages also do not qualify (*Nosegbe v Charles*, 227 A.D.3d 1400, 211 N.Y.S.3d 832 [4th Dep't. 2024]). Examples of non-qualifying e-mails may be found *in Goldin Real Estate, LLC v Shukla*, 227 A.D.3d 674, 212 N.Y.S.3d 117 (2d Dep't. 2024) and *Optical Communications Group, Inc. v Worms*, 217 A.D.3d 458, 188 N.Y.S.3d 498 [1st Dep't. 2023]). Also not qualifying are letters and affidavits (*7 Mansion, LLC v Calvano*, 226 A.D.3d 730, 209 N.Y.S.3d 490 [2d Dep't. 2024]), though in that case other forms of documentary evidence including the terms and conditions of a contract utterly refuted the plaintiff's claim and warranted the dismissal of the plaintiff's complaint.

C3211:11 Lack of Subject Matter Jurisdiction

The Appellate Division, Third Department, affirmed the dismissal of an incarcerated inmate's action for damages brought in the Court of Claims for lack of subject matter jurisdiction. The inmate sought a review of the denial of his inmate grievances, the conditions of his confinement, wrongful confinement, and discriminatory treatment. But the review of administrative determinations falls outside the scope of the Court of Claims' subject matter jurisdiction. The court held that the claims needed to be asserted as a special proceeding at the Supreme Court pursuant to CPLR Article 78 (*Cumberland v State*, 217 A.D.3d 1029, 190 N.Y.S.3d 499 [3d Dep't. 2023]). In the same case, the Third Department likewise held that the Court of Claims lacked subject matter jurisdiction to hear federal constitutional claims (*Id*., at 1031. *See also Todd v State*, 207 N.Y.S.3d 341 [Ct. of Claims 2023] [Chaudhry, J.] [as to Article 78s]; *Piraino v State*, 83 Misc.3d 489, 214 N.Y.S.3d 592 ([Ct. of Claims Sept. 14, 2023] [Chaudhry, J.] [as to Article 78s]).

The monetary jurisdictional limit of the New York City Civil Court was raised by constitutional amendment in 2021 from $25,000 to $50,000. Thereafter, in *Honest Funding, LLC v Signature Hospitality Solutions LLC*, 81 Misc.3d 897, 203 N.Y.S.3d 472 (Sup. Ct. Kings Co. 2023) (Maslow, J.), the plaintiff commenced a contract action against a guarantor in the Supreme Court for an amount of money that was less than $50,000. The defendant moved to dismiss the action under CPLR 3211(a)(2), arguing that the Supreme Court lacked subject matter jurisdiction over the amount of damages. The Supreme Court correctly disagreed. It noted that while the monetary jurisdictional limit of the Civil Court was in fact raised, nothing changed the Supreme Court's unlimited general jurisdiction to hear disputes of any amount. If the defendant is determined for the action to be litigated in the Civil Court, the remedy, if any, is a transfer of the existing action to Civil Court under CPLR 325. The Civil Court would have

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jurisdiction to hear the case, except to the extent that the plaintiff seeks use and occupancy against the guarantor (*315 West 55th Owners Corp. v Rainbow Spa 23 Inc*., 81 Misc.3d 1204[A], 199 N.Y.S.3d 441 [Sup. Ct. N.Y. Co. 2023] [Lebovits, J.]).

Courts will look to the true nature of a claim to determine whether the claim fits within its subject matter jurisdiction. In *Severini v Department of Environmental Protection*, 80 Misc.3d 1214[A], 195 N.Y.S.3d 638 (Civ. Ct. N.Y. Co. 2023) (Marcus, J.), a *pro se* plaintiff commenced an action in the small claims part of Civil Court claiming that the New York City D.E.P. improperly prosecuted certain provisions of the city's Administrative Code. The defendant moved to dismiss the action, arguing that the substance of the action and the relief sought was in the nature of Article 78 mandamus or prohibition, which is outside the subject matter jurisdiction of the Civil Court's small claims part. The court agreed and dismissed the action, finding that only the Supreme Court is authorized to hear Article 78 proceedings. Similarly, the Court of Claims lacks subject matter jurisdiction over challenges to administrative determinations (*Hudson Neurosurgery, PLLC v State*, 81 Misc.3d 1238[A], 202 N.Y.S.3d 911 [Ct. of Claims 2023] [Marnin, J.]).

Court of Claims Act 8-b provides a right of action against the state for wrongful criminal convictions and imprisonments. The statute sets forth conditions that the claimant must meet in order to be eligible to maintain such an action. The purpose of the law is to provide recompense to individuals where it is determined after-the-fact that their convictions were truly wrongful on the ground of actual innocence, and that harm was suffered as a consequence. It does not apply to a run-of-the mill reversal of a conviction based on weight, insufficiency of the evidence, trial error, or as relevant in *Nolan v State*, 205 N.Y.S.3d 707 (Ct. of Claims 2023) (Vargas, J.), ineffectiveness of counsel. The reason is that those grounds for the vacatur of convictions do not necessarily establish the actual innocence of the accused.

C3211:14 “Other Action Pending”

A recent appellate decision underscores the operation of CPLR 3211(a)(4) dismissals for prior action pending. Such dismissals may occur where there is a prior action between the same parties arising out of the same dispute. The concept behind the statute is that courts not entertain duplicative actions. The case of *Melis v Blake Stone LLC*, 227 A.D.3d 882, 213 N.Y.S.3d 64 (2d Dep't. 2024) demonstrates the limits of what is duplicative. Two actions may be related, but not necessarily duplicative as to require the dismissal of the second on account of the first. In *Melis*, the plaintiff's property was the subject of a judgment of foreclosure and sale, and was sold to the defendant at a public auction. The plaintiff commenced a separate action for conversion and an accounting, alleging that during the time between the auction sale and the issuance of the referee's deed, the defendant took possession of the property and leased it to a third party. The defendant moved to dismiss the second action on the ground of prior action pending, which the Supreme Court denied and the Appellate Division affirmed. Courts have discretion in deciding matters involving prior action pending. Here, the initial foreclosure action was already concluded by the time the defendant's CPLR 3211(a)(4) dismissal motion was made in the second action, so there was not truly a prior action *pending*. Moreover, the two actions, while related to the same property, involved different forms of relief based upon different sets of facts.

Further as to the necessity that the prior action be actually *pending* is the case of *Quinones v Z & B Trucking, Inc*., 220 A.D.3d 901, 198 N.Y.S.3d 565 (2d Dep't. 2023). The dispute between the parties involved an automobile accident in 2018. The plaintiff commenced an action for damages in 2019 by the filing of initiatory papers, but there was never any service upon the defendant. In 2021, the same plaintiff commenced an action arising out of the same occurrence, for the same damages, against the same defendant. The defendant sought to dismiss the second action on the ground of prior action pending. The Second Department held that because the summons and complaint in the initial action was never served, that action was never “pending,” and therefore, the dismissal of the second action was, at the Appellate Division, denied.

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C3211:18 Affirmative Defenses Available on Subdivision (a)(5) Motion

Infancy

CPLR 214-g, enacted as part of the Crime Victims Act, provides a revival window for civil claims or causes of action alleging intentional or negligent acts or omissions that seek to recover damages for injuries suffered as a result of, *inter alia*, conduct which would constitute a sexual offense as defined in Article 130 of the Penal Law committed against a child less than eighteen years of age. In *Schearer v Fitzgerald*, 217 A.D.3d 980, 192 N.Y.S.3d 207 (2d Dep't. 2023), the defendant in the CVA action sought to dismiss the plaintiff's complaint on the ground that Penal Law 30.30 prohibits the revival of time-barred actions, and that the CVA violates federal and state guarantees to due process. The court held that revival statutes satisfy due process if enacted if a reasonable response to remedy an injustice. The plaintiff's infancy, at the time of the alleged offense, is not a bar to an action that falls within the scope of the CVA.

Release

The Appellate Division, Second Department, found a question of fact as to the enforceability of a release executed by an automobile accident motorist to an insurer. The plaintiff sued despite the release, and the insurer sought to have the action dismissed on the ground of the release. The action is *Huang v Llerena-Salazar*, 222 A.D.3d 1033, 203 N.Y.S.3d 341 (2d Dep't. 2023). The question of fact arose from the following factors discussed by the appellate court: "The plaintiff averred, among other things, that shortly after the accident, an insurance representative for the defendants called him 'repeatedly'; that he had difficulty understanding the defendants' representative due to a language barrier; that the defendants' representative, who had him sign the release to obtain money for medical bills, never explained that the document he signed was a release or had the legal effect of a release; and that the plaintiff was not represented by an attorney at the time he signed the release. Moreover, the plaintiff raised questions of fact as to whether there was mutual mistake as to the nature of the injuries sustained by plaintiff from the alleged accident" (*Id*., at 1034). The factual questions that were of concern to the appellate court inform us of the circumstances under which a release will not necessarily be given the force of law, in opposition to a CPLR 3211(a)(5) motion to dismiss. Similarly, a release was not given force and effect where there was a question of fact raised, in opposition to dismissal, about whether the release document had actually been signed by the defendant (*Liu v Kirkwood*, 222 A.D.3d 861, 199 N.Y.S.3d 705 [2d Dep't. 2023]).

A case in contrast is *Prete v Tamares Development 1, LLC*, 219 A.D.3d 1537, 197 N.Y.S.3d 529 (2d Dep't. 2023), where the court rejected the plaintiff's averment in opposition to the defendant's motion to dismiss that he did not know the English language as used in a signed release. The court held that the excuse, standing alone, is insufficient. In *Prete*, the plaintiff did not allege that the defendant misrepresented the content of the release, nor did he claim to have made any effort to have the document translated or explained to him.

A stipulation of discontinuance with prejudice has preclusive effect on a subsequent litigation (*Busher v Barry*, 223 A.D.3d 778, 203 N.Y.S.3d 392 [2d Dep't. 2024]). The same is true of a final judgment (*Joseph v Bank of New York Mellon*, 219 A.D.3d 596, 194 N.Y.S.3d 275 [2d Dep't. 2023]).

Statute of Limitations

Statutes of limitations defenses are typically addressed by defendants seeking to dismiss plaintiffs' direct claims. But on occasion, the limitations period may be relevant to the plaintiffs seeking the dismissal of defendants' counterclaims. For that, the CPLR 3211(a)(5) defense must be read in conjunction with CPLR 203(d), as the traditional rules are different. CPLR 203(d) provides that if a counterclaim is otherwise untimely under its applicable

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statute of limitations, it is nevertheless valid if the counterclaim would have been timely on the date that the plaintiff commenced the action. In other words, for timeliness purposes, the date of the counterclaim dates back to the plaintiff's initiatory filing. There is a catch, however. In instances where the counterclaim is subject to the savings provision of CPLR 203(d), the defendant's recovery on the counterclaim is capped at whatever amount sets-off the plaintiff's award against the defendant. The defendant can use the counterclaim as a set-off, but not for an affirmative recovery that exceeds the amount of whatever damages are awarded to the plaintiff. The intersection of CPLR 3211(a)(5) and CPLR 203(d) is not seen often, as the number of counterclaims asserted in New York practice is a modest portion of litigation, and of those, most counterclaims face no issue of timeliness. These circumstances were seen in *Getzel Schiff & Pesce, LLP v Shtayner*, __ A.D.3d __, __ N.Y.S.3d __ (2d Dep't. 2024), where the plaintiff commenced an action to recover unpaid accounting fees and the defendant counterclaimed for, *inter alia*, professional malpractice. The counterclaim was interposed nine days beyond the three-year limitations period for professional malpractice (CPLR 214[6]) and the Supreme Court dismissed the counterclaim as untimely under CPLR 3211(a)(5). The Appellate Division reversed in finding that by application of CPLR 203(d), the operative date of the counterclaim related back to the filing of the plaintiff's complaint, rendering the counterclaim timely, but only to the extent that any recovery would offset damages awarded to the plaintiff.

Statute of Limitations and Bankruptcy

An opinion by Justice Fran Connolly of the Appellate Division, Second Department, is a must-read for anyone examining the interplay between the statute of limitations and bankruptcy stays. The opinion is in the case of *Bank of New York Mellon v DeMatteis*, 222 A.D.3d 1, 199 N.Y.S.3d 79 (2d Dep't. 2023]). The Westlaw version is preceded by 32 headnotes. The action was one for residential mortgage foreclosure. As was typical of many foreclosure actions, at least before the enactment of the Foreclosure Abuse Protection Act (FAPA), the plaintiff's first action was discontinued and a second action was later commenced. The second action was commenced more than six years from the acceleration of the debt in the first action, which would normally have rendered it untimely (CPLR 213[4]). However, the statute of limitations for the second action was tolled by the combination of the covid-related Executive Orders of Gov. Andrew Cuomo in 2020 and the defendant's bankruptcy filing, which operated as a toll under 11 U.S.C. 362(a). The opinion in *DeMatteis* analyzed that the bankruptcy filing operated as a statutory prohibition to the commencement of the second action, as recognized by CPLR 204(a). The unusual twist in *DeMatteis* was whether the bankruptcy toll of 11 U.S.C. 362(a), which applies to “debtors,” applied to the defendant as the holder of the defaulted note where, prior to the foreclosure actions, the property was deeded to a third party. The Second Department held that the bankruptcy stay applied in favor of the defendant note holder notwithstanding the conveyance of the deed, as the plaintiff was prohibited from commencing the second action while the stay was in effect. However, a different conclusion was reached as to the timeliness of the action against the party to whom the property had been deeded. The bankruptcy stay of the note holder did not extend to the party to whom the deed was conveyed, and who was never a “debtor” in any bankruptcy case. As a result, an action could have been commenced without any bankruptcy toll against the later title holder, so long as the original note holder was not named in any such action.

C3211:28 Lack of Personal Jurisdiction

These Supplemental Practice Commentaries have been following each year developments on what has become a very hot area of law, the circumstances under which a corporate defendant may be subject to the general jurisdiction of New York under CPLR 301. Last year's developments, discussed in the previous year's Supplemental Practice Commentaries, involved the impact of the U.S. Supreme Court's decision in *Mallory v Norfolk Southern Railway Co*., 600 U.S. 122, 143 S.Ct. 2028, 216 L.Ed.2d 815 (2023). There, these commentaries predicted that based on Justice Alito's concurrence in that case, the legal battlefield over whether compulsory consent statutes may provide a proper basis for the assertion of a state's general jurisdiction will shift to the commerce clause of the U.S. Constitution, but that some time will be required for that issue to work its way through the court system.

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In the meantime, the New York State government has not been sitting on its hands. The legislature passed a new CPLR 301-a and an amendment to BCL 1301, to provide that a foreign corporation's application to do business in New York qualifies as consent to the assertion of general jurisdiction for all actions against the corporation, and a revocation of the corporation's registration would concomitantly revoke the state's general jurisdiction over it. The legislation was intended to nullify a holding by the Court of Appeals in *Aybar v Aybar,* 37 NY3d 274 (2021) whereby, under still-continuing law, a corporation is subject to New York's general jurisdiction only if it is incorporated within the New York or maintains its principle office within the state, or under exceptional circumstances (*see also Daimler AG v Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 [2014] [Opinion by Ginsburg, J.]). None of the foregoing affects the assertion of specific jurisdiction over out-of-state entities under the longarm statute (CPLR 302).

Governor Hochul vetoed these new proposed statutory provisions in the waning days of December 2023, and the state's definition of general jurisdiction remains unchanged, at least for now. This was the second year in a row that Governor Hochul vetoed such legislation. Her rationale has been that the enactment of the proposed amended law would be bad for businesses, by discouraging them from filing certificates to do business in New York to avoid being widely subject to the state's general jurisdiction for lawsuits. It now remains to be seen whether the state legislature will attempt, for a third time, to pass a similar amendment to CPLR 301. Without any amendment to CPLR 301, the law in New York remains that general jurisdiction over corporations may only be asserted where the corporation is "at home," meaning that the corporation is incorporated in New York, or maintains its principle office within the state, or represents a truly exceptional case where the entity's operations are so substantial and of such nature as to render it at home within the state (*Daimler AG v Bauman*, *supra*).

Absent any amendment to CPLR 301, the incumbent statute is what it is.

The "department test" for general jurisdiction, for imputing liability from a subsidiary to a corporate parent, was held to not be met where the parent company was not independently subject to the general jurisdiction of New York (*KPP III CCP LLC v Douglas Development Corporation*, 222 A.D.3d 408, 202 N.Y.S.3d 15 (1st Dep't. 2023]).

C3211:32 Absence of a Person Who Should be a Party

In *Ashwood v Uber USA, LLC*, 219 A.D.3d 1289, 195 N.Y.S.3d 762 (2d Dep't. 2023), an action was not dismissed due to the absence of a person who should be a party (CPLR 3211[10]). Rather, there were two actions involving the same plaintiff, the same accident, and common questions of fact and law. The two actions were joined for trial under CPLR 602(a), which remedied the absence of necessary parties in the action where the CPLR 3211(10) dismissal motion had been denied.

C3211:35 Standards on a CPLR 3211(b) Motion

On a CPLR 3211(b) motion to dismiss one or more affirmative defenses, the allegations in the answer must be viewed in the light most favorable to the defendant. The defendant is entitled to every favorable inference, and the pleading is to be liberally construed. This construct was seen in the landlord-tenant dispute of *Soufer Family LLC v Sprague*, 80 Misc.3d 130[A], 195 N.Y.S.3d 869 (App. Term, N.Y., 1st Dep't. 2023). There, the tenant's affirmative defense was worded inartfully, but adequately conveyed at least a right of succession. The landlord's CPLR 3211(b) motion did not address the issue of succession, and on that basis the motion was denied.

C3211:42 Converting CPLR 3211 Motion Into One for Summary Judgment

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While the court may, upon adequate notice to the parties, convert a CPLR 3211 motion to dismiss to a CPLR 3212 motion for summary judgment, it may not do so if is demonstrated that summary judgment would be premature (*Russo v Crisona*, 219 A.D.3d 920, 195 N.Y.S.3d 729 [2d Dep't. 2023]).

C3211:51 Single-Motion Rule

The First Department has signaled that the single-motion rule is strictly enforced. In *TRB Acquisitions LLC v Yedid*, 225 A.D.3d 508, 207 N.Y.S.3d 76 (1st Dep't. 2024), which involved a SLAPP issue, the Appellate Division declined to reach the merits of the CPLR 3211 motion on appeal, as the motion was made in violation of the single-motion rule.

However, if the first CPLR 3211 dismissal motion is not resolved on its merits, a second dismissal motion does not violate the single-motion rule (*Lane's Floor Coverings & Interiors, Inc. v DiLalla*, 226 A.D.3d 593, 207 N.Y.S.3d 529 [1st Dep't. 2024]; *Newlands Asset Holding Trust v Vasquez*, 218 A.D.3d 786, 193 N.Y.S.3d 258 [2d Dep't. 2023] [initial motion denied for its improper service upon the plaintiff]).

C3211:53 Waiving Objection Contained in Paragraphs 1, 3, 5 or 6 of 3211(a)

The defense of lack of standing is generally deemed waived under CPLR 3211(e) if not affirmatively raised in an answer or a pre-answer motion to dismiss. There is an exception in residential mortgage foreclosure actions involving home loans, as set forth in RPAPL 1302-a enacted in 2019. That statute provides that the standing defense is not waived in those actions (*Citibank, N.A. v Boyce*, 226 A.D.3d 867, 211 N.Y.S.3d 104 [2024]; *Deutsche Bank National Trust Company v Groder*, 218 A.D.3d 542, 192 N.Y.S.3d 563 [2d Dep't. 2023]). Standing is waived, if not pleaded as an affirmative defense or raised in a CPLR 3211 motion, in actions involving other than residential mortgage foreclosure, outside the scope of RPAPL 1302-a (*e.g. Perine Intern. Inc. v Bedford Clothiers, Inc.*, 143 A.D.3d 491, 40 N.Y.S.3d 27 [1st Dep't. 2016]).

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

CPLR 3211(g), and for that matter CPLR 3212(h), provide that SLAPP actions be dismissed upon motion unless the responding 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." The First Department had an occasion to consider the meaning of the term "substantial basis" in *Reeves v Associated Newspapers, Ltd.*, 228 A.D.3d 75, 210 N.Y.S.3d 25 (1st Dep't. 2024) (Opinion by Gonzalez, J.). *Reeves* involved a claim for damages arising out of alleged defamation and related torts. The court carefully examined legislative history and precedents, and concluded that "a substantial basis in law" under the SLAPP statutes means "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." According to the sponsor's memorandum for the enactment in 1996, it is less than a preponderance of the evidence standard *(Id.*, at __). It is not measured by the standard of frivolousness (*Id.*, at __). A substantial basis is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact," which happens to be the same definition of "substantial evidence" earlier articulated by the Court of Appeals in *300 Gramatan Ave. Associates v State Division of Human Rights*, 45 NY.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183 (1978). It is a more exacting analysis than the liberal notice pleading standards applicable to ordinary CPLR 3211(a)(7) motions, as the consideration of "substantial evidence" would typically require the court to look beyond the pleadings. But by the same logic, a complaint that fails to state a cause of action under CPLR 3211(a)(7) at the get-go necessarily lacks a substantial basis in law under CPLR 3211(g) (*Id.*, at __; *215 West 84th St Owner LLC v Bailey*, 217 A.D.3d 488, 191 N.Y.S.3d 368 [1st Dep't. 2023]).

Justice Oing, while agreeing with the panel on the ultimate result in *Reeves*, wrote a separate concurrence about whether, *inter alia*, a CPLR 3211(a)(7) dismissal always means that the action lacks a substantial basis and is

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therefore subject to the other remedies of the SLAPP statutes. He noted that the trial court found the action was commenced under a cognizable legal theory and was not frivolous, even though the trial court ultimately dismissed the complaint on the ground that the alleged defamatory statements were protected by the fair report privilege. Therefore, Justice Oing concluded in concurrence, reliance upon the CPLR 3211(a)(7) dismissal as a basis for concluding the absence of "substantial evidence" was "misplaced," requiring a deeper consideration of whether the plaintiffs demonstrated a substantial basis in law for their claims.

The *Reeves* case involved the SLAPP statute in the context of CPLR 3211(g). The same term central to its analysis--"substantial basis in law"--appears in the language of CPLR 3212(h) governing summary judgment motions for SLAPP claims, and CPLR 3211(h) and 3212(i) for dismissal motions and summary judgment motions in cases involving licensed architects, engineers, land surveyors, and landscape architects. The *Reeves* analysis should be analogous and applicable to those statutes as well.

The retroactivity of the SLAPP amendments continues to be an issue of interest. As noted in these Supplemental Practice Commentaries from last year, the Court of Appeals addressed the retroactivity of the 2020 SLAPP amendments (Civil Rights Law 70-a and 76-a) in *Gottwald v Sebert*, 40 N.Y.3d 240, 197 N.Y.S.3d 694, 220 N.E.3d 621 (2023) (Garcia, J.). The Court of Appeals held that the 2020 SLAPP amendments were prospective, not retroactive. However, the same court also explained that the provisions allowing for an award of costs and attorney's fees in SLAPP actions that were "commenced or continued" without a substantial basis in law permits such assessments in favor of counterclaiming defendants, from the date of the effective date of the amendments (i.e. November 10, 2020) forward. In that sense, therefore, actions commenced prior to the 2020 SLAPP amendments received some statutory benefits in terms of potential costs and attorney's fees.

Recall that under CRL 76-a(1)(a), the amendments expanded SLAPP's remedial applicability to *inter alia* public communications regarding matters of public interest. A post-*Gottwald* twist on retroactivity arose in the case of *VIP Pet Grooming Studio, Inc. v Sproul*, 224 A.D.3d 78, 203 N.Y.S.3d 681 (2d Dep't. 2024) (Opinion by Dillon, J.). The case arose from the alleged negligence of a dog groomer which resulted in the death of a cocker spaniel named Ranger. The defendants, who were Ranger's owners, posted critical public comments about the plaintiff groomer on Yelp and Google. The plaintiff commenced a defamation action on November 2, 2020, eight days before the effective date of the SLAPP amendments. After the SLAPP amendments became effective, the defendants moved to dismiss the defamation action under CPLR 3211(a)(7) and 3211(g), the latter subdivision being SLAPP, and for a SLAPP award of costs and attorney's fees. The defendants argued that their social media postings fit within SLAPP's expanded definition of public petition and participation. However, the Second Department held that the postings were not within the scope of SLAPP at the time the plaintiff's action was commenced. It also held that the SLAPP amendments could not be applied to retroactively, as the defendants' dismissal motion was addressed to a complaint that preceded the effective date of the amendments. The complaint therefore needed to be judged by the definition of public petition and participation as was in effect at the time of the plaintiff's complaint was filed, which did not include public comments about broad matters of public interest (*Id.,* at 89).

C3211:70 Greater Scrutiny of Complaint Where Defendant is Design Professional

The reader is referred to this year's Supplemental Practice Commentary C3211:69 for a discussion of the First Department's opinion in the case of *Reeves v Associated Newspapers, Ltd.*, __ A.D.3d __, 210 N.Y.S.3d 25 (1st Dep't. 2024] [Opinion by Gonzalez, J.). The opinion addresses the meaning of the term "substantial basis in law" as used in CPLR 3211(g), 3211(h) (design professionals), 3212(h), and 3212(i).

2023

C3211:1 The Motion to Dismiss, Generally

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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, 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).

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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 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, 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

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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.

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

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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 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

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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 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

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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.

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 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.

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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 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.

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

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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 *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,

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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 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*

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(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.

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

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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 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

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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 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

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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 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

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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.

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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.

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

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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"

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

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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. 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

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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).

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.

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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 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,

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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"

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]).

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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 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

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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, 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

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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.

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 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 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.

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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

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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

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.

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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

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.

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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 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.

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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.

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).

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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

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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]).

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

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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.

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 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).

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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 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

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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

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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 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-

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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 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]).

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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.

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*

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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 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.

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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 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,

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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

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 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

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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

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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

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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, 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.

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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)

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

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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]).

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]).

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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.

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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]).

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

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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 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

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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 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.

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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 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

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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 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.

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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 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

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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 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

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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 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]).

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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 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 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.

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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 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.

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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.

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

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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."

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

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"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

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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 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

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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.).

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*.

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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.*, 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.)

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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.*

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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).

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.].)

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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.

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).

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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 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).

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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.).

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.

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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."

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

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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).

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

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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 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.

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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.

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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.*)

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?

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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

• 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.

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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.

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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.”

- 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

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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 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:

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• 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 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

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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) 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?

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"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 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

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(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 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."

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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 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).

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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).

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.

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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."

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

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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*. 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.*

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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 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

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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).

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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

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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.

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;

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- 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 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

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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 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).

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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.

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

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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).

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.

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• 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.

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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--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

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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 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].").

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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 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.

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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 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

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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 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

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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 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).

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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 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

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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).

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

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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

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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.

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,

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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 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

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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 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.

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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 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

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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 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.

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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, 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

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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.

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

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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.

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.

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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.

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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.

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.

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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 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 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.

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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.

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.

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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.

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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 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.

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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).

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

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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 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-

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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 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).

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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.").

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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

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.

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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.

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

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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).

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).

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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.

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

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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

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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

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.

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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.

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

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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

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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, 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

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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 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.

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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.).

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.

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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).

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.

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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 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.

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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.

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.

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.

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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.).

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

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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.

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).

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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.

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.

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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 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"

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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*.

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.

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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).

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.

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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 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.

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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.

Notes of Decisions (4990)

McKinney's CPLR Rule 3211, NY CPLR Rule 3211
Current through L.2024, chapters 1 to 315. Some statute sections may be more current, see credits for details.

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