CIVIL PRACTICE

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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,

1. July 1, 2011 through June 30, 2012.

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 ("CPLR"). Whether by accident or design, the author did not endeavor to discuss every Court of Appeals or appellate division decision.

I. LEGISLATIVE ENACTMENTS

A. CPLR 306-b

Chapter 473 of the Laws of 2011, effective January 1, 2012, amended CPLR 306-b to require that

> [s]ervice of a summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires.[2]

If service upon a defendant is not timely, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."[3]

Chapter 59 of the Laws of 2011, effective June 29, 2011, created CPLR 306-c, titled "Notice of commencement of action for personal injuries by recipient of medical assistance."[4] CPLR 306-c concerns Medicaid reporting and creates a notice obligation for counsel.[5] The statute provides, in relevant part, that

> [i]n the case of an individual who has suffered personal injuries and has received medical assistance pursuant to titles eleven and eleven-D of article five of the social services law on or after the date of such injury, notice of the commencement of an action by or on behalf of such individual for such personal injuries shall be sent to the social services district in the county in which such recipient resides, or to the

2. Act of August 17, 2011, ch. 473, 2011 McKinney's Sess. Laws of N.Y. 1346-47 (codified at N.Y. C.P.L.R. 306-b (McKinney Supp. 2012)).

3. N.Y. C.P.L.R. 306-b.

4. Act of March 31, 2011, ch. 473, 2011 McKinney's Sess. Laws of N.Y. 385 (codified at N.Y. C.P.L.R. 306-c).

5. *See* N.Y. C.P.L.R. 306-c.

> department of health, by certified mail, return receipt requested, or electronically in accord with regulations promulgated by the commissioner of the department of health, within sixty days of the completion of service upon all parties to such action.[6]

Transmission of the notice is not a jurisdictional requirement to commencing an action, but "[p]roof of sending such notice shall be filed with the court."[7]

B. CPLR 306-c

Chapter 473 of the Laws of 2011, effective January 1, 2012, amended CPLR 2101(f) to increase the time for raising objections to a defect in the form of a paper from two to fifteen days.[8] CPLR 2101(f) as amended provides that

> [a] defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within fifteen days after the receipt thereof, the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections.[9]

C. CPLR 3025

Chapter 473 of the Laws of 2011 amended CPLR 3025(b) to require counsel to attach a proposed amended pleading to a motion to amend so that the court can review the amended content before ruling on the motion.[10] CPLR 3025(b), as amended, provides that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."[11] As discussed, infra, a proposed amendment without merit will be rejected.[12]

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6. *Id.*

7. *Id.*

8. Act of August 17, 2011, ch. 473, 2011 McKinney's Sess. Laws of N.Y. 1347 (codified at N.Y. C.P.L.R. 2101(f)).

9. N.Y. C.P.L.R. 2101(f).

10. Act of August 17, 2011, ch. 473, 2011 McKinney's Sess. Laws of N.Y. 1347 (codified at N.Y. C.P.L.R. 3025(b)).

11. N.Y. C.P.L.R. 3025(b) (McKinney 2010).

12. *See infra* note 269 (citing Cervini v. Zanzoni, 95 A.D.3d 919, 922, 944 N.Y.S.2d 574, 577 (2d Dep't 2012)).

D. CPLR 3217

Chapter 473 of the Laws of 2011amended CPLR 3217(a) to extend the time for voluntary discontinuance without the need for a court order or stipulation in a situation without a responsive pleading.[13] Under the new rule, counsel can discontinue an action

> by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court.[14]

II. CASE LAW DEVELOPMENTS

A. Article 2: Limitations of Time

1. Methods for Computing Limitations Periods

CPLR 202 governs limitations of time with respect to claims accruing without the State, stating that a cause of action "cannot be commenced after the expiration of the time limited by the laws of either the State or the place without the state where the cause of action accrued."[15]

The age-old issue of where a claim accrued was at issue in *Oxbow Calcining USA, Inc. v. American Industrial Partners*.[16] The plaintiffs in *Oxbow* filed suit for a number of claims following the failure of multi-million dollar steel boiler stacks.[17] The plaintiffs' claims included breach of fiduciary duty, fraud, and fraudulent concealment.[18] The defendants moved to compel arbitration and to dismiss the fraud and fraudulent concealment claims as time-barred under the borrowing statute.[19] The trial court dismissed the fraud and fraudulent

13. Act of August 17, 2011, ch. 473, 2011 McKinney's Sess. Laws of N.Y. 1347 (codified at N.Y. C.P.L.R. 3217(a) (McKinney Supp. 2012)).

14. N.Y. C.P.L.R. 3217(a).

15. N.Y. C.P.L.R. 202 (McKinney 2003).

16. *See generally* 96 A.D.3d 646, 948 N.Y.S.2d 24 (1st Dep't 2012).

17. *Id.* at 648, 948 N.Y.S.2d at 28.

18. *Id.*

19. *Id.* at 650-51, 948 N.Y.S.2d at 29-30.

concealment claims as untimely under CPLR 202.[20] The First Department reversed, stating that "[w]here a nonresident brings a cause of action that accrued outside of New York, CPLR 202 applies, and the action must be timely in both New York and the other jurisdiction."[21] The court also noted that "[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss."[22] As a plaintiff was a Delaware corporation doing business in New York and Texas, with a principal place of business in Florida, the court concluded that additional discovery was needed to determine that plaintiff's residency and, in turn, held that the defendant's motion to dismiss was premature.[23]

CPLR 203 instructs practitioners how to calculate the time period for a statute of limitations, including when a claim is considered commenced (e.g., typically when the summons is served upon the defendant), when a defense or counterclaim is considered interposed (e.g., typically when the pleading containing it is served), and when claims contained in amended pleadings are considered asserted.[24]

The date when essential facts are discovered may also be relevant to the analysis, as CPLR 203 provides that a statute of limitations can run "from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered . . . the action must be commenced within two years after such actual or imputed discovery."[25]

The Court of Appeals addressed discovery of facts for accrual of a claim in *Hahn Automotive Warehouse, Inc. v. American Zurich Insurance Company*.[26] The plaintiff in *Hahn* was an automobile parts distributor that obtained insurance coverage from American Zurich.[27] The contractual relationship between Hahn and American Zurich dated to the early 1990s.[28] In 2005, American Zurich conducted an audit and realized that it had failed to bill Hahn for deductibles and loss

20. *Id.* at 651, 948 N.Y.S.2d at 30.

21. *Oxbow Calcining USA, Inc.*, 96 A.D.3d at 651, 948 N.Y.S.2d at 30.

22. *Id.* (quoting Global Fin. Corp. v. Triarc Corp., 93 N.Y.2d 525, 529, 715 N.E.2d 482, 485, 693 N.Y.S.2d 479, 482 (1999)) (internal quotation marks omitted).

23. *Oxbow Calcining USA, Inc.*, 96 A.D.3d at 651, 948 N.Y.S.2d at 31.

24. *See* N.Y. C.P.L.R. 203 (McKinney 2003).

25. *Id.*

26. *See generally* 18 N.Y.3d 765, 967 N.E.2d 1187, 944 N.Y.S.2d 742 (2012).

27. *Id.* at 767, 967 N.E.2d at 1188, 944 N.Y.S.2d at 743.

28. *Id.* at 768, 967 N.E.2d at 1189, 944 N.Y.S.2d at 744.

adjustment expenses for policies issued in 1995 and 1996.[29] After calculating the amounts owed, American Zurich sent bills to Hahn in 2005 and 2006.[30] Therefore, Hahn filed a declaratory judgment proceeding to have the debts dismissed because they arose more than six years ago and American Zurich filed counterclaims.[31] The trial court concluded that American Zurich's attempt to collect the debts was untimely, and the Fourth Department agreed, stating that Zurich's "counterclaims for any debt that arose more than six years prior to the commencement of this action were time-barred."[32]

The Court of Appeals affirmed the Fourth Department's rejection of American Zurich's argument that its claims against Hahn did not accrue until 2005 and 2006 (i.e., when Hahn refused to pay the invoices), stating that "the statute of limitations in these cases was triggered when the party that was owed the money had the right to demand payment, not when it actually made the demand."[33] Justice Read authored a dissent, stating,

> courts have heretofore uniformly concluded . . . that the statute of limitations for a claim for unpaid premiums calculated on the basis of claims history does not accrue until the insured refuses payment after demand has been made by the insurer. A breach, if any, would only occur when a due date passes without payment being made. To hold otherwise, as the majority does, creates an illogical situation whereby a claim for breach of contract accrues before the insured knows whether it owes the insurer any money at all, much less how much. In other words, the claim for breach accrues before any breach can possibly occur. Accordingly, I respectfully dissent.[34]

A similar issue was before the Fourth Department in *Haidt v. Kurnath*.[35] The plaintiff in *Haidt* filed suit for medical malpractice against Joseph Kurnath, M.D.[36] After the two-and-a-half-year medical malpractice statute of limitations expired, the plaintiff sought to add

29. *Id.*

30. *Id.*

31. *Hahn Auto. Warehouse, Inc.*, 18 N.Y.3d at 769, 967 N.E.2d at 1189, 944 N.Y.S.2d at 744.

32. *See generally* Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co., 81 A.D.3d 1331, 1333, 916 N.Y.S.2d 678, 680 (4th Dep't 2011).

33. *Hahn Auto. Warehouse, Inc.*, 18 N.Y.3d at 771, 967 N.E.2d at 1191, 944 N.Y.S.2d at 746.

34. *Id.* at 773, 967 N.E.2d at 1192, 944 N.Y.S.2d at 747.

35. *See generally* 86 A.D.3d 935, 927 N.Y.S.2d 256 (4th Dep't 2011).

36. *Id.* at 936, 927 N.Y.S.2d at 258.

Henry Wengender, M.D., to the case.[37] When Dr. Wengender's attorney argued that claims against the doctor were time-barred, the plaintiff argued that the three-prong relation-back doctrine[38] applied and, in support of her claims, offered proof that "she did not have sufficient knowledge of [Dr. Wengender's] role in prescribing the antibiotic when the alleged medical malpractice occurred or when the action was timely commenced against defendant Joseph F. Kurnath, M.D., approximately 2½ years later."[39] The appellate division concluded that the claims against Dr. Wengender were timely.[40] Of note is the majority's conclusion that Dr. Wengender received notice of the plaintiff's claim at the same time as Dr. Kurnath, and a dissent concluding that the third-prong of *Buran* was not satisfied.[41]

Relation-back was also addressed in *Adler v. Hooper*, where the Second Department held that application of the relation-back doctrine "would result in unfair prejudice to [Ellen] Adler" because Adler was added years after the allegedly discriminatory practice at issue in the case and had "lost the opportunity to preserve any statements" made by her deceased husband about ownership of the company involved.[42]

A trial court's application of the doctrine of laches to the relation-back doctrine was reviewed in *Stevens v. Winthrop South Nassau University Health System, Inc*.[43] In *Stevens*, the plaintiff filed a medical malpractice action against a number of health care providers in 2007.[44] In 2010, after expiration of the statute of limitations, the plaintiff sought to amend her complaint to add additional medical defendants.[45] The trial court denied the plaintiff's motion applying the doctrine of laches.[46] On appeal, the Second Department affirmed the holding of the lower court, but for a different reason—specifically, because the plaintiff could not establish the "'the 'linchpin' of the relation-back doctrine [which] is whether the new defendant had notice within the

37. *Id.*

38. *See* Buran v. Coupal, 87 N.Y.2d 173, 178, 661 N.E.2d 978, 981, 638 N.Y.S.2d 405, 408 (1995) (quoting Brock v. Bua, 83 A.D.2d 61, 69, 443 N.Y.S.2d 407, 412 (2d Dep't 1981)).

39. *Haidt*, 86 A.D.3d at 936, 927 N.Y.S.2d at 258.

40. *Id.* at 935, 927 N.Y.S.2d at 258.

41. *Id.* at 936-38, 927 N.Y.S.2d at 259-60.

42. 87 A.D.3d 633, 635-36, 928 N.Y.S. 2d 731, 733-34 (2d Dep't 2011).

43. *See generally* 89 A.D.3d 835, 835, 932 N.Y.S.2d 514, 516 (2d Dep't 2011).

44. *Id.* at 835, 932 N.Y.S.2d at 515.

45. *Id.* at 835, 932 N.Y.S.2d at 515-16.

46. *Id.* at 835, 932 N.Y.S. 2d at 516.

applicable limitations period.'"[47]

Finally, the relation-back doctrine appears available only if the plaintiff makes an "excusable" mistake in failing to name a defendant. Whether a mistake was "excusable" was at issue in *Tinch-McNeill v. Alcohol and Drug Dependency Services, Inc.*[48] The plaintiff in *Tinch-McNeill* filed suit against her employer for discrimination based upon age, gender, and race.[49] After expiration of the statute of limitations, the plaintiff sought leave to amend to add a claim against Richard Gallagher, her employer's executive director.[50] The trial court rejected the plaintiff's attempt to argue relation-back, and the Fourth Department affirmed, stating that the

> plaintiff and her attorneys knew from the time of her termination that Gallagher was the individual who made the decision to terminate her, and plaintiff offers no reason for failing to name Gallagher as a defendant in the complaint. Thus, the third-prong of the relation-back doctrine is not satisfied because it cannot be said that, 'but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against [Gallagher] as well.'[51]

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.[52]

While it is well-known that CPLR 205 can be used to toll a statute of limitations, the application of the statute to shorten a statute of limitations received appellate division review in *Kim v. Cruz*.[53] The plaintiff in *Kim* timely filed suit—for injuries arising out of a car accident—in the United States District Court for the Southern District

47. *Id.* at 836, 932 N.Y.S. 2d at 516 (quoting Alvarado v. Beth Israel Med. Ctr., 60 A.D.3d 981, 982, 876 N.Y.S.2d 147, 149 (2d Dep't 2009)).

48. 96 A.D.3d 1407, 1408, 946 N.Y.S.2d 356, 357-58 (4th Dep't 2012).

49. *Id.* at 1407, 946 N.Y.S.2d at 357.

50. *Id.* at 1408, 946 N.Y.S.2d at 358.

51. *Id.* (quoting Buran v. Coupal, 87 N.Y.2d 173, 178, 661 N.E.2d 978, 981, 638 N.Y.S.2d 405, 408 (1995)).

52. N.Y. C.P.L.R. 205(a) (McKinney 2003).

53. *See generally* 94 A.D.3d 820, 821, 941 N.Y.S.2d 869, 869 (2d Dep't 2012).

of New York.[54] When that action was dismissed for failure to prosecute, the plaintiff timely filed a negligence action in Supreme Court, Queens County.[55] The defendants moved to dismiss the Supreme Court action as time-barred because it was not filed within six months of the federal court dismissal.[56] The appellate division affirmed the trial court's rejection of the defendant's argument that the six months provided for in CPLR 205 shortened the state court statute of limitations to six months from dismissal, stating that "[w]here, as here, the statutory time limit has not expired, due to a toll or otherwise, this section [CPLR 205] cannot be applied in such a way as to shorten the period otherwise available to the plaintiff."[57]

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.[58] Some of the most commonly used time periods are six years under CPLR 213[59] and three years under CPLR 214.[60]

The CPLR 213(8) discovery-of-fraud rules were discussed in *Shalik v. Hewlett Associates, L.P.*[61] The plaintiffs in *Shalik* filed an action for judgment declaring an amendment to a partnership agreement to be void because a signature on the agreement was forged.[62] In response to the defendants' argument that the plaintiffs' claims were time-barred under CPLR 213(8), the plaintiffs alleged that they filed the action within two years of June 4, 2008, the date when the plaintiffs received an expert report opining that a signature had been falsified.[63] However, the appellate division noted that

> Shalik conceded that he initially received a copy of the Amendment on May 10, 2006, and that he 'noticed,' while preparing for an arbitration scheduled for April 9, 2008, that the decedent's signature on the Amendment differed from other examples of her signature, which caused him to retain a handwriting and documents expert to

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* (quoting U.S. Fid. & Guar. Co. v. E.W. Smith Co., 46 N.Y.2d 498, 505, 387 N.E.2d 604, 607, 414 N.Y.S.2d 672, 675 (1979)) (internal quotation marks omitted).

58. *See* N.Y. C.P.L.R. 211-218 (McKinney 2003).

59. N.Y. C.P.L.R. 213.

60. N.Y. C.P.L.R. 214.

61. *See generally* 93 A.D.3d 777, 778, 940 N.Y.S.2d 304, 306 (2d Dep't 2012).

62. *Id.* at 777, 940 N.Y.S.2d at 305.

63. *Id.* at 778, 970 N.Y.S.2d at 305.

evaluate the signature.[64]

The appellate division affirmed the trial court's conclusion that the clock started running when the plaintiff became suspicious about the authenticity of the signature (i.e., when the plaintiff could "with reasonable diligence have discovered [the fraud]"[65]), stating that the "plaintiffs were required to commence this action, at the latest, on or before April 9, 2010."[66]

When the plaintiff should have discovered a fraud was discussed in *Vilsack v. Meyer*.[67] While the facts of the case are not unique, the appellate division reminded counsel that "[w]hether or not a plaintiff should have discovered an alleged fraud is an objective test," and that "[o]rdinarily, an inquiry into when a plaintiff should have discovered an alleged fraud presents a mixed question of law and fact."[68]

CPLR 214(3) provides a three-year statute of limitations for an action for conversion or replevin.[69] Accrual under CPLR 214(3) was at issue in *In re Chung Li*.[70] The plaintiff in *Chung Li* alleged that the defendant converted the plaintiff's decedent's stock interests in three family business.[71] The defendant moved to dismiss the lawsuit as untimely under CPLR 214(3).[72] The trial court denied the defendant's motion.[73] As the defendant failed to meet her burden, the appellate division affirmed but also stated that "[a]ccrual runs from the date the conversion takes place and not from discovery or the exercise of diligence to discover."[74]

CPLR 214(4) provides a three-year statute of limitations for injury to property.[75] Whether the limitations period for injury to property cannot be extended by mischaracterizing the allegations in the complaint was addressed in *Village of Lindenhurst v. J.D. Posillico,*

64. *Id.*, 940 N.Y.S.2d at 305-06.

65. N.Y. C.P.L.R. 213(8).

66. *Shalik*, 93 A.D.3d at 778, 940 N.Y.S.2d at 306.

67. *See generally* 96 A.D.3d 827, 946 N.Y.S.2d 595 (2d Dep't 2012).

68. *Id.* at 828, 946 N.Y.S.2d at 597 (citations omitted).

69. *See* N.Y. C.P.L.R. 214(3).

70. *See generally* 95 A.D.3d 881, 942 N.Y.S.2d 887 (2d Dep't 2012).

71. *Id.* at 881, 942 N.Y.S.2d at 888.

72. *Id.*, 942 N.Y.S.2d at 887-88.

73. *Id.* at 881-82, 942 N.Y.S.2d at 888.

74. *Id.* (quoting Vigilant Ins. Co. of Am. v. Hous. Auth. of El Paso, Tex., 87 N.Y.2d 36, 44, 660 N.E.2d 1121, 1126, 637 N.Y.S.2d 342, 347 (1995)) (internal quotation marks omitted).

75. *See* N.Y. C.P.L.R. 214(4) (McKinney 2003).

Inc.[76] The plaintiff in *Lindenhurst* filed suit to recover damages for a "continuing public nuisance" stemming from poor public sewer construction.[77] The defendant moved pursuant to CPLR 214(4) to dismiss the complaint as time-barred.[78] The trial court agreed with the defendant, and the appellate division affirmed, stating that the cause of action, regardless of how it was characterized in the complaint, was actually one for injury to property and, in turn, was untimely.[79]

CPLR 214(6) provides a three year statute of limitations for lawsuits sounding in malpractice, other than medical, dental, and podiatric malpractice (e.g., legal malpractice).[80] When the three-year statute of limitations expires, and the concept of "continuous representation,"[81] was discussed by the Second Department in *Rupolo v. Fish*.[82] The plaintiffs in *Rupolo* brought legal malpractice and fraud claims against their attorneys.[83] The defendants moved to dismiss the legal malpractice action as time-barred, but the trial court did not agree.[84] On appeal, the appellate division held that the action was untimely because the attorney-client relationship ended in the summer of 2005–more than three years before the lawsuit was filed on October 31, 2008.[85] Of note, the appellate division held that "the fact that the defendants received a telephone call from the plaintiffs' new counsel in November 2005, during which the defendants provided requested information to new counsel, did not toll the running of the statute of limitations until that date."[86]

The Fourth Department also weighed in on a legal malpractice case in *R. Brooks Associates, Inc. v. Harter Secrest & Emery, LLP*.[87] In *R. Brooks*, the defendant argued in a motion for summary judgment that the plaintiff's claims were time-barred under CPLR 214(6).[88] The trial

76. 94 A.D.3d 1101, 1101, 943 N.Y.S.2d 553, 553 (2d Dep't 2012).

77. *Id.*, 943 N.Y.S.2d at 554.

78. *Id.*

79. *Id.*

80. *See* N.Y. C.P.L.R. 214(6).

81. *See, e.g.*, Lazzaro v. Kelly, 87 A.D.2d 975, 976, 450 N.Y.S.2d 102, 105 (4th Dep't 1982), *aff'd*, 57 N.Y.2d 630, 439 N.E.2d 868, 454 N.Y.S.2d 59 (1982).

82. *See generally* 87 A.D.3d 684, 928 N.Y.S.2d 596 (2d Dep't 2011).

83. *Id.* at 685-86, 928 N.Y.S.2d at 598.

84. *Id.* at 685, 928 N.Y.S.2d at 598.

85. *Id.*, 928 N.Y.S.2d at 597.

86. *Id.* (citations omitted).

87. *See generally* 91 A.D.3d 1330, 1330, 937 N.Y.S.2d 789, 789 (4th Dep't 2012).

88. *Id.* at 1330, 937 N.Y.S.2d at 790.

court denied the motion.[89] On appeal, the Fourth Department analyzed the plaintiff's claim of continuous representation, stating that:

> the running of the limitations period is tolled during the time that an attorney continues to represent a client on the matter that is the subject of the malpractice action because the client must be able 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.[90]

With this premise in mind, the court reviewed the plaintiff's proof and concluded that the trial court had erred because,

> although plaintiff submitted bills from defendant for legal work performed within three years of the commencement of the action, [the plaintiff] failed to establish that the bills were for work on the matter that was the subject of the alleged malpractice. Indeed, the evidence submitted by defendant established that the last work that it performed for plaintiff with respect to the subject of the alleged malpractice occurred in January or February 2001, and plaintiff failed to submit evidence raising a triable issue of fact whether the work performed after that time was related to the alleged malpractice.[91]

As continuous treatment was unavailable, the trial court decision was reversed, and the legal malpractice action was dismissed.[92]

CPLR 214-a sets forth the time period for commencement of medical, dental, and podiatric malpractice actions (i.e., two-and-a-half years from the act or omission giving rise to the claim).[93] While equitable estoppel may be available to circumvent the deadline, the argument was rejected by the Second Department in *Clark v. Ravikumar*.[94] The plaintiff in *Clark* filed a medical malpractice suit against a number of defendants.[95] After expiration of the one-year-and-ninety-day statute of limitations set forth in General Municipal Law section 50-i, the plaintiff sought to amend the complaint to add Faisal

89. *Id.*

90. *Id.* at 1330-31, 937 N.Y.S.2d at 790 (quoting Williamson v. PricewaterhouseCoopers, LLP, 9 N.Y.3d 1, 9, 872 N.E.2d 842, 846, 840 N.Y.S.2d 730, 734 (2007)) (internal quotations marks omitted).

91. *R. Brooks Assocs., Inc.*, 91 A.D.3d at 1331, 937 N.Y.S.2d at 790.

92. *Id.* at 1330, 937 N.Y.S.2d at 790.

93. *See* N.Y. C.P.L.R. 214-a (McKinney 2003).

94. 90 A.D.3d 971, 971, 935 N.Y.S.2d 633, 633 (2d Dep't 2011).

95. *Id.* at 971-72, 935 N.Y.S.2d at 634.

Aziz, M.D.[96] In support of the timeliness of the claim, the plaintiff argued that Dr. Aziz should have been equitably estopped from raising the statute of limitations as an affirmative defense because of his affirmative wrongdoing.[97] According to the plaintiff, Dr. Aziz misrepresented his role during the surgery at issue by writing in the operative report that he was the "assistant surgeon" when, in fact, he was the physician who removed the plaintiff's appendix.[98] The Second Department noted the availability of equitable estoppel as an "extraordinary remedy . . . where the defendant's affirmative wrongdoing contributed to the delay between accrual of the cause of action and commencement of the legal proceeding."[99] However, the appellate division disagreed with the trial court and dismissed the action as untimely because

> Aziz's identification of himself as an 'assistant surgeon' in the operative report was not an 'affirmative wrongdoing' under the circumstances of this case, nor should it have contributed to the delay in commencing the action against Aziz . . . . Rather, since Aziz identified himself as having participated in the surgery, the plaintiff was under a duty to inquire and ascertain all of the relevant facts regarding Aziz's role in the surgery.[100]

CPLR 217 provides a four-month statute of limitations for commencement of a suit against a body or officer, such as a union.[101] Whether the doctrine of continuous representation can be applied in this context to toll the statute of limitations was at issue in *Mercone v. Monroe County Deputy Sheriffs' Association, Inc*.[102] The plaintiff in *Mercone*, a former Monroe County Deputy Sheriff, was discharged from his position on December 15, 2004.[103] In February of 2005, the plaintiff learned that his union failed to file a grievance within ten days of his discharge, as required by the applicable collective bargaining agreement.[104] A grievance then submitted on behalf of the plaintiff was unsuccessful.[105] After a lawsuit for breach of fair representation was

96. *Id.* at 972, 935 N.Y.S.2d at 634.
97. *Id.*, 935 N.Y.S.2d at 635.
98. *Id.* at 972, 935 N.Y.S.2d at 634.
99. *Clark*, 90 A.D.3d at 972, 935 N.Y.S.2d at 635.
100. *Id.* (internal citations omitted).
101. *See* N.Y. C.P.L.R. 217 (McKinney 2013).
102. *See generally* 90 A.D.3d 1698, 936 N.Y.S.2d 826 (4th Dep't 2011).
103. *Id.* at 1698, 936 N.Y.S.2d at 828.
104. *Id.*
105. *Id.*

commenced on August 9, 2005, the defendant sought dismissal of the case as untimely under CPLR 217, and its motion was granted by the trial court.[106]

On appeal, the Fourth Department notes that the "plaintiff suffered actual harm when defendant failed to file the grievance on or before December 30, 2004, which is 10 business days after he was discharged."[107] The appellate division also rejected the plaintiff's attempt to invoke the continuous representation doctrine to toll the four-month statute of limitations, stating:

> [c]ontrary to plaintiff's contention, the statute of limitations was not tolled by the continuous representation doctrine. That doctrine, 'although originally derived from the continuous treatment concept in medical malpractice cases, has also been held applicable to professionals other than physicians.' For statute of limitations purposes, the Court of Appeals has defined professionals as those whose employment qualifications 'include extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards . . . Additionally, a professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise clients.' Even assuming, arguendo, that the relationship between plaintiff and [his union] is one of trust and confidence with a duty to counsel and advise, we conclude that the record fails to establish that [the union's] representatives held any of the other employment qualifications, and thus we decline to expand the continuous representation doctrine to include union representatives.[108]

B. Article 3: Jurisdiction and Service

1. Long-Arm Jurisdiction

CPLR 302(a) provides that a court may exercise jurisdiction over a non-domiciliary if the cause of action arises out of the non-domiciliary's contacts with New York, such as transacting business within New York, committing a tort in New York, or committing a tort

106. *Id.* at 1699, 936 N.Y.S.2d at 828.

107. *Mercone*, 90 A.D.3d at 1699, 936 N.Y.S.2d at 828.

108. *Id.* at 1699-1700, 936 N.Y.S.2d at 828-29 (first alteration in original) (quoting Zaref v. Berk & Michaels, P.C., 192 A.D.2d 346, 347, 595 N.Y.S.2d 772, 773-74 (1st Dep't 1993); Chase Scientific Research, Inc. v. NIA Grp., Inc., 96 N.Y.2d 20, 29, 749 N.E.2d 161, 166, 725 N.Y.S.2d 592, 597 (2001)).

outside of New York that causes injury to a person or property within New York.[109]

Defining the situs of an injury remains a challenge in the era of e-commerce, email, blogging, text messaging, etc. Where an injury occurred was reviewed at length by the Court of Appeals in *SPCA of Upstate New York, Inc. v. American Working Collie Association*.[110] The plaintiff in *SPCA*, a New York corporation, filed a lawsuit alleging that the American Working Collie Association ("AWCA") and Jean Levitt, its Vermont-based president, published defamatory statements on the AWCA's website about the treatment of rescue collies at one of the plaintiff's facilities.[111] The defendants' contact with New York was limited to: (1) the AWCA sent $1,000 to the plaintiff as a donation, (2) Levitt visited one of the plaintiff's facilities in New York for less than one hour to deliver leashes and collars and, while present, wrote a personal check to cover costs for veterinary care, (3) Levitt telephoned the plaintiff from Vermont, and (4) Levitt made a second hour-long trip to one of the plaintiff's facilities in New York.[112] At the time the statements were posted, the AWCA had members throughout the country, including thirteen in New York who volunteered on weekends to provide care to the collies at the plaintiff's facility.[113]

After allegedly defamatory postings were made on the AWCA website beginning on January 13, 2008, the plaintiff filed suit.[114] The defendants moved to dismiss the action for lack of personal jurisdiction under CPLR 302.[115] The trial court denied the defendants' motion, but the appellate division reversed, stating that "given New York's 'narrow approach' to long-arm jurisdiction where defamation cases are concerned, defendants' contacts with the state were insufficient to support a finding of personal jurisdiction."[116]

The Court of Appeals granted leave to appeal to review the legal significance, if any, of the defendants' contacts with New York and explained that

> [w]hen determining whether the necessary substantial relationship

109. *See* N.Y. C.P.L.R. 302(a) (McKinney 2011).

110. *See generally* 18 N.Y.3d 400, 963 N.E.2d 1226, 940 N.Y.S.2d 525 (2012).

111. *Id.* at 402, 963 N.E.2d at 1227, 940 N.Y.S.2d at 526.

112. *Id.* at 402-03, 963 N.E.2d at 1227-28, 940 N.Y.S.2d at 526-27.

113. *Id.* at 402, 963 N.E.2d at 1227, 940 N.Y.S.2d at 526.

114. *Id.* at 403, 963 N.E.2d at 1228, 940 N.Y.S.2d at 527.

115. *SPCA of Upstate N.Y., Inc.*, 18 N.Y.3d at 403, 963 N.E.2d at 1228, 940 N.Y.S.2d at 527.

116. *Id.*

> exists between a defendant's purposeful activities and the transaction giving rise to the defamation cause of action, we have considered whether the relationship between the activities and the allegedly offending statement is too diluted. To the contrary, where the contacts are more circumscribed and not directly related to the defamatory statement, defendants have prevailed.[117]

When reversing the appellate division, the Court of Appeals noted:

> Here, defendants' activities in New York were quite limited. Levitt's three phone calls and two short visits–totaling less than three hours–in addition to the donation of cash and leashes, do not constitute purposeful activities related to the asserted cause of action that would justify bringing her before the New York courts. Moreover, it is of importance that the statements were not written in or directed to New York. While they were posted on a medium that was accessible in this state, the statements were equally accessible in any other jurisdiction. Further, there is no substantial relationship between the allegedly defamatory statements and defendants' New York activities.[118]

Judge Pigott dissented in a separate opinion, in which Judges Graffeo and Smith concurred,[119] and reached the conclusion that the defendants' contacts with New York were sufficient because while

> Levitt's visits [to New York] may have been brief is irrelevant; the AWCA conducted a significant number of 'purposeful activities' in New York, such that they could hardly be classified as 'quite limited,' particularly in light of the monies and items donated and the services provided. Nor can it be said that there was no 'substantial relationship' between these 'purposeful activities' and Levitt's alleged defamatory statements.[120]

The use of electronic media as a basis for jurisdiction was also reviewed by the Fourth Department in *LHR, Inc. v. T-Mobile USA, Inc.*[121] The plaintiff in *LHR* was a debt collection agency and New York corporation that filed a breach-of-contract action arising out of a contract between it and SunCom, a Delaware corporation that was wholly-owned by T-Mobile, a Delaware corporation.[122] Pursuant to the

117. *Id.* at 403-04, 963 N.E.2d at 1228-29, 940 N.Y.S.2d at 527-28 (citations omitted).

118. *Id.* at 405, 963 N.E.2d at 1229, 940 N.Y.S.2d at 528.

119. *Id.* at 406-08, 963 N.E.2d at 1230-31, 940 N.Y.S.2d at 529-30.

120. *SPCA of Upstate N.Y., Inc*., 18 N.Y.3d at 407, 963 N.E.2d at 1231, 940 N.Y.S.2d at 530.

121. *See generally* 88 A.D.3d 1301, 930 N.Y.S.2d 731 (4th Dep't 2011).

122. *Id.* at 1302, 930 N.Y.S.2d at 733.

contract, the plaintiff would purchase delinquent customer accounts from SunCom, which was contractually obligated, in turn, to deliver information about the accounts to the plaintiff in New York.[123] In practice, SunCom delivered the information to the plaintiff by email.[124] In its motion to dismiss, the defendant argued that the trial court lacked jurisdiction under CPLR 302 because it was a Delaware company with no New York contacts.[125] The trial court denied the defendant's motion and the appellate division affirmed, stating that the defendant was properly before New York's courts under the long-arm statute because the twenty-eight purchase agreements "contemplated the delivery of goods into New York" and the plaintiff "submitted evidence in opposition to the motion demonstrating that the information pertaining to the accounts and all records relating thereto were delivered via email to plaintiff's office in New York."[126]

2. Commencing an Action

CPLR 304, 305, 306-a, and 306-b require a plaintiff to purchase an index number and file a petition or summons and complaint with the county clerk to commence a lawsuit before timely serving the defendant.[127] Failing to follow the rules may be fatal to claim.

In *Peterkin v. Houses*, the Second Department reviewed the significance of noncompliance with the plain language of CPLR 304.[128] The plaintiff in *Peterkin* endeavored to start a special proceeding under CPLR Article 78 to review a determination issued by the New York City Housing Authority.[129] After suit was commenced, the defendant moved to dismiss because the plaintiff failed to file the petition and for lack of personal jurisdiction.[130] The trial court denied the defendant's motion and the appellate division reversed, stating that the "proceeding" should have been dismissed because the plaintiff's "failure to file the initial papers necessary to institute a proceeding constitutes a nonwaivable jurisdictional defect rendering the proceeding a nullity."[131]

123. *Id.* at 1302-03, 930 N.Y.S.2d at 733-34.

124. *Id.* at 1303, 930 N.Y.S.2d at 734.

125. *Id.* at 1302, 930 N.Y.S.2d at 733.

126. *LHR, Inc.*, 88 A.D.3d at 1302-03, 930 N.Y.S.2d at 733-34.

127. *See* N.Y. C.P.L.R. 304, 305, 306-a, 306-b (McKinney 2012).

128. *See generally* 87 A.D.3d 649, 928 N.Y.S.2d 474, 474 (2d Dep't 2011).

129. *Id.* at 650, 928 N.Y.S.2d at 474.

130. *Id.*

131. *Id.* (quoting One Beacon Ins. Co. v. Daly, 7 A.D.3d 717, 718, 776 N.Y.S.2d 829, 829 (2d Dep't. 2004)) (internal quotation marks omitted).

While CPLR 306-b requires service to be completed within 120 days from when the petition or summons and complaint are filed, additional time can be secured from the trial court.[132] However, there are limits.

These limits were discussed in *Bahadur v. New York State Department of Correctional Services*.[133] The plaintiff in *Bahadur* filed suit for violations of civil rights and wrongful death.[134] There was motion practice, including a request by the plaintiff to extend the time to serve the summons and amended complaint upon the defendants.[135] The trial court denied the plaintiff's request and the appellate division affirmed, reasoning that "[i]t is undisputed that the plaintiff failed to demonstrate reasonable diligence in attempting service, which was necessary to establish good cause under CPLR 306-b."[136] In addition,

> the plaintiff failed to establish that an extension of time was warranted in the interest of justice, since she exhibited an extreme lack of diligence in attempting to effect service, made only a single unsuccessful effort to effect service two days prior to the expiration of the 120-day period of CPLR 306-b, failed to seek an extension of time until nearly two months after the defendants had moved to dismiss for lack of timely service, and did not make any additional showing beyond her attorney-verified amended complaint in support of the merits of her causes of action.[137]

CPLR 308 sets forth the manner in which a natural person is to be personally served.[138] As a general rule, delivery of process to the defendant, or in lieu of the defendant to a person of suitable age and discretion on behalf of the defendant, is preferred over "nail and mail." Inadequate attempts to serve the person before attempting "nail and mail" may render service by the latter invalid.

The Second Department reviewed diligence in attempting service in *Serraro v. Staropoli*.[139] The plaintiff in *Serraro* filed a summons and complaint for personal injuries and "completed" service by nail and

132. *See* N.Y. C.P.L.R. 306-b.
133. *See generally* 88 A.D.3d 629, 930 N.Y.S.2d 631 (2d Dep't 2011).
134. *Id.* at 629, 930 N.Y.S.2d at 632.
135. *Id.* at 629-30, 930 N.Y.S.2d at 632-33.
136. *Id.* at 630, 930 N.Y.S.2d at 633 (citations omitted).
137. *Id.* (citations omitted).
138. *See* N.Y. C.P.L.R. 308 (McKinney 2010).
139. *See generally* 94 A.D.3d 1083, 943 N.Y.S.2d 201 (2d Dep't 2012).

mail.[140] The defendants did not answer the complaint, and a default judgment was entered.[141] Thereafter, the defendants' attempt to vacate the default judgment was denied by a trial court that considered service to be valid.[142]

The appellate division reviewed the record to determine if the plaintiff used "due diligence" before turning to "nail and mail, and reversed the trial court."[143] Apparently, "the [plaintiff's] process server attempted to personally deliver the summons and complaint to each defendant at their shared home on four different weekdays: March 6, 2007, at 8:00 A.M., March 21, 2007, at 6:50 P.M., April 4, 2007, at 5:10 P.M., and April 5, 2007, at 4:05 P.M."[144] The server was unsuccessful in completing personal service.[145] The server then "affixed a copy of each summons and complaint to the front door of the defendants' shared home and mailed a copy to that same address."[146] When holding that the plaintiff had not satisfied the "due diligence" requirement of CPLR 308(4), the Court noted that

> the process server did not make any inquiries about the defendants' work schedules or their respective business addresses. He simply reviewed the residential address on each summons and complaint, and made four attempts at personal service at that address. The plaintiffs knew that the defendant Nicholas Staropoli owned and operated a service station less than a mile from the parties' neighboring homes, but inexplicably, the process server was unaware of this and he never attempted to personally deliver a summons and complaint at that location. Furthermore, each of the process server's attempts at personal service was made on weekdays during hours when it reasonably could have been expected that the defendants were either working or in transit to work.[147]

In situations without personal service, parties often litigate the issue of whether the defendant actually received a copy of the summons and complaint by mail pursuant to CPLR 308(2). In *U.S. National Bank Association v. Melton*, the Second Department discussed what a defendant seeking relief from a default judgment must show when

140. *Id.* at 1083-85, 943 N.Y.S.2d at 202-04.

141. *Id.* at 1083-84, 943 N.Y.S.2d at 202.

142. *Id.* at 1084, 943 N.Y.S.2d at 203.

143. *Id.* at 1084-85, 943 N.Y.S.2d at 203-04.

144. *Serraro*, 94 A.D.3d at 1085, 943 N.Y.S.2d at 203.

145. *Id.*

146. *Id.*

147. *Id.* at 1085, 943 N.Y.S.2d at 203-04 (citations omitted) (internal quotation marks omitted) (brackets omitted).

arguing that service was improper.[148] The plaintiff in *U.S. National Bank* attempted service at the defendant's home, served a co-tenant, and sent a copy of the pleading by mail.[149] The defendant did not answer and, sometime later, attempted to vacate a default by submitting "an affidavit stating, in conclusory fashion, that he was never personally served with a copy of the summons and complaint and that he did not have 'a precise recollection' as to whether he received a copy of the summons and complaint in time to defend against the action."[150] The defendant's attorney also stated in an affirmation that the defendant did not speak English and that a hearing was necessary to evaluate timely service.[151] The trial court denied the defendant's motion, and the appellate division affirmed, stating that the "affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308 (2), and the defendant's unsubstantiated denial of receipt was insufficient to rebut the presumption of proper service."[152] Furthermore, the court noted that "the affirmation of an attorney which is not based upon personal knowledge of the facts is of no probative or evidentiary significance."[153]

CPLR 317 enables a person not personally served with process the opportunity to defend an action within one year after the party obtains knowledge of entry of the judgment, provided the defense is within five years after the judgment was entered.[154] However, litigants often forget that relief from a judgment by motion is not automatic.

CPLR 317 was at issue in *Wassertheil v. Elburg, LLC*, where a defendant sought to vacate a default judgment by arguing that it did not receive the summons and complaint.[155] The trial court excused the default judgment, and the appellate division reversed because "[t]he mere denial of receipt of the summons and complaint is . . . insufficient to establish lack of actual notice for the purpose of CPLR 317."[156] In order to benefit from CPLR 317, "a party must still demonstrate, and

148. *See generally* 90 A.D.3d 742, 934 N.Y.S.2d 352 (2d Dep't 2011).

149. *Id.* at 743, 934 N.Y.S.2d at 352-53.

150. *Id.*, 934 N.Y.S.2d at 353.

151. *Id.*

152. *Id.* (citations omitted).

153. *U.S. Nat'l Bank Ass'n*, 90 A.D.3d at 742, 934 N.Y.S.2d at 353 (citations omitted).

154. *See* N.Y. C.P.L.R. 317 (McKinney 2010).

155. *See* 94 A.D.3d 753, 941 N.Y.S.2d 679 (2d Dep't 2012).

156. *Id.* at 754, 941 N.Y.S.2d at 680-81 (citations omitted) (internal quotation marks omitted).

the Court must find, that the party did not receive actual notice of the summons and complaint in time to defend the action."[157]

C. Article 5: Venue

1. Grounds for Venue Change

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 [the] witnesses and . . . ends of justice will be promoted by the change."[158]

What a party must show to change venue was at issue in *Pruitt v. Patsalos*.[159] The Second Department stated that "[t]o obtain a change of venue pursuant to CPLR 510(2), a movant is required to produce admissible factual evidence demonstrating a strong possibility that an impartial trial cannot be obtained in the county where venue was properly placed."[160] In reversing the trial court's denial of the plaintiff's request to transfer venue from Orange County to Dutchess County, the appellate division held that the plaintiff satisfied his burden by producing evidence that "the defendant is a retired Orange County Supreme Court Justice, who presided in that court for more than two decades, that his relative is a retired Orange County Court Judge, and that the defendant's daughter is a Support Magistrate in the Orange County Family Court."[161]

2. Timing for Venue Change

CPLR 511 requires a party seeking to change venue to serve a demand that venue be changed to a proper county.[162] Thereafter, the defendant may move to change venue.[163] In opposition to a motion, the plaintiff must submit an affidavit establishing either that the present venue is proper or the venue proposed by the defendant is improper.[164]

The timing of a defendant's motion to change venue was at issue in *Valley Psychological, P.C. v. Government Employees Insurance*

157. *Id.*, 941 N.Y.S.2d at 680 (citations omitted) (internal quotation marks omitted).
158. N.Y. C.P.L.R. 510 (McKinney 2006).
159. *See generally* 96 A.D.3d 924, 946 N.Y.S.2d 486 (2d Dep't 2012).
160. *Id.* at 924, 946 N.Y.S.2d at 487 (citations omitted).
161. *Id.*
162. *See* N.Y. C.P.L.R. 511(b).
163. *See id.*
164. *See id.*

Company.[165] The defendant in Valley Psychological answered the complaint with twenty-six affirmative defenses, but the defendant failed to include a demand to change venue.[166] Defense counsel was replaced, and new counsel submitted an amended answer that contained a venue change demand, together with a notice demanding that venue be transferred from Albany County to Nassau County.[167] On motion, the trial court concluded that the demand to change venue was untimely because it was not in the original answer.[168] The Third Department analyzed CPLR 511(b) and disagreed, stating that the

> defendant had the right to file an amended answer to the complaint, and since that amended answer superceded its prior answer, defendant had the right to serve with it a demand for a change of venue. Since defendant's motion to change venue was filed within 15 days of the service of that demand

it was timely and should not have been denied.[169]

Change of venue pursuant to CPLR 511 was also addressed by the Court of Appeals in *Simon v. Usher*.[170] Specifically, whether a defendant who intends to change venue is entitled to a five-day extension of the fifteen-day window contained in CPLR 511(b).[171] The plaintiff in *Simon* filed a medical malpractice lawsuit in Supreme Court, Bronx County on July 17, 2009.[172] On August 20, 2009, the defendants served their answers to the complaint by mail, together with a demand to change venue to Westchester County.[173] On September 9, 2009–twenty days later–the defendants moved to change venue.[174] The Supreme Court granted the defendants' motion.[175] The appellate division reversed because the motion was not made on or before September 4, 2009 (i.e., fifteen days from the demand).[176] The Court of Appeals reversed, stating that

165. *See generally* 95 A.D.3d 1546, 944 N.Y.S.2d 785 (3d Dep't 2012).
166. *Id.* at 1546, 944 N.Y.S.2d at 786.
167. *Id.* at 1546-47, 944 N.Y.S.2d at 786.
168. *Id.* at 1547, 944 N.Y.S.2d at 786.
169. *Id.* (internal citations omitted).
170. *See generally* 17 N.Y.3d 625, 958 N.E.2d 540, 934 N.Y.S.2d 362 (2011).
171. *Id.* at 627, 958 N.E.2d at 541, 934 N.Y.S.2d at 363.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Simon*, 17 N.Y.3d at 627, 958 N.E.2d at 541, 934 N.Y.S.2d at 363.
176. *Id.* at 627-30, 958 N.E.2d at 541, 934 N.Y.S.2d at 363.

> [h]ere, defendants who served their motion papers by mail 20 days after they served their demand to change venue are entitled to a five-day extension of the 15-day period prescribed in CPLR 511 (b). Plaintiffs . . . contend that defendants cannot rely upon section 2103 (b) (2) for the five-day extension because the motion did not constitute response papers. Section 2103 (b) contains no language restricting its application to instances where a party is responding to papers served by an adversary. Simply put, defendants' motion papers are not initiatory and, because the demand was served by mail, defendants were entitled to the benefit of section 2103 (b) (2)'s five-day extension.[177]

D. Article 6: Joinder of Claims, Consolidation, and Severance

1. Consolidation

CPLR 602 empowers courts to consolidate for trial matters that share common questions of law or fact.[178]

Whether a court can change venue without a request from the parties was discussed by the Second Department in *Clark v. Clark*.[179] The short answer is yes, as "[r]egardless of whether a specific request is made to the court to change venue, the court may change venue to the appropriate forum in connection with a motion to consolidate or for a joint trial pursuant to CPLR 602 (a)."[180]

E. Article 10: Parties

1. Necessary Joinder

Some cases cannot proceed unless the entities necessary to ensure that the proceeding provides "complete relief" are parties to the action.[181] Considerable ink has been spilled over who is a necessary party under CPLR 1001(a), including in a recent decision from the Court of Appeals in *Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc*.[182]

The plaintiff in *Swezey* was a member of a class of victims of human rights abuses committed by the former president of the Phillipines, Ferdinand E. Marcos, who commenced a CPLR 5225

177. *Id.* at 628-29, 958 N.E.2d at 542, 934 N.Y.S.2d at 364.
178. *See* N.Y. C.P.L.R. 602 (McKinney 2006).
179. *See generally* 93 A.D.3d 812, 941 N.Y.S.2d 192 (2d Dep't 2012).
180. *Id.* at 816, 941 N.Y.S.2d at 196 (citations omitted).
181. *See* N.Y. C.P.L.R. 1001.
182. *See generally* 19 N.Y.3d 543, 973 N.E.2d 703, 950 N.Y.S.2d 293 (2012).

turnover proceeding, obtained an almost $2,000,000,000 federal court judgment, and was attempting to collect upon the judgment from a brokerage account in New York.[183] At or about the same time, the Republic of the Philippines ("Republic") and the Presidential Commission on Good Government ("PCGG") were also attempting to recover funds improperly transferred by Marcos, including $2,000,000 to the same brokerage account in New York.[184] The plaintiff did not make the Republic or PCGG party to the CPLR 5225 turnover proceeding filed in New York State Supreme Court.[185] The defendants moved to dismiss the action because the Republic and PCGG were necessary parties, but they could not be joined because of sovereign immunity.[186] The trial court disagreed, and the appellate division reversed.[187]

The Court of Appeals set out a five-factor test for determining whether a party is "necessary," including whether the plaintiff has another remedy available if the case is dismissed, prejudice to the absent defendant(s), whether prejudice could have been avoided, whether the court can craft protective language, and whether an effective judgment can be rendered without the party.[188] As part of its analysis, the Court noted that "no single factor is determinative in the discretionary analysis of whether an action may proceed in the absence of a necessary party who is not subject to mandatory jurisdiction."[189] When considering each element, the Court noted that the plaintiffs do not have an alternative remedy available, that the Republic would be prejudiced by the outcome of the Supreme Court proceeding, that a protective order was not feasible, and that an effective judgment could not be rendered without the Republic.[190] As such, the Court ruled that "[b]ased on our balancing of the five factors delineated in CPLR 1001 (b), we conclude that this case 'cannot be decided without the presence of the foreign government.'"[191]

183. *Id.* at 546-48, 973 N.E.2d at 704-06, 950 N.Y.S.2d at 294-96.

184. *Id.* at 548, 973 N.E.2d at 706, 950 N.Y.S.2d at 296.

185. *Id.* at 549, 973 N.E.2d at 707, 950 N.Y.S.2d at 297.

186. *Id.* at 548, 973 N.E.2d at 706, 950 N.Y.S.2d at 296.

187. *Swezey*, 19 N.Y.3d at 549-50, 973 N.E.2d at 707, 950 N.Y.S.2d at 297.

188. *Id.* at 551, 973 N.E.2d at 708, 950 N.Y.S.2d at 298.

189. *Id.* (citing Red Hook/Gowanus Chamber of Commerce v. N.Y.C. Bd. of Standards & Appeals, 5 N.Y.3d 452, 459, 839 N.E.2d 878, 881-82, 805 N.Y.S.2d 525, 528-29 (2005)).

190. *Swezey*, 19 N.Y.3d at 552-54, 973 N.E.2d at 708-10, 950 N.Y.S.2d at 298-300.

191. *Id.* at 554, 973 N.E.2d at 710, 950 N.Y.S.2d at 300 (quoting Lamont v. Travelers

2. Unknown Parties

CPLR 1024 is the "John Doe" provision of the CPLR, which enables a party that does not know the name or identity of an entity to proceed against the entity "by designating so much of [the entity's] name and identity as is known."[192]

The boundaries of CPLR 1024 were addressed by the Second Department in *Temple v. New York Community Hospital of Brooklyn.*[193] The plaintiff in *Temple* filed suit for medical malpractice naming the Hospital, the City of New York, and John Doe as defendants.[194] While the summons and complaint were filed on June 7, 2005, the plaintiff did not move to substitute Alexandr Ilyukin and Metrocare for the John Doe defendant until fifteen months after expiration of the statute of limitations.[195] The trial court granted the plaintiff's motion to amend the summons and complaint, but the Second Department disagreed, stating that CPLR 1024 requires the plaintiff to "exercise due diligence to discover the identity of the John Doe defendants prior to the expiration of the statute of limitations."[196] As there was no evidence in the record that the plaintiff attempted to learn the identity of the John Doe defendants sooner (e.g., by Freedom of Information Law request or other discovery device), CPLR 1024 was unavailable.[197]

F. Article 11: Poor Persons

1. Privileges of Poor Persons

CPLR 1102 provides that trial and hearing transcripts must be provided free of charge to a party that has been permitted to appeal as a poor person, but they may be provided without charge for proceedings other than an appeal.[198]

The operation of CPLR 1102 was at issue in *Gkanios v. Gkanios.*[199] The defendant in *Gkanios* sought a copy of a divorce hearing transcript, which the trial court ordered the plaintiff to provide

Ins. Co., 281 N.Y. 362, 373, 24 N.E.2d 81, 86 (1939)).

192. N.Y. C.P.L.R. 1024 (McKinney 2012).

193. *See generally* 89 A.D.3d 926, 933 N.Y.S.2d 321 (2d Dep't 2011).

194. *Id.* at 927, 933 N.Y.S.2d at 322.

195. *Id.*

196. *Id.*, 933 N.Y.S.2d at 322-23 (citing Comice v. Justin's Rest., 78 A.D.3d 641, 642, 909 N.Y.S.2d 670, 671 (2d Dep't 2010)) (citation omitted).

197. *Temple*, 89 A.D.3d at 928, 933 N.Y.S.2d at 323.

198. *See* N.Y. C.P.L.R. 1102(b) (McKinney 2012).

199. *See generally* 88 A.D.3d 644, 930 N.Y.S.2d 637 (2d Dep't 2011).

to the defendant.[200] The plaintiff argued that she could not afford the transcript.[201] The trial court granted the defendant's motion to dismiss the complaint based upon the plaintiff's failure to provide the transcript being abandonment.[202] On appeal, the appellate court noted that "the Supreme Court improvidently exercised its discretion in denying the plaintiff's request for a free transcript of the August and September 2008 hearing without first inquiring into the plaintiff's finances" to determine if the plaintiff had maintained her poor person status, in which case the court "should have provided her with a free transcript."[203] The matter was remanded for a determination as to the plaintiff's financial situation at the time of the hearing.[204]

G. Article 13-A: Proceeds of a Crime—Forfeiture

1. Forfeiture Actions

Pursuant to CPLR 1311, a civil action may be commenced against a criminal to recover the proceeds of a crime, the instrumentality of a crime, or to recover a money judgment in an amount equivalent in value to the property constituting the proceeds of a crime.[205]

In *People v. McCoy*, the specifics of a forfeiture proceeding were reviewed by the Fourth Department.[206] The defendant in *McCoy* was arrested for selling cocaine to an informant for $80 and pleaded guilty.[207] Part of the plea was that he would forfeit $5,000 in cash.[208] In connection with sentencing, the defendant was asked to forfeit the car he was driving when he was arrested.[209] The defendant's aunt then posted $5,000 in cash for his bail, and the defendant signed a waiver that stated "he may become liable for the forfeiture of $5,000 and his vehicle due to his 'action' and stated that, to avoid a lawsuit filed against him pursuant to CPLR Article 13, he agreed to forfeit $5,000 and his vehicle to the Geneva Police Department."[210] The People did

200. *Id.* at 645, 930 N.Y.S.2d at 638.
201. *Id.*
202. *Id.* at 645-46, 930 N.Y.S.2d at 638.
203. *Id.* at 646, 930 N.Y.S.2d at 639.
204. *Gkanios*, 88 A.D.3d at 646, 930 N.Y.S.2d at 639.
205. *See* N.Y. C.P.L.R. 1311 (McKinney 2012).
206. *See generally* 96 A.D.3d 1674, 947 N.Y.S.2d 740 (4th Dep't 2012).
207. *Id.* at 1674, 947 N.Y.S.2d at 740.
208. *Id.*
209. *Id.* at 1675, 947 N.Y.S.2d at 741.
210. *Id.*

not file an order or judgment of forfeiture and failed to file the waiver with the clerk of the court.[211] The appellate division noted that "[a]part from . . . procedural irregularities," there was no "apparent nexus between defendant's crimes and the forfeited funds."[212] Vacating the forfeiture without prejudice to the People's commencement of an action for forfeiture pursuant to CPLR 13-A, the appellate division reasoned that

> the forfeited funds were not the proceeds of the crimes with which defendant was charged, nor is there any indication that the funds were derived from uncharged criminal activity in which defendant engaged. Defendant did not possess the funds when he was arrested and, in fact, it appears from the record that the forfeited funds did not belong to him but to the person who posted bail on his behalf. Notably, the People do not contend otherwise. Rather, they rely solely on the waiver form. We reject that contention.[213]

H. Article 20: Mistakes and Defects

1. Service

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.[214]

The plaintiffs in *Johns v. Van Brunt Motors, Inc.* sought to apply CPLR 2001 to excuse an unusual defect in service.[215] Specifically, service of a summons with notice when the initiating papers filed with the County Clerk were a summons and complaint.[216] On a motion to dismiss, the trial court noted that the "plaintiffs' use of a summons with notice was irregular," but that the defect was excusable.[217] The Third Department affirmed, stating that:

> the summons and complaint used by plaintiffs to commence this action was timely filed and a summons with notice was served. Moreover, defendant does not claim that its ability to defend this action has been in any way compromised because it was served with a summons with notice as opposed to a summons and complaint and

211. *McCoy*, 96 A.D.3d at 1675, 947 N.Y.S.2d at 741.
212. *Id.* at 1676, 947 N.Y.S.2d at 741.
213. *Id.*, 947 N.Y.S.2d at 742.
214. *See* N.Y. C.P.L.R. 2001 (McKinney 2012).
215. *See* 89 A.D.3d 1188, 932 N.Y.S.2d 568 (3d Dep't 2011).
216. *Id.* at 1189, 932 N.Y.S.2d at 568-69.
217. *Id.*, 932 N.Y.S.2d at 569.

> acknowledges receiving, after making an appropriate demand, a copy of the summons and complaint that had been filed by plaintiffs with the County Clerk.[218]

2. Excusable Delay or Default

In the interests of justice, a court may excuse law office failure as the basis for a delay or default.[219] Even so, a party seeking relief under CPLR 2005 must properly detail the basis for the failure to benefit from the statute.[220]

A party's failure to properly articulate why CPLR 2005 should relieve it from a default judgment of foreclosure and sale was discussed in *Cantor v. Flores*.[221] The trial court in *Cantor* concluded that CPLR 2005 was unavailable because the defendant failed to support her motion with "detailed allegations of fact explaining the law office failure."[222] The appellate division affirmed, stating that "the appellant's allegation of law office failure was vague, conclusory and unsubstantiated."[223]

I. Article 21: Papers

1. Affirmation of Truth of Statement by Attorney, Physician, Osteopath, or Dentist

CPLR 2106 provides that the

> statement of an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.[224]

What "subscribed" means in the context of an electronic signature was at issue in *Martin v. Portexit Corp.*[225] The defendants in *Martin* moved for summary judgment with physician affirmations that were

218. *Id.* at 1189-90, 932 N.Y.S.2d at 569 (internal citations omitted).
219. *See* N.Y. C.P.L.R. 2005.
220. *See id.*
221. *See generally* 94 A.D.3d 936, 943 N.Y.S.2d 138 (2d Dep't 2012).
222. *Id.* at 937, 943 N.Y.S.2d at 139 (citations omitted).
223. *Id.* (citations omitted).
224. N.Y. C.P.L.R. 2106.
225. *See generally* 98 A.D.3d 63, 948 N.Y.S.2d 21 (1st Dep't 2012).

electronically signed.[226] The plaintiff argued that the affirmation did not comply with CPLR 2106 and was inadmissible.[227] The trial court, following reargument, held that the affirmations were inadmissible.[228] The First Department reversed, stating that State Technology Law section 304(2) provides that, "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand."[229] Because the defendants' expert affirmations did not violate "either E-SIGN's provision for signatures made under oath (*see* 15 U.S.C. section 7001(g)), or State Technology Law section 304(2)," they should have been considered.[230]

CPLR 2106 also controls a situation where an attorney makes a mistake in connection with a stipulation. This scenario was reviewed by the Second Department in *Asset Management and Capital Company, Inc. v. Nugent*.[231] The plaintiff in *Asset Management* made a motion to reform a stipulation of settlement because of a mutual mistake.[232] The trial court permitted reformation, and the appellate division affirmed, stating that "where there is cause sufficient to invalidate a contract, such as fraud, collusion, [mutual] mistake or accident . . . a party [may] be relieved from the consequences of a stipulation made during litigation."[233] Moreover, the court noted that

> proof of [mutual] mistake must be of the highest order, [and] must show clearly and beyond doubt that there has been a [mutual] mistake and . . . must show with equal clarity and certainty the *exact and precise* form and import that the instrument ought to be made to assume, in order that it may express and effectuate what was really intended by the parties.[234]

226. *Id.* at 65, 948 N.Y.S.2d at 22.

227. *Id.*

228. *Id.*

229. *Id.* at 66, 948 N.Y.S.2d at 22 (citations omitted).

230. *Martin*, 98 A.D.3d at 67, 948 N.Y.S.2d at 23.

231. *See generally* 85 A.D.3d 947, 925 N.Y.S.2d 653 (2d Dep't 2011).

232. *Id.* at 948, 925 N.Y.S.2d at 654.

233. *Id.* (alternations in original) (quoting Hallock v. State of N.Y., 64 N.Y.2d 224, 230, 474 N.E.2d 1178, 1180, 485 N.Y.S.2d 510, 512 (1984)) (internal quotation marks omitted).

234. *Asset Mgmt. & Capital, Co. Inc.*, 85 A.D.3d at 948, 925 N.Y.S.2d at 654 (alterations in original) (internal quotation marks omitted) (citations omitted).

J. Article 22: Stays, Motions, and Orders

1. Motion Affecting Prior Order

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination."[235] What constitutes "new facts" is an issue frequently before the courts, including the First and Second Departments this past year in *Abrams v. Berelson*[236] and *Citizens Insurance Co. of America v. Hatzigeorgiou*.[237]

Abrams was an action for personal injuries the plaintiff suffered when he was shot by a coworker while cleaning carpets inside of a house.[238] Apparently, there was a rifle in a closet that discharged during cleaning.[239] When the defendant property owner moved for summary judgment, the plaintiff could not find Torres to secure an affidavit from him about where the gun was located and how he was injured.[240] The trial court granted the defendant's motion.[241] Nine years later, the plaintiff moved to vacate the order on the ground of newly discovered evidence (i.e., an affidavit from Torres,[242] who "deliberately went into hiding for years following the shooting.")[243] The trial court vacated its prior order and denied the defendant's motion.[244] On appeal, the Second Department analyzed whether the Torres affidavit was "new" under the meaning of CPLR 2221(e)(2) and (3) and concluded that it was not because "the plaintiffs' submissions were insufficient to demonstrate a reasonable justification for failing to present the new evidence on the prior motion" as "[m]any of the efforts made by the plaintiffs and other individuals to locate Torres, which are relied upon by the dissent, occurred after the defendant's motion for summary judgment was decided."[245] In turn, the plaintiffs could not meet their

235. N.Y. C.P.L.R. 2221(e)(2) (McKinney 2010).
236. *See generally* 94 A.D.3d 782, 942 N.Y.S.2d 132 (2d Dep't 2012).
237. *See generally* 94 A.D.3d 586, 942 N.Y.S.2d 109 (1st Dep't 2012).
238. *Abrams*, 94 A.D.3d at 783, 942 N.Y.S.2d at 133.
239. *Id.*
240. *Id.*, 942 N.Y.S.2d at 133-34.
241. *Id.*, 942 N.Y.S.2d at 134.
242. *Id.*
243. *Abrams*, 94 A.D.3d at 788, 942 N.Y.S.2d at 138.
244. *Id.* at 783, 942 N.Y.S.2d at 134.
245. *Id.* at 784, 942 N.Y.S.2d at 134 (citations omitted).

heavy burden of showing "due diligence in presenting the new evidence to the Supreme Court once it was obtained."[246]

In *Citizens*, the plaintiff insurance company moved for summary judgment.[247] As part of its motion, the plaintiff attached a disclaimer letter dated July 9, 2008.[248] The defendant insureds opposed the motion by arguing that the July 9, 2008, letter was not a disclaimer.[249] The trial court denied the plaintiff's motion.[250] The plaintiff moved to renew under CPLR 2221(e) and argued that the "new facts" were that it sent a disclaimer letter to the insured on July 16, 2008, and that the July 9, 2008, letter was a draft that was not sent.[251] The trial court denied the motion to renew.[252] On appeal, the First Department held that the

> [p]laintiff's excuse that its counsel inadvertently attached the wrong letter in its prior motion papers is unreasonable, given that, in reply to defendants' opposition to the original motion, plaintiff submitted a sworn affidavit from its agent attesting to the fact that the July 9, 2008 letter was the disclaimer letter sent to defendants. The agent's affidavit on renewal asserting that the July 16, 2008 letter is the actual disclaimer letter contradicts her prior sworn affidavit; accordingly, Supreme Court properly determined that the failure to submit the July 16, 2008 letter was more than mere law office failure.[253]

K. Article 30: Remedies and Pleading

1. Service of Pleadings

Pursuant to CPLR 3012(d), a party may seek additional time to serve the summons and complaint provided a court is satisfied that the party has a reasonable excuse for the delay or default.[254] Although not set forth in the statute, to avoid dismissal under CPLR 3012(d), a party may also need to submit an affidavit from someone with personal knowledge of evidentiary facts to show the claim is meritorious.

"Personal knowledge" of the facts was addressed in *Abele Tractor*

246. *Id.* (citing Andrews v. N.Y.C. Hous. Auth., 90 A.D.3d 962, 963, 934 N.Y.S.2d 840, 841 (2d Dep't 2011) (citations omitted)).

247. Citizens Ins. Co. of Am. v. Hatigeorgiou, 94 A.D.3d 586, 586, 942 N.Y.S.2d 109, 110 (1st Dep't 2012).

248. *Id.* at 586-87, 942 N.Y.S.2d at 110.

249. *Id.* at 587, 942 N.Y.S.2d at 110.

250. *Id.*

251. *Id.*

252. *Citizens Ins. Co. of Am.*, 94 A.D.3d at 587, 942 N.Y.S.2d at 110.

253. *Id.*, 942 N.Y.S.2d at 111.

254. *See* N.Y. C.P.L.R. 3012(d) (McKinney 2010).

& Equipment Company, Inc. v. RJ Valente, Inc.[255] In *Abele*, the defendants moved to dismiss the action as the complaint was untimely served and the plaintiff cross-moved for an order to cure late service.[256] The trial court granted the defendants' motion.[257] On appeal, the Third Department noted that the plaintiff's excuse of law office failure was valid; however, the plaintiff failed to establish merit to the action by submitting an affidavit from someone with personal knowledge.[258] "Stated another way, a plaintiff must tender 'sufficient first-hand evidence of a meritorious claim.'"[259] The appellate division affirmed the trial court, reasoning that,

> [a]lthough an affidavit from an attorney that is both based upon personal knowledge and contains competent evidentiary proof may be sufficient to establish the merits of a plaintiff's claim, an affirmation that merely asserts—in a conclusory fashion—that the attorney 'is fully familiar with the facts' and/or summarizes or paraphrases the allegations set forth in the underlying complaint or bill of particulars will not suffice.[260]

2. Certificate of Merit

CPLR3012-a requires the plaintiff in certain professional malpractice cases to include with the complaint a certificate speaking to the merit of the claim or, if the plaintiff had insufficient time, to file the certificate within ninety days after service of the complaint.[261]

In *Dudley v. Rios-Rivera*, the plaintiff did not timely file the certificate.[262] The trial court denied the plaintiff an extension of time to provide the certificate despite the plaintiff's argument that the defendant hospital had failed to provide complete medical records necessary for review.[263] The Third Department reversed, noting the absence of prejudice, the fact that the plaintiff filed the certificate shortly after receiving the balance of the records, and the submission of an affidavit

255. *See generally* 94 A.D.3d 1270, 942 N.Y.S.2d 668 (3d Dep't 2012).

256. *Id.* at 1271, 942 N.Y.S.2d at 669.

257. *Id.*, 942 N.Y.S.2d at 669-70.

258. *Id.* at 1272, 942 N.Y.S.2d at 670-71 (internal citations omitted).

259. *Id.*, 942 N.Y.S.2d at 670 (quoting Norrish v. Pacini, 29 A.D.3d 1063, 1063, 814 N.Y.S.2d 385, 386 (3d Dep't 2006)).

260. *Abele Tractor & Equip. Co.*, 94 A.D.3d at 1272, 942 N.Y.S.2d at 670-71 (internal citations omitted).

261. *See* N.Y. C.P.L.R. 3012-a (McKinney 2010).

262. *See* 94 A.D.3d 1383, 944 N.Y.S.2d 327 (3d Dep't 2012).

263. *Id.* at 1384, 944 N.Y.S.2d at 328.

of the potential merit of the claim.[264]

3. Amended Pleadings

Pursuant to C.P.L.R. 3025(b) in effect beginning January 1, 2012, a party seeking to amend a pleading must attach a copy of the proposed amended pleading to the motion seeking relief.[265] Where a proposed amended pleading is "patently devoid of merit," a motion for leave to amend should be denied.[266]

4. Bill of Particulars

CPLR 3043 governs the categories of information that may be sought in a bill of particulars, including date, time, and location of the occurrence; a general statement of the acts of omission and/or commission; statements regarding notice; a description of the injuries; length of time confined to bed and house; length of time incapacitated from employment; and total amounts claimed as special damages.[267]

Whether a plaintiff was asserting a new injury in a supplemental bill of particulars was discussed by the First Department in *Anderson v. Ariel Services, Inc.*[268] The plaintiff in *Anderson* served a third verified bill of particulars in which she asserted as an injury a third surgery during which hardware was removed from her left tibia.[269] Even though insertion of the hardware had been asserted as an injury in prior bills of particulars, the defendants attempted to preclude the plaintiff from submitting evidence about the third surgery at trial.[270] The trial court denied the defendants' motion, and the appellate division affirmed, stating that "[p]laintiff's third verified bill of particulars . . . was a supplemental bill of particulars which concerned the 'continuing consequences' of her previously identified injury, and thus, did not require prior leave of the court."[271]

264. *Id.* at 1385, 944 N.Y.S.2d at 328.

265. *See* N.Y. C.P.L.R. 3025(b) (McKinney 2013).

266. *See* Cervini v. Zanzoni, 95 A.D.3d 919, 922, 944 N.Y.S.2d 574, 577 (2d Dep't 2012).

267. *See* N.Y. C.P.L.R. 3043(a) (McKinney 2010).

268. *See generally* 93 A.D.3d 525, 941 N.Y.S.2d 40 (1st Dep't 2012).

269. *Id.* at 525, 941 N.Y.S.2d at 41.

270. *Id.*

271. *Id.*, 941 N.Y.S.2d at 41 (citing Shahid v. N.Y.C. Health & Hosps. Corp., 47 A.D.3d 798, 800, 850 N.Y.S.2d 521, 523 (2d Dep't 2008); N.Y. C.P.L.R. 3043(b)).

L. Article 31: Disclosure

1. Scope of Disclosure

CPLR 3101(a)(4) requires full disclosure of all matter material and necessary to the prosecution or defense of an action.[272] The definition of material and necessary depends upon the case.

In *Murphy v. Hamilton*, the Third Department weighed in on the plaintiff's purported need for information about the defendant's medical, bank, and credit card records.[273] The plaintiff in *Murphy* filed suit against the defendant for assault and battery stemming from an altercation over a property dispute.[274] Plaintiff's discovery demands were ignored by the defendant and the plaintiff obtained a conditional order of preclusion.[275] Eventually the defendant provided responses but did not include the medical, bank, or credit card records requested as outside the scope of CPLR 3101.[276] The plaintiff argued that the defendant had waived objections to the demands by not responding within twenty days, and sought sanctions.[277] The trial court denied the motion.[278] On appeal, the Third Department affirmed, stating that the defendant's medical records were not discoverable and the bank and credit card records were "of a confidential and private nature" and did "not appear to be relevant to the issues in the case."[279]

CPLR 3101(d) provides that, in advance of trial, a party shall identify their expert, the subject matter on which the expert will testify, and the basis for the expert's opinion.[280] In a medical malpractice action, the name of the expert may be withheld.[281]

The timing of an expert disclosure was at issue in *Lombardi v.*

272. *See* N.Y. C.P.L.R. 3101(a)(4).

273. *See generally* 90 A.D.3d 1294, 934 N.Y.S.2d 595 (3d Dep't 2011).

274. *Id.* at 1294, 934 N.Y.S.2d at 596.

275. *Id.*, 934 N.Y.S.2d at 596-97.

276. *Id.*, 934 N.Y.S.2d at 597.

277. *Id.* at 1294-95, 934 N.Y.S.2d at 597.

278. *Murphy*, 90 A.D.3d at 1295, 934 N.Y.S.2d at 597.

279. *Id.* (citing N.Y. C.P.L.R. 4504 (McKinney 2007); Cynthia B. v. New Rochelle Hosp. Med. Ctr., 60 N.Y.2d 452, 456-57, 458 N.E.2d 363, 366, 470 N.Y.S.2d 122, 125 (1983); Saratoga Harness Racing v. Roemer, 274 A.D.2d 887, 889, 711 N.Y.2d 603, 605 (3d Dep't 2000); DG&A Mgmt. Servs., LLC v. Sec. Indus. Ass'n Compliance & Legal Div., 78 A.D.3d 1316, 1318, 910 N.Y.S.2d 242, 244-45 (3d Dep't 2010)) (internal quotation marks omitted).

280. *See* N.Y. C.P.L.R. 3101(d) (McKinney 2012).

281. *See id.*

Alpine Overhead Doors, Inc.[282] The plaintiff in *Lombardi* filed suit for personal injuries sustained when an overhead door descended and caused him to fall.[283] Following discovery and the filing of the trial note of issue, the defendant moved for summary judgment.[284] In opposition to the motion, the plaintiff submitted an expert affidavit.[285] The trial court granted the defendant's motion.[286] On appeal, the Second Department affirmed, stating that "[t]he expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and the plaintiff did not provide any excuse for failing to identify the expert in response to the defendant's discovery demands."[287]

2. Protective Orders

A court may prevent abusive discovery or suppress information improperly obtained by issuing a protective order that denies, limits, conditions, or regulates discovery.[288]

The scope of CPLR 3103 was discussed in *Retamozzo v. Quinones*.[289] The plaintiff in *Retamozzo* was ordered by the trial court not to use his personal recording device during depositions.[290] On appeal, the First Department held that this directive was "an appropriate exercise of the court's power to regulate discovery"[291] under CPLR 3103, "especially given plaintiff's habit of tape recording conversations without notice to his interlocutor."[292]

The regulation of discovery was also discussed in *Ceron v. Belilovsky*.[293] *Ceron* was an action for medical malpractice.[294] In support of a motion for a protective order, the plaintiff's expert

282. *See generally* 92 A.D.3d 921, 939 N.Y.S.2d 529 (2d Dep't 2012).

283. *Id.* at 921, 939 N.Y.S.2d at 529.

284. *Id.*

285. *Id.* at 921-22, 939 N.Y.S.2d at 529.

286. *Id.* at 921, 939 N.Y.S.2d at 529.

287. *Lombardi*, 92 A.D.3d at 922, 939 N.Y.S.2d at 529-30 (citing N.Y. C.P.L.R. 3101(d) (McKinney 2005); Kopeloff v. Artic Cat, Inc., 84 A.D.3d 890, 890-91, 923 N.Y.S.2d 168, 169 (2d Dep't 2011); Ehrenberg v. Starbucks Coffee Co., 82 A.D.3d 829, 830-31, 918 N.Y.S.2d 556, 558 (2d Dep't 2011); Gerardi v. Verizon N.Y., Inc., 66 A.D.3d 960, 961, 888 N.Y.S.2d 136, 137-38 (2d Dep't 2009)).

288. *See* N.Y. C.P.L.R. 3103.

289. *See generally* 95 A.D.3d 652, 945 N.Y.S.2d 22 (1st Dep't 2012).

290. *Id.* at 652, 945 N.Y.S.2d at 23.

291. *Id.* at 653, 945 N.Y.S.2d at 23 (citing N.Y. C.P.L.R. 3103).

292. *Retamozzo*, 95 A.D.3d at 653, 945 N.Y.S.2d at 23.

293. *See generally* 92 A.D.3d 714, 938 N.Y.S.2d 607 (2d Dep't 2012).

294. *Id.* at 714, 938 N.Y.S.2d at 608.

psychologist opined that a deposition of the plaintiff's infant daughter would be detrimental to the infant's health.[295] The trial court ordered the defendants to provide written questions to plaintiff's counsel for submission to the psychologist, who would advise which, if any, of the written questions the infant would answer.[296] On appeal, the Second Department noted that the court's decision to grant the plaintiff's motion for a protective order was a proper exercise of discretion under CPLR 3013(a).[297] However, the appellate division noted that the court should not have "delegated its authority to determine the scope of discovery to a mental health professional."[298]

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

CPLR 3123 permits a party to serve a written request for admission of the "genuineness of any papers or documents, or the correctness or fairness of representation of any photographs . . . or of the truth of any matters of fact set forth in the request."[299] Where the recipient of a proper notice to admit fails to respond within twenty days, the substance of the notice is deemed admitted.[300] Practitioners affectionately refer to the notice to admit as a "hand grenade," as a notice to admit that is overlooked may explode when found.

The failure of a party to respond to a notice to admit was discussed by the Second Department in *Saline v. Saline*.[301] During discovery, the plaintiff served the defendant with a notice to admit the genuineness of the attached option to purchase dated December 3, 1986, and a 1996 deed transferring property.[302] The defendant did not respond so the authenticity of the documents was established.[303] At trial, the court found for the defendant based, in part, upon the contents of documents that the defendant admitted were authentic by not responding to the notice to admit.[304] The appellate division affirmed, stating that "the trial

295. *Id.* at 714-15, 938 N.Y.S.2d at 609.
296. *Id.* at 714, 938 N.Y.S.2d at 608.
297. *Id.* at 715, 938 N.Y.S.2d at 609 (internal citations omitted).
298. *Ceron*, 92 A.D.3d at 715, 938 N.Y.S.2d at 609.
299. N.Y. C.P.L.R. 3123(a) (McKinney 2005).
300. *See id.*
301. *See generally* 94 A.D.3d 1080, 944 N.Y.S.2d 162 (2d Dep't 2012).
302. *Id.* at 1081, 944 N.Y.S.2d at 163-64.
303. *Id.*, 944 N.Y.S.2d at 164.
304. *Id.*

court properly admitted into evidence certain documents admitted by . . . [the defendant] to be authentic and upon which it based its findings of fact."[305]

4. Penalties

CPLR 3126 provides that a party may be penalized for failing to disclose evidence that a court believes "ought to have been disclosed."[306] Penalties include issue preclusion, an adverse inference charge, and striking a pleading.[307]

The scope of CPLR 3126 was discussed in *Carnegie Associates, Ltd. v. Miller*.[308] The defendants in *Carnegie* moved to dismiss the complaint because the plaintiff, who had already been sanctioned for failing to provide discovery, failed to proceed with court-ordered mediation.[309] The trial court granted the defendant's motion and the plaintiff appealed.[310] The First Department concluded that the trial court erred and reversed the dismissal, stating that, "[w]hile CPLR 3126 authorizes the striking of a party's pleadings, this extreme sanction is only authorized when a party 'refuses to obey an order for disclosure or willfully refuses to disclose information which the court finds ought to have been disclosed.'"[311] As the court's order for mediation was not a discovery matter, the appellate division held that "CPLR 3126 simply does not apply."[312]

The sharp edge of CPLR 3126 was also discussed by the Fourth Department in *Hann v. Black.*[313] *Hann* was a case for personal injuries sustained by the plaintiff in January of 2007 when his vehicle was struck by a tractor-trailer driven by Stephen Black and owned by J&R Schugel Trucking, Inc.[314] A discovery order required J&R Schugel to produce Black for deposition.[315] J&R Schugel did not produce Black

305. *Id.* at 1081-82, 944 N.Y.S.2d at 164 (citing N.Y. C.P.L.R. 3123 (McKinney 2005); Union Indem. Ins. Co. of N.Y. v. Am. Centennial Ins. Co., 89 N.Y.2d 94, 103, 674 N.E.2d 313, 317, 651 N.Y.S.2d 383, 387-88 (1996); Ocampo v. Pagan, 68 A.D.3d 1077, 1078, 892 N.Y.S.2d 452, 454 (2d Dep't 2009)).

306. N.Y. C.P.L.R. 3126.

307. *See id.*

308. *See generally* 94 A.D.3d 404, 946 N.Y.S.2d 107 (1st Dep't 2012).

309. *Id.* at 404-05, 946 N.Y.S.2d at 108.

310. *Id.* at 404, 946 N.Y.S.2d at 107.

311. *Id.*, 946 N.Y.S.2d at 108 (quoting N.Y. C.P.L.R. 3126) (emphasis omitted).

312. *Carnegie Assocs., Ltd*., 94 A.D.3d at 404-05, 946 N.Y.S.2d at 108.

313. *See generally* 96 A.D.3d 1503, 946 N.Y.S.2d 722 (4th Dep't 2012).

314. *Id.* at 1503, 946 N.Y.S.2d at 723.

315. *Id.*

because he left the employment of J&R Schugel in October of 2007, and, apparently, the company could not locate him.[316] The plaintiff moved to strike the answer for willful misconduct in failing to produce Black, as well as accident photographs.[317] The trial court agreed, and the defendants appealed.[318] The Fourth Department affirmed, stating that the

> defendants failed to meet their burden of offering a reasonable excuse for failing to comply with the court's order to produce Black for a deposition or to provide the photographs of the accident scene in a timely manner. J&R Schugel contends that it could not comply with the order to produce Black because it was unable to locate him. However, the fact that a defendant's whereabouts are unknown is no bar to plaintiff's requested sanction of striking defendants' answer, and in any event J&R Schugel offered insufficient proof of a good faith effort to locate Black.[319]

Appellate division Judges Centra and Carni authored a dissent in which they concluded that the proper remedy was to preclude "Black from offering evidence on his own behalf at trial unless he appears for a further deposition no later than 30 days prior to trial and by directing that J&R Schugel pay plaintiffs the sum of $1,250 as a sanction for the delay in producing the photographs."[320]

M. Article 32: Accelerated Judgment

1. Motions to Dismiss

CPLR 3211 sets forth a number of grounds upon which a party can move for judgment dismissing claims or defenses.[321] The most frequently litigated grounds are lack of subject matter or personal jurisdiction,[322] lack of capacity to sue,[323] and failure to state a claim.[324]

Failure to state a claim was discussed by the Second Department in

316. *Id.* at 1504-05, 946 N.Y.S.2d at 723-24.

317. *Id.* at 1503, 946 N.Y.S.2d at 723.

318. *Hann*, 96 A.D.3d at 1503, 946 N.Y.S.2d at 723.

319. *Id.* at 1505, 946 N.Y.S.2d at 724 (citations omitted) (internal quotation marks omitted) (brackets omitted).

320. *Id.* at 1510, 946 N.Y.S.2d at 728.

321. *See* N.Y. C.P.L.R. 3211(a) (McKinney 2006).

322. *See id.* 3211(a)(2), (8).

323. *See id.* 3211 (a)(3).

324. *See id.* 3211 (a)(7).

Quiroz v. Zottola.[325] The plaintiff in *Quiroz* was injured when the school bus he was operating was struck by a garbage truck owned by Panichi Holding Corporation and being driven by Bradley Zottola.[326] The plaintiff filed a claim against Zottola for negligence and included allegations for punitive damages against Panichi for gross negligence in hiring Zottola.[327] The defendants moved, pursuant to CPLR 3211(a)(7), to dismiss the claims against Panichi for negligent hiring and punitive damages.[328] The trial court granted the motion and the plaintiff appealed.[329] The Second Department reversed, stating that,

> '[g]enerally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training.'. . . However, 'such a claim is permitted when punitive damages are sought based upon facts evincing gross negligence in the hiring or retention of the employee.'[330]

2. Motions 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.[331] Generally, a motion for summary judgment shall be supported by an affidavit, a copy of the pleadings, and other available proof, such as documentary evidence.[332]

As a CPLR 3212 motion for summary judgment is an accelerated remedy, courts require strict compliance with the statute. Strict compliance was addressed in *Weinstein v Gindi*.[333] In short, the defendant in *Weinstein* failed to attach to her motion papers a copy of the answer.[334] The appellate division noted that the

325. *See generally* 96 A.D.3d 1035, 948 N.Y.S.2d 77 (2d Dep't 2012).

326. *Id.* at 1036, 948 N.Y.S.2d at 88.

327. *Id.*

328. *Id.*, 948 N.Y.S.2d at 89.

329. *Id.*

330. *Quiroz*, 96 A.D.3d at 1037, 948 N.Y.S.2d at 89 (quoting Talavera v. Arbit, 18 A.D.3d 738, 738, 795 N.Y.S.2d 708, 708 (2d Dep't 2005); Coville v. Ryder Truck Rental, Inc., 30 A.D.3d 744, 745, 817 N.Y.S.2d 179, 180 (3d Dep't 1998); citing Segal v. St. John's Univ., 69 A.D.3d 702, 703, 893 N.Y.S.2d 221, 223 (2d Dep't 2010); Watson v. Strack, 5 A.D.3d 1067, 1068, 773 N.Y.S.2d 676, 676 (4th Dep't 2004); Karoon v. N.Y.C. Transit Auth., 241 A.D.2d 323, 324, 659 N.Y.S.2d 27, 28 (1st Dep't 1997)).

331. *See* N.Y. C.P.L.R. 3212 (McKinney 2006).

332. *See id.*

333. *See generally* 92 A.D.3d 526, 938 N.Y.S.2d 538 (1st Dep't 2012).

334. *Id.* at 527, 938 N.Y.S.2d at 539.

> [d]efendant is not entitled to judgment as a matter of law against plaintiff Pine Projects' because he failed to include his answer with his motion for summary judgment as required by statute. It is well settled that the failure to attach all of the pleadings is a fatal procedural defect requiring denial of a motion for summary judgment.[335]

The timeliness of a CPLR 3212 summary judgment motion is also important. A motion made even one day late may be denied sua sponte.

The timeliness of a motion was at issue in *Tafsiou v. Arms Acres*.[336] In *Tafsiou*, the court issued an order dated November 9, 2010, which extended the defendant's time to file a summary judgment motion by sixty days.[337] The sixty-day deadline expired on Saturday, January 8, 2011.[338] Pursuant to Judiciary Law section 282, the defendant's deadline was extended to Monday, January 10, 2011.[339] On January 10, 2011, the defendant's motion papers were received and marked "approved" by the Kings County Supreme Court Motion Office (the proper place to submit the motion).[340] However, the motion papers were not marked "filed" until January 11, 2011 and the trial court denied the motion as untimely.[341] On appeal, the Second Department reversed, stating that

> '[p]apers that are required to be filed are considered to have been filed when they are received by the office with which, or by the official with whom, they are to be filed.' Thus, the defendant's motion papers were timely filed when received by the Motion Support Office on January 10, 2011, despite the fact that they were not stamped "filed" by the Kings County Clerk until the following day.[342]

3. 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

335. *Id.* (citing Hamilton v. City of N.Y., 262 A.D.2d 283, 691 N.Y.S.2d 108 (2d Dep't 1999); Krasner v. Transcon. Equities, Inc., 64 A.D.2d 551, 407 N.Y.S.2d 625 (1st Dep't 1978)) (internal citation omitted).

336. *See generally* 95 A.D.3d 995, 943 N.Y.S.2d 763 (2d Dep't 2012).

337. *Id.* at 996, 943 N.Y.S.2d at 763.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Tafsiou*, 95 A.D.3d at 996, 943 N.Y.S.2d at 763.

342. *Id.* (quoting Castro v. Homsun Corp., 34 A.D.3d 616, 617, 826 N.Y.S.2d 89, 90-91 (2d Dep't 2006); Coty v. Cnty. of Clinton, 42 A.D.3d 612, 613-14, 839 N.Y.S.2d 825, 826-27 (3d Dep't 2007)).

Court may dismiss the party's pleadings.[343]

The specifics of CPLR 3216 were discussed at length by the Court of Appeals in *Cadichon v. Facelle*.[344] The plaintiff in *Cadichon* filed a medical malpractice lawsuit in 2003.[345] A second action was commenced and consolidated with the first in May of 2006.[346] A discovery order was issued requiring the plaintiff to file the trial note of issue by November of 2006.[347] The parties then signed a stipulation on May 3, 2007, which required additional depositions and the filing of the trial note of issue on or before December 27, 2007, as follows:

> DEMAND FOR SERVICE AND FILING OF THE NOTE OF ISSUE
>
> THE COURT DEMANDS, PURSUANT TO C.P.L.R. 3216, THAT YOU RESUME PROSECUTION OF THE ABOVE ENTITLED ACTION, AND THAT YOU SERVE AND FILE A NOTE OF ISSUE [AS PER THE ANNEXED ONE PAGE STIPULATION DATED 5/3/07, I.E., BY 12/27/07] AFTER THE RECEIPT OF THIS DEMAND.
>
> YOUR DEFAULT IN COMPLYING WITH THIS DEMAND WITHIN THE 90-DAY PERIOD *WILL SERVE AS A BASIS* FOR THE COURT, *ON ITS OWN MOTION*, TO DISMISS THE ACTION FOR UNREASONABLY NEGLECTING TO PROCEED.[348]

The plaintiff did not file the trial note of issue on or before December 27, 2007, and the case was dismissed on December 31, 2007, without notice to the parties.[349] The plaintiff learned of the dismissal when he moved to compel depositions and his motion papers were returned.[350] The trial court denied the plaintiff's motion to vacate the dismissal.[351] The appellate division affirmed 3-2.[352] The Court of Appeals reversed because the dismissal did not comport with CPLR 3216, stating that

> [h]ere, the action was apparently 'dismissed' on December 31, 2007. But there is no order of dismissal to that effect, as evidence by the parties' conduct in scheduling depositions as if the case were still active. . . . It is evident from the 90-day demand and the dictates of

343. *See* N.Y. C.P.L.R. 3216 (McKinney 2006).
344. *See generally* 18 N.Y.3d 230, 961 N.E.2d 623, 938 N.Y.S.2d 232 (2011).
345. *Id.* at 232, 961 N.E.2d at 623, 938 N.Y.S.2d at 233.
346. *Id.* at 232-33, 961 N.E.2d at 623-24, 938 N.Y.S.2d at 233-34.
347. *Id.* at 233, 961 N.E.2d at 624, 938 N.Y.S.2d at 234.
348. *Id.* (alterations in original) (internal quotation marks omitted).
349. *Cadichon*, 18 N.Y.3d at 233, 961 N.E.2d at 624, 938 N.Y.S.2d at 234-35.
350. *Id.*, 961 N.E.2d at 624, 938 N.Y.S.2d at 235.
351. *Id.*
352. *Id.*

> CPLR 3216 that the plaintiffs' failure to comply with the demand would 'serve as a basis' for the trial court, on its own motion, to dismiss the action. That is not what occurred here; there is no evidence in the record that the trial court made a motion to dismiss the action in this case . . . . Indeed, there was apparently no 'order' of the court dismissing the case and, at best, only a ministerial dismissal of the action without benefit of further judicial review even though the stipulation provided the it only 'will serve as a basis for the *court*, on its own motion' to take further action.[353]

Chief Judge Lippman and Judges Ciparick and Jones concurred with Judge Pigott.[354] Judge Graffeo dissented and voted to affirm in a separate opinion in which Judges Read and Smith concurred.[355]

N. Article 41: Trial by a Jury

CPLR 4110 permits a party to disqualify jurors if they are "related within the sixth degree by consanguinity or affinity to a party."[356]

Consanguinity and affinity formed the basis of a motion to transfer venue in *Blaine v. International Business Machines Corp.*[357] In *Blaine*, the defendant moved to change venue from Broome County to a neighboring county because of the strong possibility that an impartial trial could not be had because "the jury pool contained a large number of relatives of plaintiffs in the nine actions, as well as defendant's former employees and their families."[358] The defendant even submitted an expert report from a demographer and statistician "who determined that there is a 28.6% change that at least one juror on a randomly selected jury of six individuals and two alternates from Broome County would be related to one of the 943 plaintiffs."[359] The trial court denied the motion without prejudice to renew at the close of voir dire.[360] The appellate division affirmed.[361]

353. *Id.* at 234, 961 N.E.2d at 625, 938 N.Y.S.2d at 235-36 (emphasis omitted).
354. *Cadichon*, 18 N.Y.3d at 248, 961 N.E.2d at 634, 938 N.Y.S.2d at 243.
355. *Id.*
356. N.Y. C.P.L.R. 4110(b) (McKinney 2007).
357. *See generally* 91 A.D.3d 1175, 937 N.Y.S.2d 405 (3d Dep't 2012).
358. *Id.* at 1176, 937 N.Y.S.2d at 406.
359. *Id.*
360. *Id.* at 1175, 937 N.Y.S.2d at 406.
361. *Id.* at 1177, 937 N.Y.S.2d at 407.

O. Article 44: Trial Motions

1. Post-Trial Motions

CPLR 4404 governs post-trial motions to set aside the verdict as being against the weight of the evidence or in the interests of justice.[362]

Whether a defendant was entitled to set aside an award of damages to the plaintiff was at issue in *Da Silva v. Savo*.[363] The basis for the defendants' argument was that newly discovered evidence (i.e., documents relating to the claim for profits at issue in the case) justified the application of CPLR 4404 to modify the award for breach of contract from $136,796 to $111,721.[364] The plaintiff appealed, and the Second Department held that the trial court erred because "[t]he defendants failed to show that they could not have previously discovered the documents that were submitted in support of their motion. Further, those documents were incomplete and consisted of hearsay, and thus were not in admissible form."[365]

P. Article 45: Evidence

1. Collateral Source Payments

CPLR 4545 provides that a claim for certain categories of past and future damages, including medical care and economic losses, may be reduced by the court if it "finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source."[366]

While the statute provides for a collateral-source hearing, it is silent with respect to timing and mechanics—topics which were at issue in *Turuseta v. Wyassup-Laurel Glen Corp.*[367] On June 19, 2009, the plaintiff in *Turuseta* received a $3,750,000 verdict.[368] On July 8, 2009, the defendants moved pursuant to CPLR 4404 to set aside the verdict.[369] The trial court denied the defendants' motion.[370] On December 16, 2009, the plaintiff served a copy of the judgment upon the

362. N.Y. C.P.L.R. 4404 (McKinney 2007).
363. *See generally* 97 A.D.3d 525, 948 N.Y.S.2d 333 (2d Dep't 2012).
364. *Id.* at 525, 948 N.Y.S.2d at 334.
365. *Id.* at 526, 948 N.Y.S.2d at 335.
366. N.Y. C.P.L.R. 4545(c).
367. *See generally* 91 A.D.3d 635, 937 N.Y.S.2d 76 (2d Dep't 2012).
368. *Id.* at 636, 937 N.Y.S.2d at 77.
369. *Id.*
370. *Id.*

defendants.[371] On February 3, 2010, the defendants moved pursuant to CPLR 4545 for a collateral source hearing.[372] The plaintiff argued that the CPLR 4545 motion was untimely because it was a motion made more than 30 days after trial.[373] The trial court rejected the plaintiff's argument, and the Second Department affirmed, noting that CPLR 4545 "does not specify the procedures to be employed by the trial court in making the appropriate [collateral source] deductions, and does not specify a time limit within which a defendant may request a hearing to determine the appropriate amount of the deductions."[374]

Q. Article 50: Judgments

1. Prompt Payment

Pursuant to CPLR 5003-a, when an action to recover damages is settled, the defendant shall pay all sums due within twenty-one days from when the plaintiff provides a release and stipulation discontinuing the action.[375]

Satisfaction of CPLR 5003-a for purposes of interest was discussed in *Tencza v. St. Elizabeth Medical Center*.[376] The plaintiff in *Tencza* filed a judgment after the defendant failed to timely pay all sums due.[377] The defendant moved to vacate the judgment and interest.[378] The trial court denied the motion, and the Fourth Department affirmed, stating that

> [c]ontrary to defendant's contention, plaintiff satisfied his obligation pursuant to CPLR 5003-a by tendering a general release and stipulation of discontinuance to defendant's attorney. The general release acknowledged the existence of a Medicare lien and provided 'that a portion of the settlement will be paid to Medicare for [the] purpose[ ] of satisfying the lien.' The parties thereafter agreed that defendant was permitted to withhold only $50,000 of the settlement to satisfy the Medicare lien. 'Neither CPLR 5033-a, nor the parties' stipulation of settlement, imposed any additional requirement on the

371. *Id.*
372. *Turuseta*, 91 A.D.3d at 636, 937 N.Y.S.2d at 77.
373. *Id.*
374. *Id.*
375. *See* N.Y. C.P.L.R. 5003-a (McKinney 2007).
376. *See generally* 87 A.D.3d 1375, 930 N.Y.S.2d (4th Dep't 2011).
377. *Id.*
378. *Id.*

plaintiff or his attorney.'[379]

2. Relief from Judgment or Order

CPLR 5015 is the statute upon which attorneys frequently rely after making a mistake and attempting to fall upon the sword, as it provides a mechanism for relief from a judgment or order.[380] Even so, the statute has limits.

Whether a plaintiff was entitled to relief from an order of dismissal was at issue in *Pichardo-Garcia v. Josephine's Spa Corp*.[381] The trial court concluded that an attorney's failure to appear for a compliance conference was excusable.[382] The appellate division reviewed the attorney's excuse and reversed, stating that, even though "[c]ounsel explained that the failure to appear was due to a conflict between scheduled appearances in this action and in an unrelated action,"[383] it did not consider "[c]ounsel's 'overbooking of cases and inability to keep track of his appearances'" to be a reasonable excuse.[384] Therefore, the case was dismissed.[385]

R. Article 55: Appeals

1. Time to Take Appeal

CPLR 5513 provides that an appeal as of right must be taken within thirty days "after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry."[386] Modern technology is complicating arithmetic.

In *Fazio v. Costco Wholesale Corp.*, the First Department reviewed the timeliness of a notice of appeal that was filed electronically.[387] In *Fazio*, the defendant filed a notice of appeal thirty-two days after it was served electronically by the New York State Court Electronic Filing

379. *Id.* at 1376, 930 N.Y.S.2d at 520 (quoting Klee v. Ams. Best Bottling Co., Inc., 76 A.D.3d 544, 546, 907 N.Y.S.2d 260, 262 (2d Dep't 2010)).

380. *See* N.Y. C.P.L.R. 5015.

381. *See generally* 91 A.D.3d 413, 936 N.Y.S.2d 27 (1st Dep't 2012).

382. *Id.* at 413-14, 936 N.Y.S.2d at 28 (citation omitted).

383. *Id.* at 414, 936 N.Y.S.2d at 28.

384. *Id.* (citing Perez v. N.Y.C. Hous. Auth., 47 A.D.3d 505, 505, 850 N.Y.S.2d 75, 76 (1st Dep't 2008); Youni Gems Corp. v. Bassco Creations Inc., 70 A.D.3d 454, 455, 896 N.Y.S.2d 315, 317 (1st Dep't 2012).

385. *Pichardo-Garcia*, 91 A.D.3d at 413, 936 N.Y.S.2d at 28.

386. N.Y. C.P.L.R. 5513(a) (McKinney 1995).

387. *See generally* 85 A.D.3d 443, 924 N.Y.S.2d 381 (1st Dep't 2011).

("NYSCEF") site with notice of entry of the order.[388] The trial court rejected the plaintiff's argument that the notice of appeal was untimely.[389] The appellate division agreed, stating that "the NYSCEF site's transmission of notification of the entry to e-mail service addresses 'shall not constitute service of notice of entry by any party.'"[390] In turn, the plaintiff's service of the notice of entry by mail controlled and the defendant's filing was timely.[391]

S. Article 75: Arbitration

1. Application to Compel or Stay

CPLR 7503 permits a party to apply to the court for an order to compel arbitration if it has been aggrieved by another party's failure to arbitrate.[392]

The Court of Appeals discussed the use of CPLR 7503 as a sword and shield in *N.J.R. Associates v. Tausend*.[393] *N.J.R.* involved a dispute between a partnership and a partner.[394] The dispute was subject to an arbitration clause contained in the partnership agreement.[395] The parties pursued arbitration but disagreed about the appropriate forum to resolve a statute of limitations challenge to asserted counterclaims.[396] Specifically, the defendant sought a stay of arbitration of the counterclaims because it argued that the limitations period had expired.[397] The plaintiff moved to dismiss the proceeding and argued that the timeliness of the counterclaims should be resolve by the arbitrator.[398] The trial court stayed arbitration of the counterclaims.[399] The appellate division modified the trial court order and dismissed the defendant's petition to stay because CPLR 7503(b) "precluded the partnership from obtaining a stay because it has initiated and

388. *Id.* at 443, 924 N.Y.S.2d at 382.
389. *Id.*
390. *Id.* (quoting N.Y. COMP. CODES R. & REGS. tit. 22, § 202.5b(h)(3) (2012)).
391. *Fazio*, 85 A.D.3d at 443, 924 N.Y.S.2d at 382.
392. *See* N.Y. C.P.L.R. 7503(a) (McKinney 1998).
393. *See generally* 19 N.Y.3d 597, 973 N.E.2d 730, 950 N.Y.S.2d 320 (2012).
394. *Id.* at 601, 973 N.E.2d at 732, 950 N.Y.S.2d at 322.
395. *Id.*
396. *Id.*
397. *Id.*
398. *N.J.R. Assocs.*, 19 N.Y.3d at 601, 973 N.E.2d at 732, 950 N.Y.S.2d at 322.
399. *Id.*

participated in the arbitration."[400] The Court of Appeals held that CPLR 7503(b)

> prevents NJR from asking a court to dismiss . . . [the plaintiff's] counterclaims due to expiration of the statute of limitations. [This is because] NJR not only initiated arbitration, it also successfully defended against . . . [the plaintiff's] petition to stay arbitration in court, received an application to compel arbitration in connection with . . . [the plaintiff's] counterclaims and sought a court order to prevent the counterclaims from being considered by the arbitrator. In our view, this was enough to constitute 'participation' within the meaning of CPLR 7503(b).[401]

Moreover, the Court noted that "a party cannot compel arbitration of its own causes of action, prevent its adversary from obtaining judicial relief and then ask a court to block the adversary's counterclaims from being arbitrated."[402]

III. COURT RULES

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

A. OCA Rule 206.5

On June 26, 2012, section 206.5(c) of the Rules of the Office of Court Administration ("OCA") amended sections (c) and (d) and created section (e).[403] The amended rule provides as follows:

> (c) An original and two copies of any demand for a bill of particulars and bills of particulars served upon a party, together with proof of service, shall be filed with the clerk within 10 days after service thereof.
>
> (d) All papers for signature or consideration of the court shall be presented to the clerk, except that where the judge so directs, papers may be submitted to the judge and a copy filed with the clerk promptly thereafter. All papers for any judge that are filed in the clerk's office shall be delivered to the judge by the clerk. The papers shall be clearly addressed to the judge for whom they are intended and prominently show the nature of the papers, the title and claim number

400. *Id.* (citation omitted).

401. *Id.* at 602, 973 N.E.2d at 733, 950 N.Y.S.2d at 323 (internal quotation marks omitted).

402. *Id.*

403. *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 206.5(c)-(e) (2012).

> of the action in which they are filed, the judge's name, and the name of the attorney or party submitting them.
>
> (e) At the direction of the court, a party shall provide a courtesy copy of any paper to chambers.[404]

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.

404. *Id.*