CIVIL PRACTICE

Michael Anthony Bottar†

CONTENTS

† A graduate of Colgate University and *summa cum laude* graduate of Syracuse University College of Law, the author is a member of Bottar Leone, P.L.L.C., an adjunct professor at Syracuse University College of Law, and a member of the Syracuse University College of Law Board of Advisors. The author thanks Samantha C. (Robbins) Riggi, Esq., for her extraordinary efforts in connection with this year's *Survey*.

INTRODUCTION

During this *Survey* year,[1] New York's Court of Appeals and appellate divisions published hundreds of decisions that impact virtually all practitioners. These cases have been "surveyed" in this Article, meaning that the author has made an effort to alert practitioners and academicians about interesting commentary about and/or noteworthy changes in New York State law and to provide basic detail about the changes in the context of the Civil Practice Law and Rules. Whether by accident or design, the author did not endeavor to discuss every Court of Appeals or appellate division decision.

1. July 1, 2014 through June 30, 2015.

I. LEGISLATIVE ENACTMENTS

A. CPLR 2106

Chapter 308 of the Laws of 2014, effective January 1, 2015, amended CPLR 2106, which concerns the affirmation of truth of a statement.[2] As amended, CPLR 2016 provides:

> (b) The statement of any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:
>
> > I affirm this [—-] day of [——] , [——] , under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.[3]

B. CPLR 2214(c)

Chapter 109 of the Laws of 2014, effective July 22, 2014, amended CPLR 2214(c) by providing that, on motion, a party in an e-filed case can refer to previously e-filed documents by docket number rather than having to include copies.[4]

C. CPLR 3113(c)

Chapter 379 of the Laws of 2014, effective September 23, 2014, amended CPLR 3113(c) to allow counsel for a non-party deponent to participate in a deposition and "make objections on behalf of his or her client in the same manner as counsel for a party."[5] This amendment overrules the Fourth Department's decision in *Thompson v. Mather*.[6]

2. N.Y. C.P.L.R. 2106 (McKinney Supp. 2016).
3. *Id.* at 2106(b).
4. *Id.* at 2214(c) (McKinney Supp. 2016).
5. *Id.* at 3113(c) (McKinney Supp. 2016).
6. 70 A.D.3d 1436, 894 N.Y.S.2d 671 (4th Dep't 2010)

D. CPLR 3122-a

Chapter 314 of the Laws of 2014, effective August 11, 2014, amended 3122-a,[7] which concerns the certification of business records, by adding subdivision (d), providing:

> The certification authorized by this rule may be used as to business records produced by non-parties whether or not pursuant to a subpoena so long as the custodian or other qualified witness attests to the facts set forth in paragraphs one, two and four of subdivision (a) of this rule.[8]

E. CPLR 3216

Chapter 371 of the Laws of 2014, effective January 1, 2015, amended subdivisions (a) and (b) of CPLR 3216,[9] which concerns want of prosecution, to provide that:

> (a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, *with notice to the parties*, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.
>
> (b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:
>
> (1) Issue must have been joined in the action;
>
> (2) One year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later;

(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the

7. *See* N.Y. C.P.L.R. 3122-a (McKinney Supp. 2016).
8. *Id.* at 3122-a(d).
9. *See id.* at 3216 (McKinney Supp. 2016).

party serving said demand for dismissal as against him *or her* for unreasonably neglecting to proceed. *Where the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation*.[10]

II. CASE LAW DEVELOPMENTS

A. Article 2: Limitations of Time

1. Termination of Action

Pursuant to CPLR 205, where a timely commenced action is terminated for any reason other than (1) voluntary discontinuance, (2) failure to obtain personal jurisdiction over the defendant, (3) a dismissal for neglect to prosecute, or (4) final judgment on the merits, the plaintiff may file a new action on the same facts within six months if the new action would have been timely if commenced at the time the original action was commenced and the defendant is served within six months.[11]

This provision was addressed by the Court of Appeals in *Malay v. City of Syracuse*.[12] In *Malay*, the Court was asked to decide when a prior action terminates under CPLR 205(a) where an appeal is taken as of right, but is dismissed by the intermediate appellate court due to the plaintiff's failure to perfect.[13] Specifically, the plaintiff commenced an action in the United States District Court for the Northern District of New York alleging violations of her federal and state constitutional rights and asserting common law negligence claims.[14] After discovery, the defendants moved for summary judgment, which was granted.[15] The court declined to exercise jurisdiction over the plaintiff's remaining state law claims.[16] The plaintiff then appealed as of right to the Second Circuit.[17] The appeal was dismissed due to her failure to perfect.[18] However, prior to the Second Court dismissing the plaintiff's appeal, an action was commenced in state court.[19] The defendants then moved to

10. *Id.* at 3216(a)–(b).
11. *See id.* at 205(a) (McKinney 2015).
12. 25 N.Y.3d 323, 33 N.E.3d 1270, 12 N.Y.S.3d 1 (2015).
13. *Id.* at 325, 33 N.E.3d at 1271, 12 N.Y.S.3d at 2.
14. *Id.* at 326, 33 N.E.3d at 1271, 12 N.Y.S.3d at 2.
15. *Id.*
16. *Id.*
17. *Malay*, 25 N.Y.3d at 326, 33 N.E.3d at 1271, 12 N.Y.S.3d at 2.
18. *Id.*
19. *Id.*

dismiss the plaintiff's state court action as untimely—contending that because she commenced her state action nearly nine months after the district court's order, the six-month tolling period provided by CPLR 205(a) had already expired.[20]

Rejecting the defendants' argument, the Court of Appeals held that the prior action terminated for the purposes of CPLR 205(a) when the intermediate appellate court dismissed the appeal, and not when the underlying order appealed from was entered.[21] The Court noted that this interpretation of CPLR 205 is "in keeping with the statute's remedial purpose of allowing plaintiffs to avoid the harsh consequences of the statute of limitations" and having claims determined on the merits.[22] Notably, the Court stated that it was not reaching the unpreserved issue of whether the Second Circuit's dismissal of the plaintiff's appeal constituted a "voluntary discontinuance" or a "neglect to prosecute" within the meaning of the exceptions in CPLR 205(a).[23]

The same CPLR provision was at issue in the *Ross v. Jamaica Hospital Medical Center*, where the Second Department held that the six-month period to commence a new action under CPLR 205(a) runs from the entry of the order itself, and not from a later judgment entered on it.[24]

Finally, in *Benedetti v. Erie County Medical Center Corp.*, the Fourth Department considered whether CPLR 205(a) applied to Public Authorities Law section 3641(1)(c).[25] There, the plaintiff timely commenced an action against the defendant for medical malpractice and wrongful death.[26] As the defendant was a public benefit corporation, the plaintiff was required to serve a notice of claim, which she had failed to do prior to commencement of the action.[27] The defendant's motion to dismiss was granted.[28] The plaintiff re-commenced an action and the defendant moved to dismiss on the ground that the one-year and ninety-day period was a condition precedent to suit that was not subject to the

20. *Id.* at 326, 33 N.E.3d at 1271–72, 12 N.Y.S.3d at 2.

21. *Id.* at 328–29, 33 N.E.3d at 1273, 12 N.Y.S.3d at 4; *see* N.Y. C.P.L.R. 205(a) (McKinney 2015).

22. *Malay*, 25 N.Y.3d at 329, 33 N.E.3d at 1273–74, 12 N.Y.S.3d at 4.

23. *Id.* at 329 n.1, 33 N.E.3d at 1273 n.1, 12 N.Y.S.3d at 4 n.1.

24. 122 A.D.3d 607, 608, 996 N.Y.S.2d 118, 119 (2d Dep't 2014).

25. 129 A.D.3d 1462, 1463, 11 N.Y.S.3d 375, 376 (4th Dep't 2015); N.Y. PUB. AUTH. LAW § 3641(1)(c) (McKinney 2011); N.Y. C.P.L.R. 205(a).

26. *Benedetti*, 129 A.D.3d at 1462, 11 N.Y.S.3d at 375.

27. *Id.* at 1462, 11 N.Y.S.3d at 375–76.

28. *Id.* at 1462, 11 N.Y.S.3d at 376.

six-month extension of time provided for in CPLR 205(a).[29] The trial court denied the motion and the Fourth Department affirmed noting that, unlike the one-year statutory period for commencement of a suit against the Port Authority Trans-Hudson Corporation set forth in McKinney's, which unambiguously permits action only upon the condition that a suit be commenced within one year, Public Authorities Law section 3641(1)(c) does not contain similar express condition language.[30] As such, the Fourth Department held that the one-year and ninety-day period for commencement of an action was not a condition precedent but was, instead, a statute of limitations and, in turn, CPLR 205(a) applied.[31]

2. Statutes of Limitations

Article 2 of the CPLR sets forth statutes of limitations for claims. The time periods range in duration from less than one year through twenty years.[32] Some of the most commonly used time periods are six years under CPLR 213,[33] three years under CPLR 214,[34] and two and one-half years under 214-a.[35]

In *ACE Securities Corp. v. DB Structured Products, Inc.*, the Court of Appeals addressed the statute of limitations in a transaction involving residential mortgage-backed securities.[36] In *ACE*, the Trust—which had been substituted as the plaintiff in place of the certificate holders—sued the defendant for failure to repurchase loans that failed to conform to the defendant's representations and warranties.[37] According to the Court, despite the Trust's assertion to the contrary, the defendant's obligation to "cure or repurchase," and its failure to do so, was not an independently enforceable right giving rise to a separate breach of contract claim.[38] Rather, it was an "alternative remedy, or recourse, for

29. *Id.* at 1463, 11 N.Y.S.3d at 376.

30. *Id.* at 1463, 11 N.Y.S.3d at 376 (citing Yonkers Contracting Corp. v. Port Auth. Tran-Hudson Corp., 93 N.Y.2d 375, 375, 712 N.E.2d 678, 678, 690 N.Y.S.2d 512, 512 (1999)); *see* N.Y. UNCONSOL. § 7107 (McKinney 2000).

31. *Benedetti*, 129 A.D.3d at 1463, 11 N.Y.S.3d at 376 (first citing N.Y. PUB. AUTH. LAW § 3641(1)(c) (McKinney 2011); and then citing N.Y. C.P.L.R. 205(a) (McKinney Supp. 2016)).

32. *See* N.Y. C.P.L.R. 211–218 (McKinney 2003 & Supp. 2016).

33. *Id.* at 213.

34. *Id.* at 214.

35. *Id.* at 214-a.

36. 25 N.Y.3d 581, 589–99, 36 N.E.3d 623, 624, 631, 15 N.Y.S.3d 716, 717, 724 (2015).

37. *Id.* at 589, 36 N.E.3d at 624, 15 N.Y.S.3d at 717.

38. *Id.* at 589, 36 N.E.3d at 625, 15 N.Y.S.3d at 718.

the Trust, but the underlying act the Trust complain[ed] of is the same" (i.e., the quality of the loans).[39] Thus, the Trust's cause of action for breach of representation and warranties accrued at the point of contract execution, which was six years prior to commencement of the action and, therefore, was time barred under CPLR 213(2).[40]

Accrual was also at issue in *Faison v. Lewis*, where the plaintiff, who was administrator of her father's estate, sought to set aside and cancel a bank's mortgage interest in a piece of property because the signature on the corrected deed was forged.[41] According to the Court of Appeals, a forged deed that contains a fraudulent signature is "void ab initio," such that the deed's legal status cannot change no matter how long it takes to uncover the forgery.[42] Therefore, the six-year statute of limitations for claims based on fraud pursuant to CPLR 213(8) did not apply because a claim involving a forged deed is not subject to a statute of limitations defense.[43]

The "continuous representation doctrine"[44] is frequently relied upon by the plaintiffs in an effort to extend the time available to file suit against a defendant. Determining when the attorney-client relationship ends, however, can be a challenge.

In *Grace v. Law*, a law firm withdrew from representing the plaintiff after discovering a conflict.[45] Subsequent to this withdrawal,

39. *Id.* at 596, 36 N.E.3d at 630, 15 N.Y.S.3d at 723.

40. *Id.* at 599, 36 N.E.3d at 631, 15 N.Y.S.3d at 724.

41. 25 N.Y.3d 220, 222–23, 32 N.E.3d 400, 401, 10 N.Y.S.3d 185, 186 (2015) (citing N.Y. C.P.L.R. 213(8) (McKinney Supp. 2016)).

42. *Id.* at 222, 32 N.E.3d at 401, 10 N.Y.S.3d at 186.

43. *Id.* (citing N.Y. C.P.L.R. 213(8)).

44. The continuous representation doctrine, like the continuous treatment rule, its counterpart with respect to medical malpractice claims, "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." The doctrine also appreciates the client's dilemma if required to sue the attorney while the latter's representation on the matter at issue is ongoing: "Neither is a person expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the person. Since it is impossible to envision a situation where commencing a malpractice suit would not affect the professional relationship, the rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed."

Shumsky v. Eisenstein, 96 N.Y.2d 164, 167–68, 750 N.E.2d 67, 70, 726 N.Y.S.2d 365, 368 (2001) (first quoting Greene v. Greene, 56 N.Y.2d 86, 94, 436 N.E.2d 496, 500, 451 N.Y.S.2d 46, 50 (1982); and then quoting Glamm v. Allen, 57 N.Y.2d 87, 94, 439 N.E.2d 390, 393, 453 N.Y.S.2d 674, 677–78 (1982)).

45. 24 N.Y.3d 203, 207, 21 N.E.3d 995, 996, 997 N.Y.S.2d 334, 335 (2014).

another law firm took over representation.[46] The exact date of the transfer was unknown, but an order directing substitution of counsel was signed on December 8, 2008.[47] The plaintiff commenced a legal malpractice action against both firms on December 5, 2011.[48] The law firm that withdrew from the representation moved for summary judgment based on the three-year statute of limitations in CPLR 214(6), claiming that plaintiffs should have known by September 26, 2008 that the firm was no longer representing him and that successor counsel would be taking over.[49] The plaintiff claimed that he did not learn of the substitution of counsel until the district court's order signed December 8, 2008.[50] The Fourth Department denied the defendant's motion and the Court of Appeals affirmed, agreeing that it was "unclear" when the firm's representation of the plaintiff concluded.[51]

The continuous representation doctrine was also at issue in *In re Lawrence*.[52] In *Lawrence*, the defendant law firm represented a client in a matter that settled for over $100 million.[53] A dispute subsequently arose over the amount of the lawyer's contingency fee and several gifts the client made to individual lawyers during the representation.[54] The claims for refund of the gifts were time-barred unless the continuous representation doctrine applied.[55]

According to the Court, "[t]he two prerequisites for continuous representation tolling are a claim of misconduct concerning the manner in which professional services were performed, and the ongoing provision of professional services with respect to the contested matter or transaction."[56] In declining to extend the doctrine to a financial dispute involving a fee or a gift, the Court of Appeals noted that when a client pays a lawyer or gives the lawyer a gift, the lawyer is not performing a professional service on the client's behalf, and disputes over fees or gifts involve no mutual understanding of the need for further

46. *Id.*
47. *Id.*
48. *Id.* at 211, 21 N.E.3d at 999, 997 N.Y.S.2d at 338.
49. *Id.* (citing N.Y. C.P.L.R. 214 (McKinney 2003)).
50. *Grace*, 24 N.Y.3d at 211–12, 21 N.E.3d at 999, 997 N.Y.S.2d at 338.
51. *Id.* at 212, 21 N.E.3d at 999, 997 N.Y.S.2d at 338.
52. 24 N.Y.3d 320, 341, 23 N.E.3d 965, 980, 998 N.Y.S.2d 698, 712 (2014).
53. *Id.* at 327, 23 N.E.3d at 970, 998 N.Y.S.2d at 702–03.
54. *Id.* at 327, 23 N.E.3d at 970, 998 N.Y.S.2d at 703.
55. *Id.* at 341, 23 N.E.3d at 980, 998 N.Y.S.2d at 712.
56. *Id.* (citing Williamson *ex rel.* Lipper Convertibles, L.P. v. PricewaterhouseCoopers L.L.P., 9 N.Y.3d 1, 9, 11, 872 N.E.2d 842, 846, 847, 840 N.Y.S.2d 730, 734, 735 (2007)).

representation.[57] As such, the plaintiff could not pursue the claims to refund the gifts because they were time-barred pursuant to CPLR 213(1).[58]

The statute of limitations in an action for "medical, dental, or podiatric malpractice must be commenced within two years and six months."[59] There are, however, certain exceptions, including the foreign object exception.[60]

In *Walton v. Strong Memorial Hospital*, the Court of Appeals was "present[ed with] yet another variation among a myriad of medical protocols, devices and procedures," when it was asked whether a fragment from a heart catheter placed in plaintiff's heart during surgery is a foreign object for purposes of the discovery rule of CPLR 214-a.[61] After conducting a thorough review, the Court noted that the following principles may be distilled from its cases concerning the foreign object exception:

> (1) Tangible items (clamps, scalpels, sponges, etc.) introduced into a patient's body solely to carry out or facilitate a surgical procedure are foreign objects if left behind; (2) the alleged failure to timely remove a fixation device does not transform it into a foreign object; (3) nor does a fixation device become a foreign object if inserted in the wrong place in the body; (4) failure to timely remove a fixation device is generally akin to misdiagnosis, and improper placement of a fixation device is most readily characterized as negligent medical treatment; and (5) the Legislature, in enacting CPLR 214-a, directed the courts not to exploit the rational supporting *Flanagan* to expand the discovery exception for foreign objects beyond the rare *Flanagan* fact pattern, and explicitly commanded that chemical compounds, fixation devices and prosthetic aids or devices are never to be characterized as foreign objects.[62]

Applying these factors, the Court noted that the catheter inserted into the plaintiff's heart performed no security or supporting role during or after surgery, and because it was not a fixation device, the catheter

57. *In re Lawrence*, 24 N.Y.3d at 343–45, 23 N.E.3d at 981–82, 998 N.Y.S.2d at 713–14 (first quoting Greene v. Greene, 56 N.Y.2d 86, 95, 436 N.E.2d 496, 501, 451 N.Y.S.2d 46, 51 (1982); and then quoting McCoy v. Feinman, 99 N.Y.2d 295, 306, 785 N.E.2d 714, 722, 755 N.Y.S.2d 693, 700 (2002)).

58. *Id.* at 341, 345, 23 N.E.3d at 979–80, 982, 998 N.Y.S.2d at 712, 715.

59. N.Y. C.P.L.R. 214-a (McKinney 2003).

60. *Id.*

61. 25 N.Y.3d 554, 557, 35 N.E.3d 827, 828, 14 N.Y.S.3d 757, 758 (2015) (quoting LaBarbera v. N.Y. Eye & Ear Infirmary, 91 N.Y.2d 207, 212, 691 N.E.2d 617, 620, 668 N.Y.S.2d 546, 549 (1998)).

62. *Id.* at 571, 35 N.E.3d at 838, 14 N.Y.S.3d at 768 (citations omitted).

was not categorically excluded from the foreign object exception in CPLR 214-a.[63] Further, the Court concluded that unlike *Flanagan*, where clamps were inadvertently left behind, the medical personnel in *Walton* did not intend to leave any tubing in the plaintiff's heart.[64] Rather, the catheter was introduced for an instrumental purpose.[65] Thus, the catheters were not analogous to tangible items or other surgical paraphernalia, and therefore they were not excluded.[66] Holding that the fragment from the catheter qualified as a foreign object for purposes of the discovery rule of CPLR 214-a, the Court reversed the appellate division's order which affirmed a judgment of the trial court dismissing the plaintiff's complaint as time-barred.[67]

Finally, in *In re Smith v. Brown*, the Court of Appeals addressed when the four-month statute of limitations period pursuant to CPLR 217(1) for bringing an Article 78 prohibition proceeding begins to run—in the context of where a petitioner asserts a double jeopardy-based challenge to a retrial following a mistrial.[68] In *Smith*, after a mistrial, the People sought to re-prosecute the petitioner and the case was adjourned for more than two years.[69] When the trial date finally arrived, it was postponed because the petitioner commenced an Article 78 prohibition proceeding claiming that the Double Jeopardy Clause barred a retrial.[70] Rejecting the petitioner's argument that the statute of limitations was tolled under a continuing harm theory, the Court held that the four-month statute began to run when the People definitively demonstrated their intent to re-prosecute and lower the court began to calendar the case for eventual trial.[71] As the period to initiate this Article 78 challenge expired, the proceeding was barred by the statute of limitations.[72]

63. *Id.* at 572, 35 N.E.3d at 839, 14 N.Y.S.3d at 769.

64. *Id.* at 573, 35 N.E.3d at 839, 14 N.Y.S.3d at 769 (citing Flanagan v. Mt. Eden Gen. Hosp., 24 N.Y.2d 427, 431, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 27 (1969)).

65. *Id.* at 573, 35 N.E.3d at 840, 14 N.Y.S.3d at 770.

66. *See Walton*, 25 N.Y.3d at 573, 35 N.E.3d at 840, 14 N.Y.S.3d at 770.

67. *See id.* at 573–74, 35 N.E.3d at 840, 14 N.Y.S.3d at 770.

68. 24 N.Y.3d 981, 982–83, 20 N.E.3d 987, 988–89, 996 N.Y.S.2d 207, 208–09 (2014).

69. *Id.* at 983, 20 N.E.3d at 989, 996 N.Y.S.2d at 209.

70. *Id.* at 982, 20 N.E.3d at 988, 996 N.Y.2d at 208.

71. *Id.* at 983, 20 N.E.3d at 989, 996 N.Y.S.2d at 209.

72. *Id.*

B. Article 3: Jurisdiction and Service

1. Personal Jurisdiction by Acts of Non-Domicilaries

CPLR 302 empowers a court to exercise personal jurisdiction over any non-domiciliary under certain circumstances including where he or she transacted business, contracts to supply goods or services in the state, or commits a tortious act without the state, causing injury to a person or property within the state.[73] Whether a domiciliary is transacting business within the meaning of CPLR 302(a)(1) is a fact-based determination, requiring a finding that the activities were purposeful and established a "substantial relationship between the transaction and the claim asserted."[74]

In *Paterno v. Laser Spine Institute*, the plaintiff clicked on an Internet advertisement for the defendant—a facility specializing in spinal surgery with its principal place of business in Florida.[75] Thereafter, the plaintiff communicated with the defendant by telephone and Internet to inquire about possible surgical procedures to alleviate his back pain.[76] After numerous telephone and electronic communications, the plaintiff ultimately traveled from New York to Florida for evaluation and surgery.[77] He underwent three surgeries, but continued to experience severe pain requiring a fourth procedure in New York.[78] The plaintiff subsequently commenced a medical malpractice action in New York against the defendant facility and several surgeons who operated on him, relying upon long-arm jurisdiction under CPLR 302(a)(1) and (3).[79] The defendants moved to dismiss for lack of personal jurisdiction.[80]

In unanimously affirming the dismissal, the Court rejected the plaintiff's argument that long-arm jurisdiction existed under CPLR 302(a)(1), noting that although "[t]he lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York," the totality of defendants' contacts

73. *See* N.Y. C.P.L.R. 302(a)(1), (3) (McKinney 2010).

74. Paterno v. Laser Spine Inst., 24 N.Y.3d 370, 376, 23 N.E.3d 988, 992, 998 N.Y.S.2d 720, 724 (2014) (quoting Fischbarg v. Doucet, 9 N.Y.3d 375, 380, 880 N.E.2d 22, 26, 849 N.Y.S.2d 501, 505 (2007)) (citing Deutsche Bank Sec., Inc. v. Mont. Bd. of Invs., 7 N.Y.3d 65, 71, 850 N.E.2d 1140, 1142, 818 N.Y.S.2d 164, 166–67 (2006), *cert. denied*, 549 U.S. 1095 (2006)).

75. *Id.* at 372, 23 N.E.3d at 990, 998 N.Y.S.2d at 722.

76. *Id.* at 373, 23 N.E.3d at 990, 998 N.Y.S.2d at 722.

77. *Id.* at 373–74, 23 N.E.3d at 990–91, 998 N.Y.S.2d at 722–23.

78. *See id.* at 373–75, 23 N.E.3d at 990–92, 998 N.Y.S.2d at 722–24.

79. *Paterno*, 24 N.Y.3d at 375, 23 N.E.3d at 992, 998 N.Y.S.2d at 724.

80. *Id.*

with New York were insufficient.[81] According to the Court, passive websites which present information without permitting a business transaction are generally insufficient to establish personal jurisdiction.[82] Further, the "quality" of the defendants' contacts with the plaintiff were "responsive in nature, and not the type of interactions that demonstrate the purposeful availment necessary to confer personal jurisdiction . . . ."[83] Rejecting the plaintiff's alternative argument under CPLR 302(a)(3), the Court held that "the situs of the injury in medical malpractice cases is the location of the original event which caused the injury, and not where a party experiences the consequences of such injury."[84]

However, in *C. Mahendra (N.Y.), L.L.C. v. National Gold & Diamond Center, Inc*., the First Department held that the parties' telephone dealings were sufficient to confer personal jurisdiction over the defendant pursuant to CPLR 302(a)(1).[85] Recognizing that "courts of this state have generally held telephone communications to be insufficient for finding purposeful activity conferring personal jurisdiction," the court noted that there are exceptions where telephone communications may be sufficient.[86] According to the court, the telephone dealings were frequent and took place over the course of several years and were not a single consumer transaction.[87] Also, during the conversations the parties negotiated the essential terms required for contract formation.[88] Therefore, the quality of the defendant's conduct was sufficient to subject it to long-arm jurisdiction.[89]

2. Attorneys

CPLR 321(c) deals with the death, removal, or disability of an attorney, and provides that "[i]f an attorney dies . . . at any time before judgment, no further proceeding shall be taken . . . without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party . . . ."[90]

81. *Id.* at 376, 23 N.E.3d at 993, 998 N.Y.S.2d at 725.

82. *Id.* at 377, 23 N.E.3d at 994, 998 N.Y.S.2d at 726.

83. *Id.* at 378, 23 N.E.3d at 994, 998 N.Y.S.2d at 726.

84. *Paterno*, 24 N.Y.3d at 381, 23 N.E.3d at 996, 998 N.Y.S.2d at 728 (citing Hermann v. Sharon Hosp., Inc., 135 A.D.2d 682, 683, 522 N.Y.S.2d 581, 583 (2d Dep't 1987)).

85. 125 A.D.3d 454, 458, 3 N.Y.S.3d 27, 31 (1st Dep't 2015).

86. *Id.* at 457, 3 N.Y.S.3d at 30.

87. *Id.* at 458, 3 N.Y.S.3d at 31.

88. *Id.* at 456, 3 N.Y.S.3d at 30.

89. *Id.* at 458, 3 N.Y.S.3d at 31.

90. N.Y. C.P.L.R. 321(c) (McKinney 2015).

In *Fan v. Sabin*, the defendant moved for summary judgment.[91] The plaintiff's attorney "cross-moved to be relieved as counsel and for an order staying the action for thirty days so that [the plaintiff] could retain new counsel."[92] "When the parties appeared for oral argument," the court converted the motion for summary judgment to one under CPLR 3211(a)(1), denied plaintiff's counsel's request to make an argument in opposition, granted the cross-motion to withdraw, and then dismissed the action.[93]

Upon review, the First Department reversed, holding that

> when the court granted plaintiff's counsel's motion for leave to withdraw, further proceedings against the plaintiff were stayed by operation of CPLR 321(c), until thirty days after notice to appoint another attorney had been served. While the stay was in effect, the court had no power to decide defendant's motion for summary judgment . . . *sua sponte* convert it to a CPLR 3211(a)(1) motion, and then prevent[] plaintiff's counsel from making [any] opposition.[94]

Further, although the court recognized

> that . . . CPLR 321(c) provides that an action may continue with leave of court, the statutory provision was designed to allow [the continuance] . . . 'where the stay of proceedings would produce undue hardship to the opposing party, as where the time to take an appeal or other action would run or where a provisional remedy is sought and speed is essential.'[95]

According to the First Department, none of those circumstances were present.[96]

91. 125 A.D.3d 498, 499, 4 N.Y.S.3d 164, 166 (1st Dep't 2015).

92. *Id.* at 499, 4 N.Y.S.3d at 166.

93. *Id.*

94. *Id.* at 499–500, 4 N.Y.S.3d at 166–67 (first citing N.Y. C.P.L.R. 321(c); then citing Leonard Johnson & Sons Enters. v. Brighton Commons P'ship, 171 A.D.2d 1059, 1060, 569 N.Y.S.2d 40, 42 (4th Dep't 1991); and then citing Blondell v. Malone, 91 A.D.2d 1201, 1202, 459 N.Y.S.2d 193, 194 (4th Dep't 1983)).

95. *Id.* (quoting Moray v. Moven & Krause, Esqs., 15 N.Y.3d 385, 390, 938 N.E.2d 980, 983, 912 N.Y.S.2d 547, 550 (2010)).

96. *Fan*, 125 A.D.3d at 500, 4 N.Y.S.3d at 167.

C. Article 5: Venue

Article 5 of the CPLR governs where a lawsuit should be commenced.[97]

1. Contractual Provisions Fixing Venue

CPLR 501 provides "[s]ubject to the provisions of subdivision two of section 510, written agreement [sic] fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial."[98]

In *Bhonlay v. Raquette Lake Camps, Inc.*, the Second Department affirmed the trial court's decision to grant the defendants' motion to change venue pursuant to CPLR 501 and denied the plaintiffs' cross motion to retain venue.[99] According to the court, the plaintiff failed to demonstrate "that enforcement of the venue clause would be unjust, . . . [in contravention of] public policy, or that it was rendered invalid by fraud or overreaching."[100] The court also noted that, although "there [was] evidence that it would be inconvenient for plaintiff and his witnesses to travel . . . for trial, 'it cannot be said that the selected forum would be so gravely difficult that [plaintiff] would, for all practical purposes, be deprived of [his] day in court.'"[101]

2. Grounds for Venue Change

Whether by accident or design, parties often file suit in the wrong forum. Pursuant to CPLR 510, a party may ask a court to change the place of trial where the place designated for trial is not proper, where "an impartial trial cannot be had" in the county selected, or where "the convenience of material witnesses and ends of justice will be promoted by the change."[102]

A motion to change venue was made by the plaintiff in *Xhika v. Rocky Point Union Free School District*.[103] Specifically, the plaintiff commenced the action against the defendant in Suffolk County as required by CPLR 504(2), which provides that the place of trial for all

97. *See* N.Y. C.P.L.R. 501–513 (McKinney 2006).

98. *Id.* at 501.

99. 120 A.D.3d 1015, 1015–16, 991 N.Y.S.2d 765, 766 (1st Dep't 2014).

100. *Id.* at 1016, 991 N.Y.S.2d at 766 (citing Molino v. Sagamore, 105 A.D.3d 922, 923, 963 N.Y.S.2d 355, 357 (2d Dep't 2013)).

101. *Id.* (quoting LSPA Enter., Inc. v. Jani-King of N.Y., Inc., 31 A.D.3d 394, 395, 817 N.Y.S.2d 657, 658 (2d Dep't 2006)) (citing Horton v. Concerns of Police Survivors, Inc., 62 A.D.3d 836, 836, 878 N.Y.S.2d 793, 794 (2d Dep't 2009)).

102. N.Y. C.P.L.R. 510.

103. 125 A.D.3d 646, 647, 2 N.Y.S.3d 601, 602 (2d Dep't 2015).

actions against school districts "*shall* be . . . in the county [where the] . . . school district is [located]."[104] However, as noted by the Second Department, "despite the seemingly unforgiving language of [CPLR 504], venue may be changed to a non-mandated county upon a showing of special circumstances."[105]

Reversing the trial court's denial of the plaintiff's motion, the Second Department found that the plaintiff had "established that the convenience of the material witnesses and the ends of justice outweighed the asserted governmental inconvenience" by producing "affirmations from his treating physicians, both of whom maintained a surgical practice in Kings County, and an affidavit from an eyewitness to the accident, who lived in Kings County."[106] The court also found that the defendant failed to assert that "any of its employees witnessed the accident," and failed to "establish that any of its trial witnesses would be inconvenienced by traveling" to a different county.[107] Therefore, according to the Second Department, the plaintiff's motion should have been granted.[108]

Dealing with the same issue in *Fitzsimons v. Brennan*, the Second Department held that the trial court properly denied the defendants' motion pursuant to CPLR 510(3) to change venue.[109] In *Fitzsimons*, the court noted that a party seeking to change a venue pursuant to CPLR 510(3)

> must set forth: (1) the names, addresses, and occupations of material witnesses, (2) the facts to which those witnesses will testify at trial, (3) a showing that those witnesses are willing to testify, and (4) a showing that those witnesses will be inconvenienced if the venue of the action is not changed. Although . . . the defendants provided the names of certain college students who were allegedly present at the subject house on the night preceding to the fire, [they] failed to offer sufficient

104. *Id.* (emphasis added) (quoting N.Y. C.P.L.R. 504(2) (McKinney 2006)) (first citing Wagner v. Pelham Union Free Sch. Dist., 108 A.D.3d 84, 88, 966 N.Y.S.2d 126, 129, (3d Dep't 2013); and then citing Grumet v. Pataki, 244 A.D.2d 31, 35, 675 N.Y.S. 662, 665 (3d Dep't 1998)), *aff'd*, 93 N.Y.2d 677, 720 N.E.2d 66, 697 N.Y.S.2d 856 (1999).

105. *Id.* at 647, 2 N.Y.S.3d at 602 (first citing *Wagner*, 108 A.D.3d at 88, 966 N.Y.S.2d at 129; and then citing Hatzipetros v. Cty. of Chemung, 56 A.D.3d 1039, 1039–40, 868 N.Y.S.2d 793, 794 (3d Dep't 2008)).

106. *Id.* (first citing Weissmandl v. Murray Walter, Inc., 147 A.D.2d 474, 475, 537 N.Y.S.2d 574, 575 (2d Dep't 1989); then citing Messinger v. Festa, 94 A.D.2d 792, 793, 463 N.Y.S.2d 235, 236 (2d Dep't 1983); and then citing *Hatzipetros*, 56 A.D.3d at 1040, 868 N.Y.S.2d at 794).

107. *Id.* (citing Cornelius v. Bd. of Educ. of Delhi Cent. Sch. Dist., 77 A.D.3d 1048, 1050, 911 N.Y.S.2d 481, 483 (3d Dep't 2010)).

108. *Xhika*, 125 A.D.3d at 647–48, 2 N.Y.S.3d at 602.

109. 128 A.D.3d 634, 636, 9 N.Y.S.3d 318, 320 (2d Dep't 2015).

> proof of [their addresses], the facts upon which [they] would testify, whether [they were] willing to testify, and that [they] would be inconvenienced if not changed. [They] also provided names of fire, police officers, and first responders, but failed to provide their current addresses, or basic details of their testimony.[110]

D. Article 9: Class Actions

1. Prerequisites to a Class Action

Pursuant to CPLR 901(a) there are certain factors for class certification.[111] The prerequisites are:

> (1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
>
> (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (4) the representative parties will fairly and adequately protect the interest of the class; and
>
> (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[112]

A class action to recover a statutory penalty is expressly barred unless the statute imposing the penalty specifically directs otherwise.[113] Specifically, CPLR 901(b) states as follows: "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."[114]

In *Borden v. 400 East 55th Street Associates, L.P.*, the Court of Appeals dealt with both CPLR 901(a) and (b), holding that the appellate division did not abuse its discretion in affirming the trial court's

110. *Id.* at 635–36, 9 N.Y.S.3d at 320 (first citing Goldberg v. Goldberg, 65 A.D.3d 1282, 1283, 885 N.Y.S.2d 617, 618 (2d Dep't 2009); then citing Walsh v. Mystic Tank Lines Corp., 51 A.D.3d 908, 908, 859 N.Y.S.2d 233, 234 (2d Dep't 2008); then citing Shindler v. Warf, 24 A.D.3d 429, 430, 805 N.Y.S.2d 428, 429 (2d Dep't 2005); then citing Giaimo v. Hastings, 19 A.D.3d 365, 366, 795 N.Y.S.2d 909, 909 (2d Dep't 2009); and then citing O'Brien v. Vassar Bros. Hosp., 207 A.D.2d 169, 171–73, 622 N.Y.S.2d 284, 285–87 (2d Dep't 1995)).

111. N.Y. C.P.L.R. 901(a) (McKinney 2006).

112. *See id.* at 901(b) (McKinney 2006).

113. *Id.*

114. *Id.*

determination that the putative classes met the prerequisites for class certification under CPLR 901(a), and that CPLR 901(b) does not prohibit a class action seeking recovery of actual damages, even though the statute imposes a penalty.[115] Specifically, the plaintiffs sought to recover compensatory rent overcharges against landlords who decontrolled their apartments in contravention of Rent Stabilization Law of 1969 section 26-156(a), while accepting tax benefits under New York City's J-51 tax abatement program.[116]

As to CPLR 901(a), the Court reviewed the standards for class certification, as outlined above, and concluded that the class size was well above the threshold contemplated by the legislature, that the predominant question applicable to the entire class was whether the apartments were unlawfully deregulated, and that there were no substantiated conflicts between the tenants, competent attorneys, and a representative with an "adequate understanding of the case."[117] As to CPLR 901(b), the Court noted that while it prohibits any claim for penalties to be brought as a class action, under the language of the statute and its legislative history, "it is not dispositive that a statute imposes a penalty so long as the [class] action brought pursuant to that statute does not seek to recover the penalty."[118] Therefore, despite the fact that the Rent Stabilization Law imposes treble damages on the finding of a willful violation of its provisions, the treble damages are not mandatory but only applied where a defendant fails to disprove willfulness by a preponderance of the evidence; and, further, recovery of the base amount of rent overcharge is actual, compensatory damages, not a penalty.[119] As such, the plaintiffs, who unilaterally waived their claims for treble damages and sought only damages for rent overcharges, were entitled to bring their claims as a class action.[120] Succinctly stated, "[w]here a statute imposes a nonmandatory penalty, plaintiffs may waive the penalty in order to bring the claim as a class action."[121]

115. 24 N.Y.3d 382, 389–90, 23 N.E.3d 997, 999, 998 N.Y.S.2d 729, 731 (2014).

116. *Id.* at 390, 23 N.E.3d at 999, 998 N.Y.S.2d at 731.

117. *Id.* at 399–400, 23 N.E.3d at 1006, 998 N.Y.S.2d at 738 (quoting Borden v. 400 E. 55th Street Assocs., L.P., 105 A.D.3d 630, 631, 964 N.Y.S.2d 115, 117 (1st Dep't 2013)).

118. *Id.* at 393, 23 N.E.3d at 1001, N.Y.S.2d at 733.

119. *See id.* at 395–97, 23 N.E.3d at 1002–05, 998 N.Y.S.2d at 734–36.

120. *Borden*, 24 N.Y.3d at 392–98, 23 N.E.3d at 1000–05, 998 N.Y.S.2d at 732–37.

121. *Id.* at 394, 23 N.E.3d at 1002, 998 N.Y.S.2d at 734.

E. Article 10: Parties Generally

1. Substitution upon Death

When a party dies, CPLR 1015 empowers a court to order substitution of the proper parties.[122]

Whether the trial court was free to act prior to formal substitution of the estate as a party plaintiff was at issue in *Kilmer v. Moseman*.[123] During litigation, the defendant moved for various forms of relief, including summary judgment.[124] The next month, the decedent passed away.[125] "Without notifying the supreme court [of the death] or seeking [substitution of] decedent's estate as a party, the plaintiffs submitted opposition to the motion" and cross-moved for other relief.[126] The court "denied [the defendant's] motion and granted [the] plaintiffs' cross-motion."[127] Thereafter, the plaintiffs moved to substitute the executors of the decedent's estate as party plaintiffs.[128]

On appeal, the defendants argued that the trial court should not have ruled on the motions because the decedent had died and his estate had not been made a party.[129] Noting that "[o]rdinarily the death of a party results in a stay of the proceedings and, absent substitution of a proper legal representative, [the order] would be void," because the personal representative was the appropriate party to substitute, and all of the plaintiffs were motivated to protect decedent's interests, the Second Department held that the supreme court was free to act prior to formal substitution of the estate as a party plaintiff.[130]

122. N.Y. C.P.L.R. 1015(a) (McKinney 2012).

123. 124 A.D.3d 1195, 1197, 3 N.Y.S.3d 147, 149 (3d Dep't 2015).

124. *Id.* at 1196, 3 N.Y.S.3d at 148.

125. *Id.*

126. *Id.* at 1196–97, 3 N.Y.S.3d at 148–49.

127. *Id.* at 1197, 3 N.Y.S.3d at 149.

128. *Kilmer*, 124 A.D.3d at 1197, 3 N.Y.S.3d at 149.

129. *Id.*

130. *Id.* at 1197–98, 3 N.Y.S.3d at 149 (quoting Giaquinto v. Comm'r of the N.Y. State Dep't of Health, 91 A.D.3d 1224, 1225 n.1, 939 N.Y.S.2d 578, 580 n.1 (3d Dep't 2012)) (first citing McDonough v. Bonnie Heights Realty Corp., 249 A.D.2d 520, 521, 672 N.Y.S.2d 378 (2d Dep't 1998); then citing Wisdom v. Wisdom, 111 A.D.2d 13, 14–15, 488 N.Y.S.2d 682 (1st Dep't 1985); and then citing Nieves v. 331 E. 109th St. Corp., 112 A.D.2d 59, 60, 491 N.Y.S.2d 350, 351 (1st Dep't 1985)).

F. Article 20: Mistakes and Defects

1. Discretion

CPLR 2001 empowers a court to "permit" correction of a "mistake, omission, defect, or irregularity" made at any stage of an action, provided "a substantial right of a party is not prejudiced."[131]

Whether CPLR 2001 could save a plaintiff who obtained an index number but failed to file initiatory papers was at issue in *O'Brien v. Contreras*.[132] In *O'Brien*, the plaintiff obtained an index number, but did not file or serve a summons or complaint.[133] According to the Second Department, although CPLR 2001 gives the court "broad discretion to correct or disregard mistakes, omissions, defects, or irregularities at any stage of the action, including mistakes in the filing process," New York courts "have made it clear that the complete failure to file the initial papers necessary to institute an action is not the type of error that falls within the court's discretion to correct under CPLR 2001."[134] Instead, the omission was beyond the reach of CPLR 2001 and "[t]he failure to file the initial papers necessary to institute an action constitute[d] a nonwaiveable, jurisdictional defect, rendering the action a nullity."[135]

Similarly, whether CPLR 2001 could cure a defective notice in a CPLR 3213 motion was at issue before the Second Department in *Segway of N.Y., Inc. v. Udit Group, Inc*.[136] The plaintiff in *Segway* commenced an action pursuant to CPLR 3213 to recover on a promissory note and two personal guaranties.[137] "The defendants failed to appear on the return date or otherwise oppose the motion . . . , and it was granted upon defendants' default," resulting in entry of a judgment in favor of the plaintiff for the sum of $204,292.96.[138] Thereafter, "the

131. *See* N.Y. C.P.L.R. 2001 (McKinney 2012).

132. 126 A.D.3d 958, 958, 6 N.Y.S.3d 273, 273–74 (2d Dep't 2015).

133. *See id.* at 958, 6 N.Y.S.3d at 273–74.

134. *Id.* at 958–59, 6 N.Y.S.3d at 274 (first citing Goldenberg v. Westchester Cty. Healthcare Corp., 16 N.Y.3d 323, 328, 946 N.E.2d 717, 719–20, 921 N.Y.S.2d 619, 621 (2011); then citing Grskovic v. Holmes, 111 A.D.3d 234, 240, 972 N.Y.S.2d 650, 654, (2d Dep't 2011); and then citing Miller v. Waters, 51 A.D.3d 113, 117–18, 853 N.Y.S.2d 183, 186 (3d Dep't 2008)).

135. *Id.* at 958, 6 N.Y.S.3d at 273 (first citing *Miller*, 51 A.D.3d at 116, 853 N.Y.S.2d at 185; then citing Graquinto v. Long Island Rubbish Removal E. Corp., 32 Misc.3d 262, 263, 921 N.Y.S.2d 520, 521 (Sup. Ct. Suffolk Cty. 2011); and then citing Peterkin v. Mary Houses, 87 A.D.3d 649, 650, 828 N.Y.S.2d 474, 474 (2d Dep't 2011)).

136. 120 A.D.3d 789, 789, 992 N.Y.S.2d 524, 524 (2d Dep't 2014).

137. *Id.*

138. *Id.* at 790, 992 N.Y.S.2d at 526.

defendants moved to vacate the judgment," maintaining that "various defects in the summons and notice of motion deprived the court of personal jurisdiction over the defendants."[139] The trial court rejected the defendants' contention and denied their motion.[140]

While "the record supported the trial court's determination to credit the process server's testimony that he served copies of the summons and notice of motion upon the defendants in a manner consistent with his affidavits," the appellate division held that the trial court "erred in applying CPLR 2001 to disregard the facial defects in the summons and notice of motion."[141] Specifically, the appellate division found that the notice of motion did not provide timely notice of the motion, and the served copies "contained an affirmative misstatement of the address where the motion could be defended."[142] According to the court, CPLR 2001 "may be used to cure only a technical infirmity" and "[w]here a defect creates a greater possibility of frustrating the core principles of notice to the defendant, the defect must be regarded as substantial and courts may not disregard it under CPLR 2001."[143]

G. Article 21: Papers

1. Form of Papers

CPLR 2101(d) provides that "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving of filing the paper, or if the party does not appear by attorney, with the name, address and telephone number of the party."[144]

At issue in *Schoenefeld v. New York* was the minimum requirements necessary to satisfy the statutory directive that nonresident attorneys maintain an office within the state "for the transaction of law business" under Judiciary Law section 470.[145] By way of background, the statute, codified at section 470 of the Judiciary Law, provides that

139. *Id.*

140. *Id.*

141. *Segway*, 120 A.D.3d at 790–91, 992 N.Y.S.2d at 527.

142. *Id.* at 791, 992 N.Y.S.2d at 527 (citing N.Y. C.P.L.R. 2214 (McKinney 2010 & Supp. 2016)).

143. *Id.* at 791, 992 N.Y.S.2d at 527 (quoting Ruffin v. Lion Corp., 15 N.Y.3d 578, 582, 940 N.E.2d 909, 911, 915 N.Y.S.2d 204, 206 (2010)) (citing Brown v. New York, 114 A.D.3d 632, 633, 979 N.Y.S.2d 676, 677 (2d Dep't 2014)).

144. N.Y. C.P.L.R. 2101 (McKinney 2012).

145. 25 N.Y.3d 22, 25, 29 N.E.3d 230, 231, 6 N.Y.S.3d 221, 222 (2015) (quoting N.Y. JUD. LAW § 470 (McKinney 2005)).

"[a] person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state."[146]

In *Schoenefeld*, an attorney residing in New Jersey commenced an action in federal district court, challenging the requirement under Judiciary Law section 470 that attorneys maintain an office for the transaction of law business in the state as being unconstitutional on its face as applied to nonresident attorneys.[147] The federal district court declared it unconstitutional and on appeal to the Second Circuit, the court determined that the constitutionality was dependent upon the interpretation of the "law office" requirement, certifying the question to the Court of Appeals.[148]

According to the Court of Appeals, by the plain terms of Judiciary Law section 470, a nonresident attorney is required to maintain a physical office in New York.[149] "[R]ecognizing that there may be a constitutional flaw if the statute is interpreted as written," the Court rejected the defendants' suggestion to interpret the rule less narrowly and require only a mailing address or an in-state agent.[150] The Court of Appeals found that such an interpretation had "no support in the wording of the provisions and would require [it] to take the impermissible step of rewriting the statute."[151] Instead, the Court concluded that the phrase "for the transaction of law business," made it "less plausible" that anything but a real office was required, and as such, held that the law requires nonresident attorneys to keep a physical office in the state as a prerequisite to practice.[152]

2. Affirmation of Truth of Statement

CPLR 2106(a) enables "an attorney admitted to practice in the courts of the state, and "a physician, osteopath or dentist[] authorized by law to practice in the state," to execute an affirmation in lieu of an

146. N.Y. JUD. LAW § 470.

147. *See Schoenefeld*, 25 N.Y.3d at 25–26, 29 N.E.3d at 231–32, 6 N.Y.S.3d at 222–23.

148. *Id.* at 26, 29 N.E.3d at 232, 6 N.Y.S.3d at 223 (first citing Schoenefeld v. New York, 907 F. Supp. 2d 252, 266 (N.D.N.Y. 2011); and then citing Schoenefeld v. New York, 748 F.3d 464, 467 (2d Cir. 2014)).

149. *Id.* at 27, 29 N.E.3d at 232, 6 N.Y.S.3d at 223.

150. *Id.* at 27–28, 29 N.E.3d at 233, 6 N.Y.S.3d at 224.

151. *Id.* at 28, 29 N.E.3d at 233, 6 N.Y.S.3d at 224.

152. *Schoenefeld*, 25 N.Y.3d at 28, 29 N.E.3d at 233, 6 N.Y.S.3d at 224 (citing Wood v. Irving, 85 N.Y.2d 238, 245, 647 N.E. 1332, 1336, 623 N.Y.S.2d 824, 828 (1995)).

affidavit.[153]

Whether the affirmation of a doctor, who was not authorized to practice medicine in New York, constitutes competent evidence, was at issue in *Tomeo v. Beccia*.[154] Answering the question in the negative, the Second Department held that "[t]he plaintiff failed to raise a triable issue of fact in opposition to [the defendant's] prima facie" entitlement to summary judgment where the plaintiff's expert's affirmation "did not constitute competent evidence, because [he] was not authorized by law to practice medicine in New York."[155] As such, the defendant was entitled to summary judgment and dismissal of the complaint.[156]

H. Article 23: Subpoenas, Oaths, and Affirmations

1. Oaths and Affirmations

CPLR 2309 governs oaths and affirmations, including who may administer the oath and how the oath should be administered.[157]

Noting the "significant upswing in the number of appeals where the parties are contesting the admissibility of affidavits executed out of state without CPLR 2309(c) certificates of conformity," the Second Department "clarif[ied] the law relating to conformity of out-of-state affidavits" in *Midfirst Bank v. Agho*.[158] *Midfirst* involved a mortgage foreclosure action in which plaintiff moved for summary judgment with an out-of-state affidavit of plaintiff's mortgagee's senior foreclosure litigation specialist.[159] The defendants did not submit any opposition.[160] The trial court denied the plaintiff's unopposed motion in a handwritten, three-sentence decision, holding that "the affidavit relied upon had an out of state notary, w/o a certificate of conformity."[161] As the affidavit was necessary for the plaintiff's success on their motion for summary judgment, the primary issue on appeal was "whether [the plaintiff's] out-of-state affidavit was sworn to and conformed in a manner

153. N.Y. C.P.L.R. 2106(a) (McKinney 2012).

154. 127 A.D.3d 1071, 1073, 7 N.Y.S.3d 472, 475 (2d Dep't 2015).

155. *Id.* (first citing N.Y. C.P.L.R. 2106 (McKinney 2012); then citing Kelly v. Fenton, 116 A.D.3d 923, 924, 984 N.Y.S.2d 131, 132 (2d Dep't 2014); then citing Lieber v. City of New York, 94 A.D.3d 715, 716, 941 N.Y.S.2d 249, 250 (2d Dep't 2012); Palov v. Latt, 270 A.D.2d 323, 323, 704 N.Y.S.2d 143, 144 (2d Dep't 2000)).

156. *Id.* at 1074, 7 N.Y.S.3d 475.

157. N.Y. C.P.L.R. 2309 (McKinney 2010).

158. 121 A.D.3d 344–45, 991 N.Y.S.2d 623, 625 (2d Dep't 2014).

159. *Id.* at 345–46, 991 N.Y.S.2d at 625–26.

160. *See id*. at 347, 991 N.Y.S.2d at 626.

161. *Id*. at 347, 991 N.Y.S.2d at 626.

rendering it admissible . . . under CPLR 2309(c)."[162]

According to the Second Department, "[t]he obvious purpose of CPLR 2309(c) is to assure that sworn documents executed outside of New York, perhaps under different standards or procedures, are executed in a manner that meets New York's reliability standards."[163] The "certificate of conformity" required by CPLR 2309(c) "speaks to the manner in which a foreign oath is taken," and "a certificate of authentication" concerns the "vested power of the individual to administer the oath."[164] As noted by the court, "Real Property Law section 299 identifies certain officers who may, for the conveyance of real property situated in New York, acknowledge conveyance outside of New York," which includes "notary publics in a foreign state."[165] The Second Department also noted that pursuant to Real Property Law section 311(5), a certificate of authentication is not required when "acknowledged or proved before any officer designated in section 299."[166]

Further, "[a] combined reading of CPLR 2309(c) and Real Property Law §§ 299 and 311(5) leads to the inescapable conclusion that where, as here, a document is acknowledged by a foreign state notary, a separate 'certificate of authentication' is not required to attest to the notary's authority to administer oaths."[167] Still, even when an oath or affirmation is taken by a foreign notary, pursuant to CPLR 2309(c),

> there must still be a "certificate of conformity" to assure that the oath was administered in a manner consistent with either the laws of New York or of the foreign state. In other words [it] is required whenever an oath is acknowledged in writing outside of New York by a non-New York notary, and the document is proffered for use in New York litigation.[168]

In consideration of the above principles, the Second Department held that the trial court erred in concluding that the affidavit submitted in

162. *Id*. at 348, 991 N.Y.S.2d at 627.

163. *Midfirst*, 121 A.D.3d at 348, 991 N.Y.S.2d at 627–28.

164. *Id.* at 349, 991 N.Y.S.2d at 628 (first citing Ford Motor Credit Corp. v. Prestige Gown Cleaning Serv., 193 Misc.2d 262, 264, 748 N.Y.S.2d 235, 236, (N.Y.C. Civ. Ct. Queens Cty. 2002); and then citing Firstcom Broad. Servs. v. N.Y. Sound, 184 Misc.2d 524, 525, 709 N.Y.S.2d 329, 329 (N.Y.C. Civ. Ct. N.Y. Cty. 2000)).

165. *Id*. (citing N.Y. REAL PROP. LAW § 299 (McKinney 2006)).

166. *Id*. (quoting N.Y. REAL PROP. LAW § 311(5) (McKinney 2006)).

167. *Id*. (first citing *Ford Motor*, 193 Misc.2d at 263, 748 N.Y.S.2d at 236; and then citing *Firstcom*, 184 Misc.2d at 525, 709 N.Y.S.2d at 329–30).

168. *Midfirst*, 121 A.D.3d at 350, 991 N.Y.S.2d at 629.

support of the plaintiff's motion to summary judgment was not accompanied by a certificate of conformity because the "Uniform, All Purpose Certificate of Acknowledgement," was just that.[169] And, further, because the signature "was acknowledged by a notary licensed in Oklahoma," the court held that "no separate certificate of authentication was required."[170]

Therefore, because the plaintiff's expert established its entitlement to summary judgment, the Second Department reversed the trial court's decision and granted the plaintiff's motion.[171] Additionally, it should be noted that the Second Department stated in dicta that "even if [the plaintiff's] affidavit was not accompanied by a certificate of conformity, the Appellate Division, Second Department, has typically held, since 1950, that the absence of a certificate of conformity is not, in and of itself, a fatal defect."[172]

Shortly thereafter, in *Hunter Sports Shooting Grounds, Inc. v. Foley*, the Second Department revisited the same issue.[173] There, the trial court denied the defendant's motion for summary judgment because, among other reasons, its expert affidavit was notarized in "New Jersey [and] lacked the requisite certificate of conformity."[174] Rather than "correcting the defects . . . and moving to renew . . . , the defendant made a second motion for summary judgment, and submitted the same documents" it had submitted in support of the first.[175]

According to the Second Department, although the defendant's failure to submit the requisite certificate of conformity "was not a fatal defect that would warrant the outright denial of its motion for summary judgment . . . the Supreme Court properly afforded [the defendant] an opportunity to correct the defect, and yet [the defendant] failed to do so."[176] As such, the court affirmed the trial court's denial of the

169. *Id.* at 351, 991 N.Y.S.2d at 629.

170. *Id*. (citing N.Y. REAL PROP. §§ 299, 311(5)).

171. *Id*. at 352, 991 N.Y.S.2d at 630.

172. *Id.* at 351, 991 N.Y.S.2d at 629–30 (first citing Mack-Cali Realty, L.P. v. Everfoam Insulation Sys., Inc., 110 A.D.3d 680, 680, 972 N.Y.S.2d 310, 312 (2d Dep't 2013); then citing Beyn v. Neuman, 100 A.D.3d 581, 582, 953 N.Y.S.2d 266, 268 (2d Dep't 2012); then citing Fredette v. Town of Southampton, 95 A.D.3d 940, 942, 944 N.Y.S.2d 206, 208 (2d Dep't 2012); then citing Falah v. Stop & Shop Cos., 41 A.D.3d 638, 639, 838 N.Y.S.2d 639, 641 (2d Dep't 2007); then citing Smith v. Allstate Ins. Co., 38 A.D.3d 522, 523, 832 N.Y.S.2d 587, 589 (2d Dep't 2007); and then citing Raynor v. Raynor, 279 A.D. 671, 671, 108 N.Y.S.2d 20, 21 (2d Dep't 1951)).

173. 120 A.D.3d 759, 760, 992 N.Y.S.2d 285, 287 (2d Dep't 2014).

174. *Id*. at 760, 992 N.Y.S.2d at 287.

175. *Id*. at 761, 992 N.Y.S.2d at 287.

176. *Id.* (first citing *Midfirst*, 121 A.D.3d at 352, 991 N.Y.S.2d at 630; and then citing Rosenblatt v. Saint George Health & Racquetball Assocs., L.L.C., 119 A.D.3d 45, 55, 984

defendant's second motion.[177]

I. Article 30: Remedies and Pleading

1. Particularity and Form of Statements

CPLR 3013 requires "statements in a pleading" to be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."[178]

CPLR 3014 addresses the form of the pleadings, and, among other requirements, requires each "pleading [to] consist of plain and concise statements in consecutively numbered paragraphs . . . contain[ing,] as far as practicable, a single allegation" or defense.[179]

The particularity of statements required in a pleading was addressed by the First Department in *Scholastic Inc. v. Pace Plumbing Corp.*[180] Specifically, at issue before the court was whether the defendant properly pleaded an affirmative defense based on the statute of limitations where the defense was not separately stated and numbered but rather was "concealed within a boilerplate, catchall paragraph containing 15 other affirmative defenses and an attempt to plead and reserve every other conceivable affirmative defense."[181] Following discovery, the defendant moved for summary judgment to dismiss the plaintiff's complaint for several reasons, including that the action was time-barred.[182] In opposition, the plaintiff argued that the defendant "failed to adequately plead a statute of limitations defense" and as such, the defense was waived.[183] Though agreeing with the plaintiff that the defendant failed to adequately plead the defense, the trial court granted the defendant's motion on its merits and there was an appeal.[184]

According to the First Department, the defendant failed to comply with CPLR 3103 "because its inclusion of the defense within a laundry list of predominately inapplicable defenses did not provide plaintiff with the requisite notice."[185] Indeed, the court noted that "neither the plaintiff

N.Y.S.2d 401, 408 (2d Dep't 2014)).

177. *Id.*

178. N.Y. C.P.L.R. 3013 (McKinney 2010).

179. N.Y. C.P.L.R. 3014 (McKinney 2010).

180. 129 A.D.3d 75, 76, 8 N.Y.S.3d 143, 145 (1st Dep't 2015).

181. *Id.*

182. *Id.* at 78, 8 N.Y.S.3d at 146.

183. *Id*.

184. *Id.* at 79, 8 N.Y.S.3d at 146.

185. *Scholastic*, 129 A.D.3d at 79, 8 N.Y.S.3d at 146 (first citing N.Y. C.P.L.R. 3013

nor the court" should be "compelled to wade through a mass of verbiage and superfluous matter to divine which defenses may apply to the case."[186] Also, the court noted that the defendant failed to comply with the numbering requirement of CPLR 3014, because the "defense lay buried within a paragraph of mostly irrelevant, and conclusory, defenses."[187]

The court then dealt with the question presented by CPLR 3026: "[t]hat is, the CPLR directs us to construe a defendant's answer liberally and disregard defects unless a substantial right of the plaintiff would be prejudiced."[188] Although the plaintiff effectively established that the "defendant's defective pleading induced the plaintiff to forgo targeted discovery on the statute of limitations issue," the court found that "treating the [statute of limitations] defense as waived" would be an "excessively severe result."[189] Instead, because "the prejudice [could] be cured by allowing the plaintiff to conduct discovery on the statute of limitations issue," the court remanded the matter to permit the defendant to correct its defective pleading and for the plaintiff to obtain necessary discovery.[190]

2. Responsive Pleadings

Pursuant to CPLR 3018(b), "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading."[191] CPLR 3018(b) includes a list of examples of affirmative defenses which must be plead, but the list is not exhaustive.[192]

At issue in *Thome v. Brenchmark Main Transit Associates, L.L.C.*, was whether the court abused its discretion in denying third-party defendant Fischer's motion seeking leave to assert an affirmative defense in its second amended third-party answer.[193] In *Thome*, the plaintiff commenced a personal injury action for damages "sustained

(McKinney 2010); then citing N.Y. C.P.L.R. 3014 (McKinney 2010); and then citing Kowalczyk v. Monticello, 107 A.D.3d 1365, 1366, 969 N.Y.S.2d 566, 568 (3d Dep't 2013)).

186. *Id.* at 79, 8 N.Y.S.3d at 147 (quoting Bersalla v. City of New York, 82 A.D.2d 747, 748, 440 N.Y.S.2d 12, 13 (1st Dep't 1981)).

187. *Id.*

188. *Id.* at 80, N.Y.S.3d at 147 (citing N.Y. C.P.L.R. 3026 (McKinney 2010)).

189. *Id.* at 80–81, 8 N.Y.S.3d at 147–48.

190. *Scholastic*, 129 A.D.3d at 81, 8 N.Y.S.3d at 148 (citing N.Y. C.P.L.R. 104 (McKinney 2003)).

191. N.Y. C.P.L.R. 3018 (McKinney 2010).

192. *See id.*

193. 125 A.D.3d 1283, 1284, 3 N.Y.S.3d 475, 477 (4th Dep't 2015).

when a lift he was operating fell into a hole at a construction site."[194] The defendant/third-party plaintiff Christa commenced third-party actions against third-party defendants Fisher and Industrial Power & Lighting Corp. (IPL).[195] "Plaintiff, Christa, and IPL settled the main action and the third-party action with respect to IPL."[196] Shortly thereafter, Fisher made a motion for leave to serve a second amended answer to the third-party complaint and "assert several affirmative defenses . . . including that the settlement between the plaintiff, Christa and IPL was unreasonable.[197] The trial court denied Fisher's motion.[198]

On appeal to the Fourth Department, the court held that the trial court abused its discretion in denying Fisher's motion.[199] According to the court, amendment was "proper because the settlement had not occurred by the time the third-party complaint and Fisher's initial and amended third-party answers were served. Thus, the settlement could not have been mentioned in the complaint, nor could the affirmative defense have been raised in the initial or amended third-party answers."[200] Following *Thorne*, it appears that a list of affirmative defenses that must be pleaded pursuant to CPLR 3018(b) now includes the unreasonableness of a prior settlement.

3. Amended and Supplemental Pleadings

CPLR 3025 permits a party to amend a pleading under several circumstances including:

> once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it . . . at any time by leave of court . . . [and] before or after judgment to conform [the pleading] to the evidence.[201]

Generally, leave to amend a pleading pursuant to CPLR 3025(b) should be freely granted in the absence of prejudice or surprise resulting from the delay.[202]

At issue before the Court of Appeals in *Kimso Apartments, L.L.C.*

194. *Id.*
195. *See id.*
196. *See id.*
197. *See id.*
198. *See Thome*, 125 A.D.3d at 1284, 3 N.Y.S.3d at 478.
199. *See id.*
200. *Id.* at 1285, 3 N.Y.S.3d at 478 (quoting Patrick M. Connors, *Practice Commentary*, N.Y. C.P.L.R. 3018, at 314 (McKinney 2010)).
201. N.Y. C.P.L.R. 3025 (a)–(c) (McKinney 2010).
202. *See id.*

v. Ghandi, was whether the trial court's denial of the defendant's motion to amend its answer to assert a counterclaim, was improper.[203] *Kimso* concerned an action against a former shareholder seeking to recover money allegedly due on loans.[204] Approximately one month before trial, the plaintiffs sought to preclude the defendant from presenting evidence of, or making a claim that, the plaintiffs owed the defendant money from a settlement agreement.[205] The defendant opposed the motion arguing that he did not assert an affirmative claim for past-due settlement payments because the plaintiffs consistently *acknowledged* the obligation," and further asserted that "pursuant to CPLR 3025(c), pleadings may be conformed to the proof at any time, *including during or after trial*."[206] The court denied the motion, and reserved until the conclusion of trial.[207] "Before resting, [the defendant] moved to conform the pleadings to the proof, seeking to assert a counterclaim for money owed him under the settlement agreement.[208] The trial court granted the defendant's motion, but on appeal the appellate division reversed.[209]

While noting that applications to amend are "within the sound discretion of the court" and that "courts are given considerable latitude in exercising their discretion, which may be upset . . . only for abuse as a matter of law," the Court of Appeals reversed the appellate division's order.[210] According to the Court, the appellate division abused its discretion because there was no prejudice and the plaintiffs, who built their strategy on the fact of their admitted payment obligations to the defendant, could not "turn around and seek to assert defenses to those admissions."[211] The Court also noted that, although the delay in seeking the amendment may be considered on a motion pursuant to CPLR 3025(c), it does not bar a court from permitting the amendment.[212]

203. 24 N.Y.3d 403, 409, 23 N.E.3d 1008, 1012, 998 N.Y.S.2d 740, 744 (2014).

204. *See id.* at 406–07, 23 N.E.3d at 1010–11, 998 N.Y.S.2d at 742.

205. *Id.* at 409, 23 N.E.3d at 1012, 998 N.Y.S.2d at 744.

206. *Id.*

207. *Id.*

208. *Kimso*, 24 N.Y.3d at 409, 23 N.E.3d at 1012, 998 N.Y.S.2d at 744.

209. *Id.* at 410, 23 N.E.3d at 1012–13, 998 N.Y.S.2d at 744–45.

210. *Id.* at 411, 414, 23 N.E.3d at 1013–14, 1015, 998 N.Y.S.2d at 745, 747 (citing *In re* Van Bulow, 63 N.Y.2d 221, 225, 470 N.E.2d 866, 868, 481 N.Y.S.2d 67, 69 (1984) (per curiam)).

211. *Id.* at 412, 23 N.E.3d at 1014, 998 N.Y.S.2d at 746.

212. *Id.* at 413–14, 23 N.E.3d at 1015, 998 N.Y.S.2d at 747 (citing Dittmer Explosives v. A.E. Ottavaine, Inc., 20 N.Y.2d 498, 502–03, 231 N.E.2d 756, 758–59, 285 N.Y.S.2d 55, 58 (1967)).

J. Article 31: Disclosure

1. Scope of Disclosure

CPLR 3101(a) requires "full disclosure of all matter material and necessary to the prosecution or defense of an action."[213] The definition of material and necessary depends upon the case.[214]

CPLR 3101(a) was at issue in *City of Newburg v. Hauser*.[215] In *Newberg*, the Second Department considered a decision by a trial court "which granted the defendants' motion to compel the plaintiff to produce certain documents submitted in a private mediation between the plaintiff and a nonparty."[216] Holding that the documents were "material and relevant to the defense of [the] action," the Second Department affirmed the trial court's decision.[217] Further, the appellate division rejected the plaintiff's argument that CPLR 4547, which generally precludes the admission of both offers of settlement and statements made in the context of settlement offers, barred disclosure of the documents.[218] According to the Second Department, CPLR 4547 "is concerned with the *admissibility* of evidence, and does not limit the discoverability of [the same]."[219]

However, in *Ferolito v. Arizona Beverages USA, L.L.C.*, the Second Department reversed the trial court's decision granting the plaintiff's motion to compel the defendant to disclose certain

213. N.Y. C.P.L.R. 3101(a) (McKinney 2010 & Supp. 2016).

214. Allen v. Crowell-Collier Publ'g Co., 21 N.Y.2d 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.2d 449, 452 (1968) (citing N.Y. C.P.L.R. 3101(a)) ("The words 'material and necessary' are, . . . , to be interpreted liberally to require disclosure, . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.").

215. 126 A.D.3d 926, 3 N.Y.S.3d 616 (2d Dep't 2015).

216. *Id.*

217. *Id.* at 927, 3 N.Y.S.3d at 616 (first citing N.Y. C.P.L.R. 3101 (McKinney 2010 & Supp. 2016); then citing Andon v. 302-304 Mott St. Assocs., 94 N.Y.2d 740, 745–46, 731 N.E.2d 589, 592–93, 709 N.Y.S.2d 873, 876–77 (2000); then citing *Allen*, 21 N.Y.2d at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452; then citing Yoshida v. Hsueh-Chin Chin, 111 A.D.3d 704, 705–06, 974 N.Y.S.2d 580, 582 (2d Dep't 2013); then citing Osowski v. AMEC Constr. Mgmt., Inc., 69 A.D.3d 99, 106, 887 N.Y.S.2d 11, 15–16 (1st Dep't 2009); then citing American Re-Ins. Co. v. U.S. Fid. & Guar. Co., 19 A.D.3d 103, 104, 796 N.Y.S.2d 89, 90 (1st Dep't 2005); then citing Masterwear Corp. v. Bernard, 3 A.D.3d 305, 307–08, 771 N.Y.S.2d 72, 75–76 (1st Dep't 2004); and then citing Masterwear Corp. v. Bernard, 298 A.D.2d 249, 250, 750 N.Y.S.2d 5, 6 (1st Dep't 2002)).

218. *Id.*

219. *Id.* (emphasis added) (citing Town of Waterford v. N.Y. State Dep't of Envtl. Conservation, 77 A.D.3d 224, 233, 906 N.Y.S.2d 651, 659 (3d Dep't 2010), *aff'd in part and modified in part*, 18 N.Y.3d 652, 967 N.E.2d 652, 944 N.Y.S.2d 429 (2012)); *see also* N.Y. C.P.L.R. 4547 (McKinney 2007).

documents.[220] According to the court, notwithstanding the fact that the documents were "highly relevant," that the plaintiff met his burden of establishing that the information was material and necessary, and despite "New York's policy of liberal discovery," the defendant effectively demonstrated that the documents sought contained one or more trade secrets.[221] "Thus, the burden shifted to [the plaintiff] to demonstrate that the information contained was 'indispensable to the ascertainment of the truth, and could not be acquired in any other way.'"[222] As the plaintiff failed to meet the burden, the Second Department held that the plaintiff's motion should have been denied.[223]

2. Scope of Disclosure—Trial Preparation—Experts

Pursuant to CPLR 3101(d)(1)(i),

> upon request, each party must identify each person whom the party expects to call as an expert witness at trial and [must] disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.[224]

Expert disclosure was at issue in *Rivera v. Montefiore Medical Center*, where the plaintiff moved to prevent the defendant's expert from testifying that the decedent's death was caused by sudden cardiac arrest.[225] According to the plaintiff, the defendant's expert disclosure lacked specificity about causation.[226] The disclosure stated that the expert would "testify as to the possible causes of the decedent's injuries and contributing factors . . . [and] on the issue of proximate causation."[227]

According to the appellate division, the plaintiff failed to timely object, was "not justified in assuming that the [] expert testimony would comport with the autopsy report, and cannot now be heard to complain that defendant's expert improperly espoused some other theory of

220. 119 A.D.3d 642, 642, 990 N.Y.S.2d 218, 219 (2d Dep't 2014).

221. *Id.* at 643–44, 990 N.Y.S.2d at 220 (citing Kapon v. Koch, 23 N.Y.3d 32, 34, 37–38, 11 N.E.3d 711, 713–14, 988 N.Y.S.2d 559, 563–64 (2014)).

222. *Id.* at 644, 990 N.Y.S.2d at 220 (citing Finch, Pruyn, & Co. v. Niagara Paper Co., 228 A.D.2d 834, 837, 643 N.Y.S.2d 773, 776 (3d Dep't 1996)).

223. *Id.* (citing Deas v. Carson Prods. Co., 172 A.D.2d 795, 796, 569 N.Y.S.2d 167, 168 (2d Dep't 1991)).

224. N.Y. C.P.L.R. 3101 (McKinney 2010 & Supp. 2016).

225. 123 A.D.3d 424, 425, 998 N.Y.S.2d 321, 323 (1st Dep't 2014).

226. *Id.*

227. *Id.*

causation for which there was support in the evidence."[228] The dissent disagreed, stating that the "[p]laintiff could not have anticipated this entirely new theory as to the cause of the decedent's death before hearing [the expert's] testimony," and "disallowing a motion to limit expert testimony by excluding a new theory revealed for the first time at trial would eviscerate the procedural protection that CPLR 3101(d) was drafted to create."[229]

3. Scope of Disclosure—Trial Preparation—Materials

Although CPLR 3101(a) mandates the disclosure of all matter "material and necessary" to the prosecution or defense of an action, this right is not unlimited.[230] Indeed, pursuant to CPLR 3101(d)(2), materials otherwise discoverable under CPLR 3101(a), but "prepared in anticipation of litigation or for trial by or for another party . . . may be obtained only upon a showing that the party seeking discovery has substantial need of the materials . . . and is unable without undue hardship to obtain [them] by other means."[231]

The scope of discovery was addressed in *Ligoure v. City of New York*, where the defendants sought a protective order preventing disclosure of certain witness statements and investigation and inspection reports because the materials were privileged since they were prepared in anticipation of litigation.[232] The Second Department stated that the burden of proving that a statement is privileged is on the party opposing discovery and will be met "by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation."[233]

According to the court, the defendants failed to meet their burden by submitting only an "attorney's affirmation containing conclusory assertions that the requested materials are conditionally immune from disclosure pursuant to CPLR 3101(d)(2)," which, "without more, [was] insufficient to sustain [the defendant's] burden."[234]

228. *Id.* at 426, 998 N.Y.S.2d at 323.

229. *Id.* at 428, 998 N.Y.S.2d at 325 (Gonzalez, P.J., dissenting).

230. N.Y. C.P.L.R. 3101(a) (McKinney Supp. 2016).

231. N.Y. C.P.L.R. 3101(d)(2) (McKinney Supp. 2016).

232. 128 A.D.3d 1027, 1028, 9 N.Y.S.3d 678, 679 (2d Dep't 2015).

233. *Id.* (quoting Ural v. Encompass Ins. Co. of Am., 97 A.D.3d 562, 566, 948 N.Y.S.2d 621, 626 (2d Dep't 2012)) (citing Sigelakis v. Wash. Grp., L.L.C., 46 A.D.3d 800, 800, 848 N.Y.S.2d 272, 273 (2d Dep't 2007)).

234. *Id.* at 1029, 9 N.Y.S.3d at 679–80 (citing Koump v. Smith, 25 N.Y.2d 287, 290–91, 250 N.E.2d 857, 859, 303 N.Y.S.2d 858, 861 (1969); N.Y. Sch. Ins. Reciprocal v.

4. Signing Deposition

It is well-known that a deposition may be provided to a witness following examination, at which time the deponent may make corrections to his or her deposition testimony along with "a statement of the reasons given by the witness for making them."[235] The deposition is then signed by the deponent, before an officer authorized to administer an oath.[236] "If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed."[237]

In *Castano v. Wygand*, the First Department considered the admissibility of deposition transcripts that were unsigned.[238] First, the court held that a defendant's deposition transcript that was unsigned was admissible in support of a co-defendant's motion for summary judgment because the defendant "accepted its accuracy by submitting it in support of his motion for summary judgment."[239] The court also held that the deposition transcript of a non-party witness was admissible in support of the motion for summary judgment, even though it was unsigned, because evidence was presented that "the transcript had been submitted to the witness for signature and return and she failed to do so within 60 days."[240] Finally, the court noted that there is nothing improper in submitting excerpts of deposition transcripts on motion practice, as long as they are not misleading.[241]

5. Admissions as to Matters of Fact, Papers, Documents, and Photographs

Pursuant to CPLR 3123(a), a party may serve upon another party a written request to admit:

> the truth of any matters of fact set forth in the request, as to which the party . . . reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.[242]

In *Altman v. Kelly*, the defendant sought to withdraw its admissions in a notice to admit, and reverse an order of summary

Milburn Sales Co., 105 A.D.3d 716, 718, 963 N.Y.S.2d 152, 154 (2d Dep't 2013)).

235. N.Y. C.P.L.R. 3116(a) (McKinney Supp. 2016).

236. *Id.*

237. *Id.*

238. 122 A.D.3d 476, 477, 997 N.Y.S.2d 36, 37 (1st Dep't 2014).

239. *Id.*

240. *Id.*

241. *Id.*

242. N.Y. C.P.L.R. 3123(a) (McKinney 2005).

judgment based upon those admissions.[243] In *Altman*, there was a collision between the plaintiff's motorcycle and a motor vehicle owned and operated by the defendant.[244] The plaintiff commenced an action against the defendant and the defendant's employer, alleging that the employer was liable for the driver's negligence under the doctrine of respondeat superior.[245] In a notice to admit, the plaintiff sought an admission that the driver was acting "in the course of his employment" and "in the scope of his employment" and "acting in furtherance of the business activities of" his employment.[246] All requests for admissions were admitted.[247]

The plaintiff moved for summary judgment on the issue of liability against the defendants.[248] The defendant employer opposed and cross-moved for leave to withdraw its admissions, contending that the notice to admit was improper as it sought admissions of ultimate conclusions of the action.[249] The trial court denied the cross-motion and granted the plaintiff's motion for summary judgment.[250]

According to the Second Department, the legislative policy underlying CPLR 3123(a) is to "promote efficiency in the litigation process by eliminat[ing] from the issues in litigation matters which will not be in dispute at trial."[251]

However, according to the court, "[a] notice to admit which goes to the heart of the matters at issue is improper."[252] According to the court, the defendant employer's liability hinged upon whether it was liable for the driver's acts under the doctrine of respondeat superior and, as such, the notice to admit was addressed "to the core legal and factual issues" and could have instead been obtained through discovery, including depositions.[253] Accordingly, the Second Department held that the

243. 128 A.D.3d 741, 741, 9 N.Y.S.3d 359, 360 (2d Dep't 2015).

244. *Id.* at 742, 9 N.Y.S.3d at 360.

245. *Id.*

246. *Id.* at 742, 9 N.Y.S.3d 361.

247. *Id.*

248. *Altman*, 128 A.D.3d at 742, 9 N.Y.S.3d at 361.

249. *Id.*

250. *Id.*

251. *Id.* at 743 (quoting DeSilva v. Rosenberg, 236 A.D.2d 508, 508, 654 N.Y.S.2d 30, 31 (2d Dep't 1997)).

252. *Id.* at 743, 9 N.Y.S.3d at 361 (quoting *DeSilva*, 236 A.D.2d at 508, 654 N.Y.S.2d at 31).

253. *Altman*, 128 A.D.3d at 743, 9 N.Y.S.3d at 361 (citing Priceless Custom Homes, Inc. v. O'Neill, 104 A.D.3d 664, 664, 960 N.Y.S.2d 455, 457 (2d Dep't 2013); Stanger v. Morgan, 100 A.D.3d 545, 545–46, 954 N.Y.S.2d 95, 96 (1st Dep't 2012); Riner v. Texaco, 222 A.D.2d 571, 572, 635 N.Y.S.2d 658, 659 (2d Dep't 1995); Gomez v. Long Island R.R., 201 A.D.2d 455, 456, 607 N.Y.S.2d 388, 389 (2d Dep't 1994)).

defendant's cross-motion to withdraw should have been granted and, moreover, because the plaintiff's summary judgment motion relied upon the admissions, the plaintiff failed to establish prima facie entitlement to judgment as a matter of law.[254]

6. Penalties for Refusal to Comply with Order or to Disclose

CPLR 3126 permits sanctions to be imposed if a party willfully fails to comply with its discovery obligations.[255] The nature and degree of the sanction to be imposed are vested in the trial court's discretion, including authority to strike a pleading.[256]

At issue in *BDS Copy Inks, Inc. v. International Paper*, was whether the trial court abused its discretion in striking the plaintiffs' complaint as a discovery sanction.[257] According to the Third Department, the remedy of striking a pleading is "drastic, especially where . . . it has the effect of preventing a party from asserting its claim," so it will be "reserved for those instances where the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious."[258] With this principle in mind, the appellate division nonetheless found that the trial court did not abuse its discretion in striking the plaintiffs' complaint, as the record revealed that over a period of nearly two years, the court met with the plaintiffs' attorney at least six times and issued two orders extending their time to comply with their discovery obligations.[259] Despite such orders, the plaintiffs continued to refuse to disclose documents bearing on their claimed damages, instead insisting that the defendant's ability to sift through sixty to eighty banker's boxes in a warehouse constituted reasonable compliance with the document production request.[260] Accordingly, the court found that the record demonstrated a "pattern of noncompliance" to support a finding that the plaintiffs' conduct was willful and contumacious, and as such, the trial court was did not abuse its discretion in striking the plaintiffs' complaint.[261]

254. *Id.* at 743, 9 N.Y.S.3d at 361–62.

255. N.Y. C.P.L.R. 3126 (McKinney 2005).

256. *Id.* at 3126(3).

257. 123 A.D.3d 1255, 1256, 999 N.Y.S.2d 234, 236 (3d Dep't 2014).

258. *Id.* at 1256–57, 999 N.Y.S.2d at 236 (quoting D.A. Bennett L.L.C. v. Cartz, 113 A.D.3d 945, 946, 979 N.Y.S.2d 179, 181 (3d Dep't 2014)).

259. *Id.* at 1257, 999 N.Y.S. at 236.

260. *See id.*

261. *Id.* at 1257–58, 999 N.Y.S. at 237 (citing Hameroff & Sons, L.L.C. v. Plank, L.L.C., 108 A.D.3d 908, 909, 970 N.Y.S.2d 102, 104 (3d Dep't 2013).

K. Article 32: Accelerated Judgment

1. Motion to Dismiss

CPLR 3211 provides a mechanism for a court to dispose of a cause of action for several reasons.[262] Among the reasons a court may dismiss pursuant to CPLR 3211, is that the cause of action cannot 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."[263]

In *172 Van Duzer Realty Corp. v. Globe Alumni Student Association, Inc*., a plaintiff sought rent arrears and an amount equal to future remaining rent owed under an acceleration clause of a commercial lease.[264] The defendants made a motion to dismiss pursuant to CPLR 3211(a)(5), arguing that the doctrine of res judicata barred the plaintiff from recovering damages in a supreme court action because the damages had not been recovered in a prior civil court action awarding the plaintiff possession of the premises.[265]

According to the Court of Appeals, the civil court did not possess the authority to address a claim for the balance of rent due under the acceleration clause in the plaintiff's holdover proceeding.[266] Thus, the plaintiff could not have been barred from pursuing damages for the defendants' breach, because the plaintiff was unable to seek that remedy in the first instance.[267]

Ross v. Jamaica Hospital Medical Center also involved CPLR 3211(a)(5), and provided an opportunity for the Second Department to clarify the burden of proof on a motion to dismiss based on the statute of limitations.[268] *Ross* involved an action to recover damages for medical malpractice.[269] The plaintiff originally commenced an action by filing a summons with notice, but the action was later dismissed due to the plaintiff's failure to provide a complaint after a demand was appropriately made.[270] The plaintiff commenced the subsequent action that was at issue before the Second Department, and the defendants moved to dismiss, maintaining that the action was barred by the statute

262. *See* N.Y. C.P.L.R. 3211(a) (McKinney Supp. 2016).
263. *Id.* at 3211(a)(5).
264. 24 N.Y.3d 528, 531–32, 25 N.E.3d 952, 953–54, 2 N.Y.S.3d 39, 40–41 (2014).
265. *See id.* at 533, 25 N.E.3d at 955, 2 N.Y.S.3d at 42.
266. *Id.* at 534, 25 N.E.3d at 955, 2 N.Y.S.3d at 42.
267. *Id.*
268. 122 A.D.3d 607, 607, 996 N.Y.S.2d 118, 118 (2d Dep't 2014).
269. *Id.*
270. *Id.*

of limitations.[271]

According to the Second Department, the defendants successfully established that the two and one-half year statute of limitations to commence the action had expired.[272] The Second Department also found that the plaintiffs failed to raise a triable issue of fact as to whether the statute of limitations was tolled pursuant to CPLR 205(a).[273] Accordingly, the appellate division affirmed the trial court's decision to dismiss the complaint pursuant to CPLR 3211(a)(5) as time barred.[274]

A court may also dismiss pursuant to CPLR 3211 if the pleading fails to state a cause of action.[275] This provision was at issue in *Liberty Affordable Housing, Inc. v. Maple Court Apartments*, where the Fourth Department considered whether the trial court properly admitted documentary evidence on a CPLR 3211 motion, following the Court of Appeals's decision in *Miglino v. Bally Total Fitness of Greater N.Y., Inc*.[276]

In rejecting the plaintiff's argument that "*Miglino* fundamentally changed the parameters of CPLR 3211(a)(7) and effectively barred the consideration of any evidentiary submissions outside the four corners of the complaint,"[277] the Court held that it did not alter the long-standing practice by which dismissal might be obtained with sufficiently conclusive evidentiary submissions as set forth in *Rovello v. Orofino Realty Co*.[278] Rather, *Rovello* held that evidentiary submissions may be considered for the "limited purpose" of assessing facial sufficiency of a civil complaint, but that *Miglino* was not resolved as a matter of law because the evidentiary submissions were insufficiently conclusive—not because they were categorically inadmissible in the context of a CPLR 3211(a)(7) motion.[279]

Thus, evidentiary submissions for a "limited" role (*Rovello*) are to

271. *Id.* at 607, 996 N.Y.S.2d at 118.

272. *Id.* at 608, 996 N.Y.S.2d at 119.

273. *Ross*, 122 A.D.3d at 608, 996 N.Y.S.2d at 119.

274. *Id.*

275. N.Y. C.P.L.R. 3211(a)(7) (McKinney Supp. 2016).

276. Liberty Affordable Hous., Inc. v. Maple Court Apartments, 125 A.D.3d 85, 88, 998 N.Y.S.2d 543, 545 (4th Dep't 2015) (citing Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351, 985 N.E.2d 128, 134, 961 N.Y.S.2d 364, 370 (2013)).

277. *Id.* at 88, 998 N.Y.S.2d at 545 (citing *Miglino*, 20 N.Y.3d at 351, 985 N.E.2d at 134, 961 N.Y.S.2d at 370).

278. *Id.* at 88, 91, 998 N.Y.S.2d at 545, 547 (citing *Miglino*, 20 N.Y.3d, at 351, 985 N.E.2d, at 134, 961 N.Y.S.2d at 370; Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 635, 357 N.E.2d 970, 972, 389 N.Y.S.2d 314, 316 (1976)).

279. *Id.* at 89–92, 998 N.Y.S.2d at 546–47.

be distinguished from a "nonexistent role" (*Miglino*).[280] Thus, the Fourth Department held that the trial court was not limited to the four corners of the complaint and properly considered the defendant's evidentiary submissions in its evaluation of the defendant's motion to dismiss.[281]

Also, in *Davis v. South Nassau Communities Hospital*, a bus driver brought an action against physicians and a hospital for damages for personal injuries sustained when a patient became unconscious as a result of medications administered to her at the hospital, crossed a double yellow line, and struck the plaintiff while he was driving in the opposite direction.[282] The defendant moved to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7).[283]

Upon review, the Second Department noted that the sole criterion under which CPLR 3211(a)(7) is considered is whether, "from the complaint's 'four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.'"[284] In viewing the complaint in the most favorable light to the plaintiffs, the court found that the complaint failed to state a cause of action alleging medical malpractice, since there was no physician-patient relationship between the plaintiffs and the defendants.[285] Additionally, the Second Department found that the trial court correctly denied the plaintiffs' cross-motion to amend the complaint to add a cause of action for negligence because there generally is no "duty to control the conduct of third persons to prevent them from causing injury to others[,] even where, as a practical matter, the defendant could have exercised such control."[286] This case later went up for review before the Court of Appeals.[287]

280. *Id.* at 89, 998 N.Y.S.2d at 546.

281. *See Liberty*, 125 A.D.3d at 91, 998 N.Y.S.2d at 547.

282. 119 A.D.3d 512, 513, 989 N.Y.S.2d 500, 500–02 (2d Dep't 2014).

283. *See id.* at 513, 989 N.Y.S.2d at 502.

284. *Id.* at 514, 989 N.Y.S.2d at 502 (quoting Nasca v. Sgro, 101 A.D.3d 963, 964, 957 N.Y.S.2d 246, 248 (2d Dep't 2012)).

285. *See id.*

286. *Id.* (quoting Citera v. Cty. of Suffolk, 95 A.D.3d 1255, 1258, 945 N.Y.S.2d 375, 378 (2d Dep't 2012)).

287. Although technically beyond the scope of this *Survey*, whether third-party liability can attach when a hospital administered drugs to a patient and then released her in an impaired state, without any warning that the medication impaired or could have impaired her ability to safely operate a motor vehicle, was considered by the court. *See* Davis v. S. Nassau Cmtys. Hosp., 26 N.Y.3d 563, 569, 46 N.E.3d 614, 616, 26 N.Y.S.3d 231, 233 (2015). In a four to two decision, the Court of Appeals answered in the affirmative and modified the Second Department's decision by denying the defendants' motion to dismiss. *Id.* at 570, 46 N.E.3d at 617, 26 N.Y.S.3d at 234.

2. Motion for Summary Judgment

CPLR 3212 provides a mechanism for a court to dispose of a claim, defense, or entire action if there are no genuine issues of fact for jury resolution.[288] If the date to make such a motion has not been set by the court, the 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."[289]

In *Bissell v. New York State Department of Transportation*, at issue was whether the court of claims erred in entertaining the defendant's untimely motion for summary judgment and dismissing the complaint.[290] There, the defendant made its motion over ten months after the expiration of the 120 day statutory deadline and failed to show good cause for such delay in its motion papers.[291] According to the Fourth Department, the court improperly considered the defendant's "good cause" excuse, which was proffered "for the first time in its reply papers and, in any event, defendant's explanation for its untimeliness did not constitute good cause."[292] As such, the Court reversed the order dismissing the plaintiff's claim.[293]

Similarly, in *Connolly v. 129 East 69th Street Corp.*, a trial court's individual part rules required summary judgment motions to be "filed" within sixty days of the filing of the note of issue.[294] As the note of issue was filed on July 10, 2013, motions were due by September 9, 2013.[295] The defendant did not file its motion until September 10, 2013—one day after the sixty-day time period. Therefore, the motion was untimely.[296] On appeal, the First Department reversed the trial court's order granting the defendant's motion to dismiss the complaint.[297]

3. Motion for Summary Judgment in Lieu of Complaint

CPLR 3213 allows for a motion for summary judgment in lieu of a complaint when an action involves an instrument for the payment of

288. N.Y. C.P.L.R. 3212 (McKinney 2005).

289. N.Y. C.P.L.R. 3212(a).

290. 122 A.D.3d 1434, 1434, 995 N.Y.S.2d 530, 530 (4th Dep't 2014).

291. *See id.* at 1434–35, 995 N.Y.S.2d at 530.

292. *Id.* at 1435, 995 N.Y.S.2d at 530–31.

293. *See id.* at 1434, 995 N.Y.S.2d at 530.

294. 127 A.D.3d 617, 618, 7 N.Y.S.3d 889, 889 (1st Dep't 2015).

295. *Id.*

296. *Id.* (citing Corchado v. City of New York, 64 A.D.3d 429, 429–30, 883 N.Y.S.2d 33, 34 (1st Dep't 2009)).

297. *See id.*

money or upon a judgment.[298]

At issue before the Court of Appeals in *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v. Navarro*, was whether the defendant's challenge to the plaintiff's demand pursuant to CPLR 3213 was foreclosed by a guaranty.[299] In support of its motion, the plaintiff submitted a purchase agreement, a personal guaranty signed by the defendant, proof of receivables due pursuant to the purchase agreement, and a default judgment entered against a corporation whose obligations the defendant had agreed to guaranty.[300]

Under the terms of the purchase agreement, the defendant specifically agreed that his "liability . . . shall be absolute and unconditional irrespective of (1) any lack of validity or enforceability of the agreement; . . . or (iv) any other circumstance which might otherwise constitute a defense available to . . . a guarantor."[301] In seeking to avoid application of the guarantee, the defendant argued that the plaintiff failed to satisfy its summary judgment burden because a question of fact existed regarding whether the federal default judgment constituted an obligation covered by the guaranty, because the judgment was "unlawful, having been obtained by collusion."[302]

Preliminarily, the Court held that an unconditional guaranty is an "instrument for the payment of 'money only'" within the meaning of CPLR 3213.[303] Thus, in order for a plaintiff to meet his or her prima facie burden under CPLR 3213 in a suit involving an unconditional guaranty, a plaintiff must prove "the existence of the guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty."[304] Thereafter, the burden shifts to the defendant to establish an "existence of a triable issue with respect to a bona fide defense."[305]

On the record, the court held that the "broad, sweeping and unequivocal language [in] the [g]uaranty foreclose[d] any challenge to the enforceability and validity of the documents which establish[ed] defendant's liability for payments arising under the [p]urchase

298. *See* N.Y. C.P.L.R. 3213 (McKinney 2005).

299. 25 N.Y.3d 485, 491, 36 N.E.3d 80, 84, 15 N.Y.S.3d 277, 281 (2015).

300. *See id.* at 492, 36 N.E.3d at 84, 15 N.Y.S.3d at 281.

301. *Id.* at 494, 36 N.E.3d at 86, 15 N.Y.S.3d at 283.

302. *Id.* at 495, 36 N.E.3d at 87, 15 N.Y.S.3d at 284.

303. *Id.* at 492, 36 N.E.3d at 84, 15 N.Y.S.3d at 281 (citing European Am. Bank & Tr. Co. v. Schirripa, 108 A.D.2d 684, 684, 485 N.Y.S2d 763, 763 (1st Dep't 2015)).

304. *Cooperatieve Centrale*, 25 N.Y.3d at 492, 36 N.E.3d at 84, 15 N.Y.S.3d at 281 (quoting Davimos v. Halle, 35 A.D.3d 270, 272, 826 N.Y.S.2d 61, 62 (1st Dep't 2006)).

305. *Id.* (quoting Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc., 57 A.D.3d 708, 710, 870 N.Y.S.2d 395, 397 (2d Dep't 2008)).

[a]greement, as well as to any other possible defense to his liability for the obligations of the [defaulting corporation]."[306] Further, the court noted that even if the defendant's argument was not waived by the "broad, inclusive, in no way limited, language of subparagraph (iv) of the [g]uaranty," the defendant failed to establish the alleged collusion.[307] Therefore, in affirming the appellate division's decision granting summary judgment in lieu of a complaint, the Court held that the defendant's collusion claim was barred by the express language of the guaranty and that his claim of collusion was contradicted by the record.[308]

4. Default Judgment

CPLR 3125 permits a plaintiff to seek a default judgment "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed . . . ."[309] There are, however, specific rules that a plaintiff must follow when seeking a default judgment, including providing the requisite notice.[310] Pursuant to CPLR 3125(g)(1), a "defendant who has appeared is entitled to at least five days' notice of the time and place of the application" for default judgment.[311]

In *Paulus v. Christopher Vacirca, Inc*., the consequences of failing to provide the correct notice when seeking a default judgment were addressed.[312] The issue in *Paulus* was "whether the failure of a party to give notice of a motion for leave to enter a default judgment to a defendant who has previously appeared . . . entitle[d] such defendant to vacatur of the default judgment."[313] An issue of first impression for the Second Department, it noted that the First, Third, and Fourth Departments have addressed the issue "with varying results."[314]

306. *Id.* at 494, 36 N.E.3d at 86, 15 N.Y.S.3d at 283.

307. *Id.* at 496, 36 N.E.3d at 88, 15 N.Y.S.3d at 285.

308. *See id.* at 487, 36 N.E.3d at 81, 15 N.Y.S.3d at 278.

309. N.Y. C.P.L.R. 3215(a) (McKinney Supp. 2016).

310. *See id.* at 3215(g) (McKinney Supp. 2016).

311. *Id.* at 3215(g)(1).

312. 128 A.D.3d 116, 117, 6 N.Y.S.3d 572, 573 (2d Dep't 2015).

313. *Id.*

314. *Id.* at 122–24, 6 N.Y.S.3d at 576–78. *See generally* Walker v. Foreman, 104 A.D.3d 460, 460, 963 N.Y.S.2d 625, 625 (1st Dep't 2013) (failure to provide notice requires a new inquest on proper notice); Fleet Fin., Inc. v. Nielsen, 234 A.D.2d 728, 729, 650 N.Y.S.2d 904, 905 (3d Dep't 1996) (failure to provide notice did not, standing alone, warrant vacatur); Dime Sav. Bank of N.Y. v. Higner, 281 A.D.2d 895, 895, 722 N.Y.S.2d 651, 652 (4th Dep't 2001) (failure to comply with requirements deprives court of jurisdiction to entertain the motion, rendering the ensuing judgment null—requiring vacatur).

In concurring with the First and Fourth Departments, the Second Department stated that "[t]he failure to provide proper notice of a motion can readily be viewed as a fundamental defect because it deprives the opposing party of a fair opportunity to oppose the motion."[315] That rationale, according to the court, applied with equal force to a plaintiff who fails to give a defendant notice of motion for leave to enter a default judgment.[316] Accordingly, the court held that the default judgment should have been vacated pursuant to CPLR 5015(a)(4).[317]

5. Want of Prosecution

CPLR 3216 governs what happens when a party unreasonably fails to proceed with the prosecution of an action, including when and how a court may dismiss the party's pleadings.[318]

In *Diemer v. Eben Ezer Medical Associates*, the Second Department addressed what happens when a party fails to serve a ninety-day demand pursuant to CPLR 3216.[319] According to the court, "CPLR 3216 is a legislative creation and not part of a court's inherent power, [thus,] a court may not dismiss an action for want of prosecution where the plaintiff was not served with the requisite 90-day demand pursuant to CPLR 3216(b)."[320] Therefore, because the defendant failed to serve such demand, the Second Department reversed the trial court's order dismissing the plaintiffs' complaint.[321]

L. Article 40: Trial Generally

1. Post-Trial Motion for Judgment and New Trial

Pursuant to CPLR 4404, upon the motion of any party, or on its an own initiative, a court may set aside a verdict or judgment and direct that it be entered in favor of the party entitled to judgment as a matter of law or order a new trial where the verdict is contrary to the weight of the evidence, in the interest of justice, or where the jury cannot agree

315. *Paulus*, 128 A.D.3d at 125, 6 N.Y.S.3d at 579.

316. *Id.*

317. *Id.* at 125–26, 6 N.Y.S3d at 578–79.

318. *See* N.Y. C.P.L.R. 3216(a)–(b) (McKinney Supp. 2016).

319. 120 A.D.3d 614, 614–15, 990 N.Y.S.2d 875, 875 (2d Dep't 2014).

320. *Id.* at 615, 990 N.Y.S.2d at 875 (first citing Chase v. Scavuzzo, 87 N.Y.2d 228, 233, 661 N.E.2d 1368, 1371, 638 N.Y.S.2d 587, 590 (1995); then citing Airmont Homes, Inc. v. Town of Ramapo, 69 N.Y.2d 901, 902, 508 N.E.2d 927, 928, 516 N.Y.S.2d 193, 194 (1987); and then citing Arroyo v. Bd. of Educ. of N.Y., 110 A.D.3d 17, 19–20, 970 N.Y.S.2d 229, 231–32 (2d Dep't 2013)).

321. *Id*. at 615, 990 N.Y.S.2d at 875–76.

after being kept together for a reasonable time as determined by the court.[322]

In *Piacente v. Bernstein*, the plaintiff requested that the trial court empanel the first six jurors that had been selected and designate the remaining two as alternate jurors, pursuant to CPLR sections 4105 and 4106.[323] The trial court denied the request, stating that the local rule enacted in the Third Judicial District required that the six deliberating jurors be chosen at random.[324] The jury returned a verdict of no cause and the plaintiff moved pursuant to CPLR 4404(a) to set aside the verdict in the interest of justice, "asserting, among other things, that the violation of his statutory right to designate the first six jurors selected during voir dire denied him a fair trial."[325] The trial court granted the motion and the defendants appealed.[326]

The Third Department initially noted that there was no evidence in the record before it to indicate that the plaintiff had waived its objection to the trial court's reliance on the local jury selection rule.[327] The court also found that the record revealed that both parties had operated on the understanding that the first six jurors would ultimately serve.[328] As such, the Third Department held that the supreme court correctly exercised its discretion in granting the plaintiff's motion to set aside the verdict as "its application of the Third Judicial District rule contravened plaintiff's substantial right to empanel the first six jurors . . . pursuant to the 'mandatory procedure' set forth in CPLR 4105."[329]

M. Article 50: Judgments Generally

1. Scope of Review

Pursuant to CPLR 5501, an appeal from a final judgment generally brings up several items for review, including "any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to

322. N.Y. C.P.L.R. 4404(a) (McKinney 2007).

323. 127 A.D.3d 1365, 1365–66, 6 N.Y.S.3d 793, 794 (3d Dep't 2015).

324. *Id.* at 1366, 6 N.Y.S.3d at 794.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Piacente*, 127 A.D.3d at 1366, 6 N.Y.S.3d at 795.

329. *Id.* at 1367, 6 N.Y.S.3d at 795 (first citing N.Y. C.P.L.R. 4404(a) (McKinney 2007); then citing Straub v. Yalamanchili, 58 A.D.3d 1050, 1052, 871 N.Y.S.2d 773, 774 (3d Dep't 2009); and then citing Sorel v. Iacobucci, 221 A.D.2d 852, 854, 633 N.Y.S.2d 688, 690 (3d Dep't 1995)).

which he objected."[330]

In *Rivera v. Montefiore Medical Center*, which was discussed, *supra*, in the context of CPLR 3101(d), the First Department considered the scope of review on an appeal from a final judgment where the plaintiff challenged an appeal on a ruling by the trial court, which was not raised and discussed in the context of a post-verdict motion.[331] Although agreeing that the issue was preserved by the objection made at trial, the First Department held that it was not brought up for review on the appeal, "which [was] solely from the order on the motion to set aside the verdict."[332] Indeed, the Court noted that unlike a judgment, "which brings up for review any ruling to which the appellant objected and any non-final order adverse to the appellant,"[333] an appeal from an order "usually results in the review of only the narrow point involved on the motion that resulted in the order."[334]

2. Appeals to the Court of Appeals as of Right

CPLR 5601(a) permits an appeal as of right to the Court of Appeals, in an order from the appellate division "which finally determines the action, [only] where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal."[335]

The interpretation of CPLR 5601(a) was before the Court of Appeals in *Reis v. Volvo Cars of North America*.[336] The plaintiff in *Reis* was injured when her vehicle launched forward and brought a products liability action against the vehicle manufacturer for failure to warn and defective design.[337] The manufacturer moved for summary judgment, which was denied.[338] The manufacturer appealed, and the case went to trial while the appeal was still pending.[339] During trial, at the plaintiffs' request and over the defendant's objection, the court included certain provisions from the Pattern Jury Instructions (PJI).[340]

Ultimately, the jury returned a verdict for the plaintiffs on both

330. N.Y. C.P.L.R. 5501(a)(3) (McKinney 2014).

331. 123 A.D.3d 424, 427, 998 N.Y.S.2d 321, 324 (1st Dep't 2014).

332. *Id.* at 427, 998 N.Y.S.2d at 324–25.

333. *Id.* at 427, 998 N.Y.S.2d at 325 (citing N.Y. C.P.L.R. 5501(a)(1),(2) (McKinney 2014)).

334. *Id.* (quoting David D. Siegel, *Practice Commentary*, N.Y. C.P.L.R. 5501:1 (McKinney 2010)).

335. N.Y. C.P.L.R. 5601(a) (McKinney 2014).

336. (*Reis IV*, 24 N.Y.3d 35, 41, 993 N.Y.S.2d 672, 675, 18 N.E.3d 383, 386 (2014).

337. *Id.* at 38–39, 993 N.Y.S.2d at 674, 18 N.E.3d at 385.

338. *Id.* at 39, 993 N.Y.S.2d at 674, 18 N.E.3d at 385.

339. *Id.*

340. *Id.*

claims and, after the verdict was rendered but before judgment was entered, the appellate division modified the trial court's order on the defendant's summary judgment motion by dismissing the failure to warn claim.[341] "The trial court then set aside the verdict on the failure to warn claim[]," but entered judgment on the design defect claim.[342] Both parties appealed.[343] The appellate division held that the trial court properly set aside the jury's verdict on the plaintiffs' failure to warn claim, but that the court did not commit error by charging the jury with the PJI.[344] The dissenting justices would have remanded for a new trial on the ground that the instruction was given in error.[345] The defendant thereafter appealed from the order as of right and the plaintiffs, who were also aggrieved because the majority agreed on the dismissal of his failure to warn claims, also sought an appeal as of right.[346]

The Court of Appeals dismissed the plaintiffs' appeal because the appellate division's dissent was not in his favor.[347] The Court also noted that the plaintiffs did not move for permission to appeal under CPLR 5602(a), and "therefore the part of the order unfavorable to plaintiff [the majority's opinion] is . . . beyond our review." [348] Finally, in noting that an appeal properly taken under CPLR 5601(a) brings up for review "all issues" that were decided adversely to the appellant, even those to which no justice dissented, the Court reversed and remitted the case for a new trial because it agreed that a decision to charge a certain PJI was in error.[349]

341. *Reis IV*, 24 N.Y.3d at 40, 993 N.Y.S.2d at 675, 18 N.E.3d at 386 (citing Reis v. Volvo Cars of N. Am. (*Reis I*), 73 A.D.3d 420, 423, 901 N.Y.S.2d 10, 13 (1st Dep't 2010)).

342. *Id.*

343. *Id.* (citing Reis v. Volvo Cars of N. Am., Inc. (*Reis II*), 105 A.D.3d 663, 663, 665, 964 N.Y.S.2d 125, 127, 129 (1st Dep't 2013)).

344. *Reis II*, 105 A.D.3d at 663–64, 964 N.Y.S.2d at 127–28.

345. *Reis IV*, 24 N.Y.3d at 40, 993 N.Y.S.2d at 675, 18 N.E.3d at 386 (citing *Reis II*, 105 A.D.3d at 665, 964 N.Y.S.2d at 129 (Abdus-Salaam, J., dissenting)).

346. *Id.* at 41, 993 N.Y.S.2d at 675, 18 N.E.3d at 386.

347. *Id.* (citing Reis v. Volvo Cars of N. Am., Inc. (*Reis III*), 21 N.Y.3d 1051, 1051, 973 N.Y.S.2d 84, 84, 995 N.E.2d 1156, 1156–57 (2013)).

348. *Id.*

349. *Id.* at 41, 993 N.Y.S.2d at 676, 18 N.E.3d at 387 (first citing Holtslander v. C. W. Whalen & Sons, 69 N.Y.2d 1016, 1016, 517 N.Y.S.2d 936, 937, 511 N.E.2d 79, 80 (1987); then citing ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS 207–08 (3d ed. 2005)).

N. Article 78: Proceeding Against Body or Officer

1. Procedure

Pursuant to CPLR 7804(f), a respondent "*may* raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition . . . . If the motion is denied, the court *shall* permit the respondent to answer, upon such terms as may be just."[350]

Despite such language, in *Kickertz v. New York University*, the Court of Appeals noted that courts need not permit an answer "if the 'facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer.'"[351] Where, however, the motion papers "clearly [do] not establish that there [are] no triable issues of fact," the procedure under CPLR 7804 must be followed.[352] On the facts before it, the Court vacated the appellate division's order and remanded the matter to the trial court.[353]

III. COURT RULES

The New York State Office of Court Administration (OCA) made a few material changes to the rules of court during this *Survey* year, outside of electronic filing mandates.

A. OCA Rule 202.5(e)

Effective March 1, 2016, section 202.5(e) was adopted as a new rule.[354] Compliance was voluntary through February 28, 2015 and mandatory thereafter.[355] Section 202.5(e) reads as follows:

> (e) Omission or redaction of confidential personal information.
>
> (1) Except in a matrimonial action, or a proceeding in surrogate's court, or a proceeding pursuant to article 81 of the Mental Hygiene Law, or as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, the parties shall

350. N.Y. C.P.L.R. 7804(f) (McKinney 2008) (emphasis added).

351. 25 N.Y.3d 942, 944, 6 N.Y.S.3d 546, 547, 29 N.E.3d 893, 894 (2015) (quoting Nassau BOCES Ctr. Council of Teachers v. Bd. of Coop. Educ. Serv. of Nassau Cty., 63 N.Y.2d 100, 102, 480 N.Y.S.2d 190, 190, 469 N.E.2d 511, 511 (1984)).

352. *Id.* at 944, 6 N.Y.S.3d at 547–48, 29 N.E.3d at 894–95 (quoting *Nassau BOCES Ctr.*, 63 N.Y.2d at 104, 480 N.Y.S.2d at 192, 469 N.E.2d at 513).

353. *Id.* at 944, 6 N.Y.S.3d at 548, 29 N.E.3d at 895.

354. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.5(e) (2016).

355. Administrative Order of the Chief Administrative Judge of the Courts, AO/198/14 (Nov. 6, 2014), http://nylawyer.nylj.com/adgifs/decisions14/111414redaction.pdf.

omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information (CPI) means:

(i) the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof;

(ii) the date of an individual's birth, except the year thereof;

(iii) the full name of an individual known to be a minor, except the minor's initials;

(iv) a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof; and

(v) any of the documents or testimony in a matrimonial action protected by Domestic Relations Law section 235 or evidence sealed by the court in such an action which are attached as exhibits or referenced in the papers filed in any other civil action. For purposes of this rule, a *matrimonial action* shall mean: an action to annul a marriage or declare the nullity of a void marriage, an action or agreement for a separation, an action for a divorce, or an action or proceeding for custody, visitation, writ of *habeus corpus*, child support, maintenance or paternity.

(2) The court *sua sponte* or on motion by any person may order a party to remove CPI from papers or to resubmit a paper with such information redacted; order the clerk to seal the papers or a portion thereof containing CPI in accordance with the requirement of section 216.1 of this Title that any sealing be no broader than necessary to protect the CPI; for good cause permit the inclusion of CPI in papers; order a party to file an unredacted copy under seal for in camera review; or determine that information in a particular action is not confidential. The court shall consider the *pro se* status of any party in granting relief pursuant to this provision.

(3) Where a person submitting a paper to a court for filing believes in good faith that the inclusion of the full confidential personal information described in subparagraphs (1)(i) to (iv) of this subdivision is material and necessary to the adjudication of the action or proceeding before the court, he or she may apply to the court for leave to serve and file together with a paper in which such information has been set forth in abbreviated form a confidential affidavit or affirmation setting forth the same information in unabbreviated form, appropriately referenced to the page or pages of the paper at which the abbreviated form appears.

(4) The redaction requirement does not apply to the last four digits of the relevant account numbers, if any, in an action arising out of a consumer credit transaction, as defined in subdivision (f) of section 105 of the Civil Practice Law and Rules. In the event the defendant appears in such an action and denies responsibility for the identified account, the plaintiff may without leave of court amend his or her pleading to add full account or CPI by (i) submitting such amended paper to the court on written notice to defendant for in camera review or (ii) filing such full account or other CPI under seal in accordance with rules promulgated by the Chief Administrator of the Courts.[356]

B. OCA Rule 202.70(g)

Effective April 1, 2015, section 202.70(g) was amended to add Rule 11-e, which reads as follows:

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

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

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

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

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

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

(d) By agreement of the parties to a date no later than one (1) month prior to the close of fact discovery, or at such time set by the Court, the responding party shall state, for each individual request: (i) whether the production of documents in its possession, custody or control and that are responsive to the individual request, as

356. 22 NYCRR 202.5(e).

> propounded or modified, is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to the individual request as propounded or modified.
>
> (e) Nothing contained herein is intended to conflict with a party's obligation to supplement its disclosure obligations pursuant to CPLR 3101(h).[357]

Also effective on April 1, 2015, Rule 14 of section 202.70(g) was amended to read as follows:

> Rule 14. Disclosure Disputes.
>
> If the court's Part Rules address discovery disputes, those Part Rules will govern discovery disputes in a pending case. If the court's Part Rules are silent with respect to discovery disputes, the following Rule will apply. Discovery disputes are preferred to be resolved through court conference as opposed to motion practice. Counsel must consult with one another in a good faith effort to resolve all disputes about disclosure. See Section 202.7. If counsel are unable to resolve any disclosure dispute in this fashion, counsel for the moving party shall submit a letter to the court not exceeding three single-spaced pages outlining the nature of the dispute and requesting a telephone conference. Such a letter must include a representation that the party has conferred with opposing counsel in a good faith effort to resolve the issues raised in the letter or shall indicate good cause why no such consultation occurred. Not later than four business days after receiving such a letter, any affected opposing party or non-party shall submit a responsive letter not exceeding three single-spaced pages. After the submission of letters, the court will schedule a telephone or in-court conference with counsel. The court or the court's law clerks will attempt to address the matter through a telephone conference where possible. The failure of counsel to comply with this rule may result in a motion being held in abeyance until the court has an opportunity to conference the matter. If the parties need to make a record, they will still have the opportunity to submit a formal motion.[358]

CONCLUSION

Civil practice is dynamic. Practitioners and academicians alike should use their best efforts to stay current because a failure to follow the rules may bring about an adverse result. Certainly, it is far less traumatic to read about someone else's case.

357. 22 NYCRR 202.70(g).

358. *Id.*