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, meaning the authors have 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 authors did not endeavor to discuss every Court of Appeals or Appellate Division decision.

I. LEGISLATIVE ENACTMENTS AND AMENDMENTS

There were many legislative enactments and amendments during this *Survey* year. Several are outlined below.

A. CPLR 214-g

Chapter 130, section 1 of the Laws of 2020, effective August 3, 2020, amended CPLR 214-g to provide that an action may be commenced not earlier than six months after, and not later than two years and six months after the effective date of this section.[2] Previously, the section provided for one year and six months.[3]

B. CPLR 3211(g)

Chapter 250, section 3 of the Laws of 2020, effective November 10, 2020, amended CPLR 3211(g) to provide, and add, the following:[4]

> (g) Stay of proceedings and standards for motions to dismiss in certain cases involving public petition and participation.
>
> 1. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in

1. July 1, 2020 through June 30, 2021.
2. N.Y. C.P.L.R. 214(g) (McKinney 2020).
3. N.Y. C.P.L.R. 214(g) (McKinney 2019), *amended by* N.Y. C.P.L.R. 214(g) (McKinney 2021).
4. N.Y. C.P.L.R. 311(g) (McKinney 2020).

law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

2. In making its determination on a motion to dismiss made pursuant to paragraph one of this subdivision, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based. No determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

3. All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.

4. For purposes of this section, "complaint" includes "cross-complaint" and "petition", "plaintiff" includes "cross-complainant" and "petitioner", and "defendant" includes "cross-defendant" and "respondent." [5]

C. CPLR 5020

Chapter 227, section 1 of the Laws of 2020, effective February 4, 2021, amended CPLR 5020 to provide that,

> [w]hen a judgment for five thousand dollars or more is fully satisfied, if the person required to execute and file with the proper clerk pursuant to subdivisions (a) and (d) of this section fails or refuses to do so within twenty days after receiving full satisfaction, then the judgment creditor shall be subject to a penalty of five hundred dollars recoverable by the judgment debtor pursuant.[6]

5. N.Y. C.P.L.R. 3211(g)(1)–(4) (McKinney 2021).
6. N.Y. C.P.L.R. 5020(c) (McKinney 2021).

D. CPLR 5306

Chapter 127, section 8 of the Laws of 2021, effective June 11, 2021, amended CPLR 5306 to provide for a stay of a proceeding pending appeal from a foreign country judgment by "a party", as the previous language provided for only a defendant.[7] The statute authorizes the court in which recognition is sought, in its discretion, to stay recognition proceedings until either the appeal is determined, or the party opposing recognition has been allowed a reasonable opportunity to pursue the appeal.[8]

E. CPLR 5307

Chapter 127, section 8 of the Laws of 2021, effective June 11, 2021, amended CPLR 5307 to add subdivision (a)–(b), and provide:[9]

> (a) If the court, in a proceeding under section fifty-three hundred five of this article finds that the judgment is entitled to recognition under this article, then, to the extent that the foreign country judgment grants or denies recovery of a sum of money, the foreign country judgment is:
>
> 1. conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and
>
> 2. enforceable in the same manner and to the same extent as a judgment rendered in this state.
>
> (b) This article does not prevent the recognition of a foreign country judgment in situations not covered by this article.[10]

II. CASE LAW DEVELOPMENTS

A. Article 2: Limitations of Time

On March 20, 2020, in response to the ongoing COVID-19 pandemic, then Governor Cuomo issued an Executive Order tolling all statues of limitations in the state up through April 9, 2020.[11] The date was repeatedly extended.[12]

7. N.Y. C.P.L.R. 5306 (McKinney 2021).
8. *See id.*
9. N.Y. C.P.L.R. 5307(a)–(b) (McKinney 2021).
10. *Id.*
11. *See* 9 N.Y.C.R.R. § 8.202.8 (2020).
12. *See id.* §§ 8.202.14, 8.202.28, 8.202.38, 8.202.48, 8.202.55, 8.202.60, 8.202.67.

On November 3, 2020, then Governor Cuomo issued Executive Order 202.72 that ended, effective November 4, 2020, the tolling of the statutes of limitations that first went into effect on March 20, 2020.[13]

Diverging opinions developed as to whether the effect of the Executive Orders acted as a toll, or a suspension.[14]

In a June 2, 2021, decision issued by the Second Department, the Appellate Division answered this question and unanimously held that the Governor had the authority to "alter" or "modify" the requirements of a statute during a state emergency and that the Executive Orders acted as a "toll".[15]

As noted by the Second Department in *Brash v. Richards*, then Governor Cuomo expressly stated that he intended to "toll" the statutory limitation periods, and although subsequent Executive Orders following the first did not expressly use the word "toll", language used in those orders indicated that the Governor's intent was to extend it with the same terms, including tolling.[16] Therefore, the Court found that the subsequent Executive Orders continued to toll the statutory time limits.[17]

The distinction between tolling and a suspension of statutory time periods is of critical import. Tolling means that the days during which the Executive Orders were in effect are added to the original statutory time period.[18] We expect there to be several cases dealing with this issue during the next survey year.

1. CPLR 201: Application of article.

Pursuant to CPLR 201, an action must be "commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action."[19]

13. *See id.* § 8.202.72 (2020).

14. *See* Joshua C. Prever, *Are New York Executive Orders a True Tolling of Statute of Limitations or Merely a Grace Period?*, HOLLAND & KNIGHT (Oct. 28, 2020), https://www.hklaw.com/en/insights/publications/2020/1-/are-new-york-executive-orders-a-true-tolling.

15. Brash v. Richards, 195 A.D.3d 582, 582, 149 N.Y.S.3d 560, 561 (2d Dep't 2021).

16. *See id.* at 585, 149 N.Y.S.3d at 563.

17. *See id.*

18. *See* Prever, *supra* note 14.

19. N.Y. C.P.L.R. 201 (McKinney 2021).

The above provision was at issue before the Court of Appeals in *Chavez v. Occidental Chemical Corporation*.[20] By way of background, in a pair of decisions decided approximately 40 years ago, the United States Supreme Court held that the commencement of a putative class action lawsuit in federal court tolls the running of the statute of limitations applicable to federal claims for all purported members of the class until entry of an order denying class certification, or otherwise dismissing the action.[21] This tolling is commonly referred to as the "American Pipe tolling."[22]

Among several certified questions by the United States Court of Appeals for the Second Circuit, was (1) whether New York recognizes the American Pipe tolling of the statute of limitations for absent class members of a putative class action filed in another jurisdiction, and (2) whether a non-merits dismissal of class action can terminate cross-jurisdictional tolling.[23]

As to the first question, this was answered in the affirmative, noting that a determination that tolling is not available cross-jurisdictionally would subvert article 9 – the primary function of which is to allow named plaintiffs to bring truly representative lawsuits without necessitating a municipality of litigation that "squanders resources and undermines judicial economy, while still ensuring that defendants receive fair notice of the specific claims advanced against them."[24]

As to the second question, and in light of the above-framework, the Supreme Court rejected the defendant's argument that CPLR 201 prevented it from recognizing cross-jurisdictional tolling.[25] According to the Court of Appeals, its recognition of America Pipe tolling cross-jurisdictionally did not run afoul of the statute of its purposes because it is predicated on the express legislative design of CPLR article 9.[26] As noted by the Court of Appeals,

20. *See* 35 N.Y.3d 492, 504, 158 N.E.3d 93, 101–02, 132 N.Y.S.3d 224, 232–33 (2020).

21. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983).

22. *See* Jeremy L. Brown, *The Misunderstood Role of Reliance in American Pipe Tolling*, 88 UNIV. CHICAGO L. REV. 685, 687 (2021).

23. *See Chavez*, 35 N.Y.3d at 501, 158 N.E.3d at 99, 132 N.Y.S.3d at 230.

24. *Id.* at 503–04, 158 N.E.3d at 100, 132 N.Y.S.3d at 231 (citing Desrosiers v. Perry Ellis Menswear, LLC, 30 N.Y.3d 488, 495, 90 N.E.3d 1262, 1266, 68 N.Y.S.3d 391, 395 (2017)).

25. *See id.* at 504, 158 N.E.3d at 100, 132 N.Y.S.3d at 231.

26. *See id.* at 505, 158 N.E.3d at 102, 132 N.Y.S.3d at 233.

> "CPLR 201 makes clear that courts do not have discretion to excuse late filings by plaintiffs who have slept on their rights . . . [but c]ross-jurisdictional tolling does not implicate this concern because injured individuals who rely on a representative class action have not slept on their rights and such tolling involves no exercise of judicial discretion – it turns entirely on the existence of a class action."[27]

Further, the Court of Appeals noted that New York "statute of limitations doctrines are intended to promote repose . . . not undermine other significant statutory schemes", and that its recognition of American Pipe cross-jurisdictional tolling harmonizes any tension between two statutory schemes adopted by the legislature, CPLR articles 2 and 9, and is not an exercise of judicial discretion.[28]

2. CPLR 213-c: Actions by victim of conduct constituting certain sexual offenses.

Pursuant to CPLR 213-c, all civil causes of action brought by any person for physical, psychological, or other injury or condition may be brought against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of the said conduct, within twenty years.[29]

In *Gutierrez v. Mount Sinai Health*, the plaintiff alleged that she was sexually assaulted while at the defendant's residential health care facility.[30] The defendants moved to dismiss the first cause of action, which was granted by the motion court.[31] On appeal, the First Department reversed, noting that while the statute of limitations for intentional torts is one year (CPLR 215), the action was timely pursuant to the language of CPLR 213-c, which was "board" and

27. *See id.* at 505, 158 N.E.3d at 102, 132 N.Y.S.3d at 233 (first citing Lubonty v. U.S. Bank Nat'l Ass'n, 34 N.Y.3d 250, 261, 139 N.E.3d 1222, 1228, 116 N.Y.S.3d 642, 648 n.8 (2019); and then citing Arnold v. Mayal Realty Co., 299 N.Y. 57, 60, 85 N.E.2d 616, 617 (1949)).

28. *Chavez*, 35 N.Y.3d at 505, 158 N.E.3d at 102, 132 N.Y.S.3d at 233 (first citing ACE Sec. Corp., Home Equity Loan Tr., v. DB Structured Prods. Inc., 25 N.Y.3d 581, 593, 36 N.E.3d 623, 627, ACE Sec. Corp., Home Equity Loan Tr., v. DB Structured Prods. Inc., 25 N.Y.3d 581, 593, 15 N.Y.S.3d 716, 720, 36 N.E.3d 623, 627 (2015); then citing Tall Trees Constr. Corp. v. Zoning Bd. of Appeals, 97 N.Y.2d 86, 91, 761 N.E.2d 565, 568, 735 N.Y.S.2d 873, 876 (2001); then citing People v. Dethloff, 283 N.Y. 309, 313, 28 N.E.2d 850, 852 (1940); then citing Barchet v. N.Y.C. Transit Auth., 20 N.Y.2d 1, 6, 228 N.E.2d 361, 363, 281 N.Y.S.2d 289, 292 (1967); and then citing *In re* Humfreville, 154 N.Y. 115, 121, 47 N.E. 1086, 1087 (1987)).

29. *See* N.Y. C.P.L.R. 213-c (McKinney 2021).

30. *See* 188 A.D.3d 418, 419, 134 N.Y.S.3d 337, 339 (1st Dep't 2020).

31. *See id.* at 418, 134 N.Y.S.3d at 338.

"encompass[es] claims against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of said conduct, and not merely the perpetrator."[32] Therefore, the action is not barred under the express language of the statute, which "extends the time of the statute of limitations [and] does not create a cause of action where none otherwise exists."[33]

3. CPLR 214: Action to be commenced within three years: for non-payment of money collected on execution; for penalty created by statute; to recovery chattel; for injury to property; for personal injury for malpractice other than medical, dental or podiatric malpractice; to annul a marriage on the ground of fraud.

CPLR 214 provides for actions which must be commenced within three years.[34]

Among them, CPLR 214(6) provides that an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort must be commenced within three years.[35]

In *Flintlock Construction Services, LLC v. Rubin, Fiorella & Friedman, LLP*, the plaintiff, a general contractor, was represented by the defendant law firm in an action in which it was alleged that the certain excavation work damaged property.[36] The jury returned a verdict as to damages on July 12, 2013, and a monetary judgment was entered on September 5, 2018.[37] The plaintiff commenced a legal malpractice action against the defendant law firm on September 17, 2018, alleging that it committed malpractice by entering into certain stipulations during the course of the action.[38] The defendant moved to dismiss the complaint on the ground that it was time-barred.[39]

According to the First Department, a legal malpractice claim accrues when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court.[40] This, in most cases, is measured from the day an actionable injury occurs, or when

32. *Id.* at 418, 134 N.Y.S.3d at 338 (first citing N.Y. C.P.L.R. 213-c; and then citing Alford v. St. Nicholas Holding Corp., 218 A.D.2d 622, 622, 631 N.Y.S.2d 30, 31 (1st Dep't 1995)) (internal quotations and citation omitted).

33. *Id.* at 418, 134 N.Y.S.3d at 338.

34. *See* N.Y. C.P.L.R. 214 (McKinney 2021).

35. *See id.* 214(6).

36. *See* 188 A.D.3d 530, 530, 136 N.Y.S.3d 13, 14 (1st Dep't 2020).

37. *See id.*

38. *See id.* at 530, 136 N.Y.S.3d at 14.

39. *See id.*

40. *See id.* at 531, 136 N.Y.S.3d at 15.

the damages are sufficiently calculable, even if the aggrieved party is then ignorant of the wrong injury.[41] According to the Court, any damages arising from the defendant's alleged malpractice were sufficiently calculable for pleading purposes when the jury rendered its verdict on July 29, 2013, and therefore, the action commenced on September 17, 2018 was time-barred.[42]

4. CPLR 214-a: Action for medical, dental or podiatric malpractice to be commenced within two years and six months; exceptions.

CPLR 214-a provides that "[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure. . .."[43] There are, however, certain exceptions, including the foreign object exception (CPLR 214-a(a)), and the exception based upon a failure to diagnose cancer or malignant tumor, which may be commenced within two years and six months of the later of either when the person knows or reasonable should have known of the negligence, no later than seven years from the negligent act, or the date of the last treatment where there is continuous treatment for the condition (CPLR 214-a(b)).[44]

In *Gaylord v. Gentile***,** the plaintiff appealed a decision which granted summary judgment to the defendant, maintaining that the statute of limitations had tolled.[45] There, a stent was placed in the plaintiff's ureter as part of a surgical procedure to remove kidney stones and was intended to remain for two to four weeks post-operatively to ensure that the ureter remained unobstructed, allowing urine and stone fragments to pass.[46] In affirming the lower court's decision the First Department found that neither the fact that the ureter was temporary, nor the fact that its continued presence was

41. *See Flintlock Constr. Servs., LLC*, 188 A.D.3d at 531, 136 N.Y.S.3d at 15 (first quoting McCoy v. Feinman, 99 N.Y.2d 295, 301, 785 N.E.2d 714, 718, 755 N.Y.S.2d 693, 697 (2002); and then quoting King Tower Realty Corp. v. G & G Funding Corp., 163 A.D.3d 541, 543, 79 N.Y.S.3d 289, 292 (2d Dep't 2018)).

42. *See id.* at 531, 136 N.Y.S.3d at 15.

43. N.Y. C.P.L.R. 214-a (McKinney 2021).

44. *See id.* 214-a(a), (b).

45. *See* 187 A.D.3d 569, 570, 130 N.Y.S.3d 677, 677 (1st Dep't 2020).

46. *See id.* at 570, 130 N.Y.S.3d at 677 (first citing N.Y. C.P.L.R. 214-a(a) (McKinney 2021); and then citing LaBarbera v. N.Y. Eye & Ear Infirmary, 91 N.Y.2d 207, 208, 691 N.E.2d 617, 618, 668 N.Y.S.2d 546, 547 (1998)).

inadvertent, transformed the stent into a foreign object to toll the statute of limitations.[47]

In *McKinnon v. North Shore-Long Island Health System*, the plaintiff alleged that in August 2011, her gynecologist performed an endometrial polyp biopsy, and the samples were sent to the defendant for analysis.[48] The report dated August 29, 2011 indicated that the test performed on the samples revealed no abnormalities but in January 2014, the plaintiff was informed that there was a mistake in the interpretation of the results which actually revealed that she had endometrial cancer.[49]

The plaintiff filed a lawsuit in March 2015.[50] The defendants moved to dismiss on the grounds that the cause of action was time-barred.[51] The Second Department affirmed.[52] In so doing, it held that the statute of limitations began to run on August 29, 2011, the date of the plaintiff's misdiagnosis, which was more than two and one-half years prior to the lawsuit.[53] Further, because the recently-enacted revival provision (CPLR 214-a(b)) became effective after her action was time-barred, she could not rely on it. [54]

5. CPLR 215: Actions to be commenced within one year: against sheriff, coroner or constable; for escape of prisoner; for assault, battery, false imprisonment, malicious prosecution, libel or slander; for violation of right of privacy; for penalty given to informer; on arbitration award.

CPLR 215 provides for actions which must be commenced within one year.[55]

47. *See id.* at 570, 130 N.Y.S.3d at 677 (first citing *LaBarbera*, 91 N.Y.2d at 212–13, 291 N.E.2d at 620–21, 668 N.Y.S.2d at 549–50; and then citing Walton v. Strong Mem'l Hosp., 25 N.Y.3d 554, 571, 35 N.E.3d 827, 838, 14 N.Y.S.3d 757, 768 (2015)).

48. *See* McKinnon v. N. Shore-Long Island Jewish Health Sys. Lab'y, 187 A.D.3d 890, 890, 130 N.Y.S.3d 731, 732 (2d Dep't 2020).

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id*. at 891, 130 N.Y.S.3d at 732.

53. *See McKinnon*, 187 A.D.3d at 891, 130 N.Y.S.3d at 732 (first citing Mula v. Sasson, 181 A.D.3d 686, 687–88, 121 N.Y.S.3d 143, 144 (2d Dep't 2020); and then citing Forbes v. Caris Life Sci., Inc., 159 A.D.3d 1569, 1573, 72 N.Y.S.3d 728, 732 (4th Dep't. 2018)).

54. *See id.* at 891, 130 N.Y.S.3d at 732 (citing Act of Jan. 31, 2018, 2018 McKinney's Sess. Laws of N.Y., ch. 1, at 7588A (codified at N.Y. C.P.L.R. 203, 214-a (McKinney 2021)).

55. *See* N.Y. C.P.L.R. 215 (McKinney 2021).

CPLR 215(3) provides that an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a right of privacy under section fifty-one of the civil rights law must be commenced within one years.[56]

The above provision was at issue in *Young v. Sethi*.[57] There, it was alleged that during the performance of an interbody fusion surgery on the plaintiff's spine – to which she consented –, the defendants de-rotated her pelvis.[58] As was amplified in discovery, the plaintiff was born with a genetic physical anomaly known as a twisted or rotated pelvis that had been present throughout her life without causing pain or complications.[59] The claims interposed against the defendant alleged that they acted negligently during the surgery by repositioning or derotating the pelvis without the plaintiff's knowledge or consent, causing her to suffer permanent injuries and debilitating pain.[60]

Following discovery, the defendants moved for summary judgment.[61] The Appellate Division affirmed the trial court's dismissal for several reasons, one of which included a finding that any claim that defendants derotated plaintiff's pelvis as a separate procedure from the surgery to which she consented is necessarily an allegation that they acted intentionally.[62] "Despite the fact that plaintiff's complaint alleges only negligence, 'when a patient agrees to treatment for one condition and is subjected to a procedure related to a completely different condition, there can be no question but that the deviation from the consent given was intentional,'" subjecting it to the one-year statute of limitations for the intentional tort of battery: intentional physical contact with another person without their consent.[63]

B. Article 3: Jurisdiction and Service, Appearance and Choice of

56. *See id.* 215(3).

57. 188 A.D.3d 1339, 1342, 134 N.Y.S.3d 571, 574 (3d Dep't 2020) (citing Coopersmith v. Gold, 172 A.D.2d 962, 983, 568 N.Y.S.2d 250, 252 (3d Dep't 1991)).

58. *See id.* at 1340, 134 N.Y.S. at 572–73.

59. *See id.* at 1339–40, 134 N.Y.S. at 572.

60. *See id.* at 1340, 134 N.Y.S. at 572–73.

61. *See id*. at. 1340, 134 N.Y.S. at 573.

62. *See Young*, 188 A.D.3d at 1342, 134 N.Y.S. at 574.

63. *Id.* (citing Messina v. Matarasso, 284 A.D.2d 32, 34, 729 N.Y.S.2d 4, 6 (1st Dep't 2001)).

Court

1. CPLR 301: Jurisdiction over persons, property to status.

CPLR 301 enables a court to exercise personal jurisdiction over persons, property, or status as might have been exercised heretofore.[64]

In *Lowy v. Chalkable, LLC*, the Second Department affirmed the supreme court's order granting the defendants' motion to dismiss insofar as asserted against them for lack of personal jurisdiction.[65] There, the plaintiffs entered into a joint venture agreement with the defendants to produce and develop websites and web-based companies.[66] Both of the defendants were formed under the laws of Delaware and have their principal place of business in California.[67] One of the defendants owns and operates software that facilitates communication in schools and provides educational data management in schools in 50 states, while the other defendant owns and operated the educational technology platform that serves millions of users in more than 70 countries.[68]

According to the Second Department, general jurisdiction provided for in CPLR 301, allows a court to exercise such jurisdiction over persons, property, or status as might have been exercised heretofore, but to comport with due process the "defendant's contacts with New York must be 'so continuous and systematic,' judged against [its] national and global activities, that it is essentially at home' in the state."[69] Quoting *Daimler AG v. Baum*, the Second Department held that the plaintiffs failed to demonstrate that this was an "'exceptional case'", where a corporation would be subject to general jurisdiction outside of the states where it is incorporated and has a principal place of business.[70]

2. CPLR 302: Personal jurisdiction by acts of non-domiciliaries

CPLR 302 enables a court to exercise personal jurisdiction over any non-domiciliary, or his or her executor or administrator, under certain circumstances including, *inter alia*, if he, she, or an agent,

64. *See* N.Y. C.P.L.R. 301 (McKinney 2021).

65. *See* 186 A.D.3d 590, 592–93, 129 N.Y.S.3d 517, 521 (2d Dep't 2020).

66. *See id.* at 590, 129 N.Y.S.3d at 519.

67. *See id.* at 591, 129 N.Y.S.3d at 519.

68. *See id.*

69. *Id.* at 591–92, 129 N.Y.S.3d at 520 (citing Aybar v. Aybar, 169 A.D.3d 137, 143, 93 N.Y.S.3d 159, 163 (2d Dep't. 2019)) (quoting Gucci Am. Inc., v. Bank of China, 768 F.3d 122, 135 (2d Cir. 2014)).

70. *Lowy*, 186 A.D.3d at 592, 129 N.Y.S.3d at 520 (quoting Daimler AG v. Bauman, 571 U.S. 117, 139 (2014)) (citing *Aybar*, 169 A.D.3d at 144, 93 N.Y.S.3d at 164).

transacted business or contracts to supply goods or services in the state; commits a tortious act within the state; commits a tortious act without the state, causing injury to a person or property within the state; or owns, uses, or possesses any real property situated within the states.[71]

In *Barbato v. Giacin*, the plaintiff alleged that defendants husband and wife, who are domiciled in Missouri, engaged in a relentless campaign of harassment and stalking against her wherein, among other things, the husband repeatedly made unwelcome and inappropriate entreaties to her and the wife falsely and publicly accused her, via social media, of having a sexual relationship with her husband.[72] According to the First Department, the supreme court correctly determined that the plaintiff established personal jurisdiction over the husband under CPLR 302(a)(2) – i.e. commits a tortious act without the state, causing injury causing injury to a person or property within the state.[73] However, the court held that the plaintiff did not establish personal jurisdiction over the wife defendant, as there was no basis to infer that the defendant husband's actions toward the plaintiff benefited his wife, or that the defendant husband acted at the behest of his wife.[74]

3. CPLR 306-b: Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause.

CPLR 306-b provides that service shall be made within one hundred twenty days after the commencement of the action or proceeding and if service is not made upon a defendant within the time provided, 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.[75]

In *U.S. Bank National Association v. Kaufman*, the defendant moved to vacate default judgment arguing that she was never properly served, and the plaintiff cross-moved to extend time to service.[76] The

71. *See* N.Y. C.P.L.R. 302(a)(1)–(3) (McKinney 2021).

72. *See* 188 A.D.3d 556, 557, 132 N.Y.S.3d 641, 641 (1st Dep't 2020).

73. *See id.*

74. *See id.* (first citing N.Y. C.P.L.R. 302(a)(2) (McKinney 2021); and then citing Lawati v. Montague Morgan Slade Ltd., 102 A.D.3d 427, 428, 961 N.Y.S.2d 5, 7 (1st Dep't 2013)).

75. *See* N.Y. C.P.L.R. 306-b (McKinney 2021).

76. *See* 187 A.D.3d 1456, 1456, 135 N.Y.S.3d 496, 498 (3d Dep't 2020).

supreme court denied the cross-motion.[77] On appeal before the Third Department, it held,

> "[e]ven if we agree with the defendant that the plaintiff failed to satisfy the good cause standard of CPLR 306-b, we find that plaintiff established its entitlement to an extension of time in the interest of justice. The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties."[78]

On review, the court noted that approximately one month after commencement of the lawsuit, the plaintiff made numerous attempts to serve the defendant at the address provided on the mortgage documents, and the plaintiff promptly cross-moved for an extension of time to cure any service defects approximately one month after the defendant raised the issue of improper service.[79] Further, and importantly, the defendant did not argue, nor did the record establish, that she would suffer any prejudice if any extension of time was granted.[80] In light of the foregoing, and the plaintiff's demonstration of merit to its claim, the cross-motion was properly granted for an extension of time to serve in the interest of justice.[81]

In *Matter of Park Beach Associated Living v. Zucker*, the petitioners commenced a proceeding via an Order to Show Cause, which directed service of the petition to be made upon the Attorney General, which the petitioners complied.[82] Respondents thereafter moved to dismiss for several reasons including lack of personal jurisdiction, as the petitioners failed to effect service upon the respondents (*see* CPLR 307, 7804(c)), and only complied with the service provided for in the Order to Show Cause.[83] Petitioners cross-moved for an extension of time pursuant to CPLR 306-b.[84]

As noted by the Third Department, petitioners promptly sought permission to correct the error to effect service, respondents were not

77. *See id.* at 1457, 135 N.Y.S.3d at 498.

78. *Id.* at 1458, 135 N.Y.S.3d at 499 (quoting Leader v. Maroney, 97 N.Y.2d 95, 105, 761 N.E.2d 1018, 1025, 736 N.Y.S.2d, 291, 298 (2001)).

79. *See* at 1458, 135 N.Y.S.3d at 499.

80. *See id.*

81. *See U.S. Bank Nat'l Ass'n*, 187 A.D.3d at 1458, 135 N.Y.S.3d at 499. (citing Mead v. Singleman, 24 A.D.3d 1142, 1144, 806 N.Y.S.2d 783, 785 (3d Dep't 2005)).

82. *See* 189 A.D.3d 1756, 1757, 137 N.Y.S.3d 209, 211 (3d Dep't 2020).

83. *See id.*

84. *See id.* at 1757–58, 137 N.Y.S.3d at 211.

prejudiced, and the statute of limitations had expired.[85] Accordingly, the court held that "in the interest of justice . . . petitioners should not be penalized for relying on the terms of the order to show cause," and therefore remanded to supreme court for the issuance of a new order to show cause requiring service upon respondents and extending the time of service.[86]

In *JPMorgan Chase Bank N.A. v. Kelleher*, a mortgage foreclosure action, the Third Department upheld the supreme court's denial of a motion for an extension of time to serve.[87] There, the court found that the plaintiff engaged in a pattern of dilatory conduct over nearly a decade, taking roughly three years after commencing the action to file a request for judicial intervention, the case having been administratively closed by the supreme court on at least one occasion, and despite having been made aware of the service issue, the plaintiff did not move for an extension to serve until approximately two and a half years later.[88] Further, despite the statute of limitations having expired, the court found that there was a real concern as to the plaintiff's ability to prevail on the merits.[89]

Justice Aarons dissented on several grounds.[90] Of import for purposes of the instant note, Justice Aarons rejected the defendant's argument that the plaintiff could not prove a *prima facie* case, noting that the plaintiff only had to demonstrate a *potentially* meritorious cause of action.[91]

4. CPLR 327: Inconvenient forum.

CPLR 327 provides that when a court finds that in the interest of "substantial justice", the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just.[92]

In *Diwan v. Grinberg*, the plaintiffs appealed an order which granted defendant's motion to dismiss on the ground of inconvenient forum.[93] There, the plaintiffs sought to enforce the forum selection

85. *See id.* at 1759, 137 N.Y.S.3d at 212.

86. *Id.* (first citing N.Y. C.P.L.R. 306-b (McKinney 2021)) (quoting Leader v. Maroney, 97 N.Y.2d 95, 101, 761 N.E.2d 1018, 1021, 736 N.Y.S.2d 291, 294 (2001)).

87. *See* 188 A.D.3d 1484, 1486, 137 N.Y.S.3d 535, 538 (3d Dep't 2020).

88. *See id.* at 1486, 137 N.Y.S.3d at 537.

89. *See id.* at 1486, 137 N.Y.S.3d at 537–38.

90. *See id.* at 1486, 137 N.Y.S.3d at 538 (Aarons, J., dissenting).

91. *See id.* at 1487, 137 N.Y.S.3d at 539 (Aarons, J., dissenting).

92. N.Y. C.P.L.R. 327 (McKinney 2021).

93. *See* 188 A.D.3d 526, 526, 132 N.Y.S.3d 617, 618 (1st Dep't 2020).

clause in account agreements which were executed between two corporations of which the plaintiffs were shareholders.[94] The defendant was the president of the two corporations and signed the agreement solely in his corporate capacity.[95] In affirming the dismissal, the First Department noted the supreme court considered the proper factors for dismissal, including the burden on the court, the residence of the parties, the location of evidence and witnesses, and the nexus of New York to the claims.[96]

Similarly, in *Cernich v. Athene Holding Ltd*., the court affirmed the trial court's order that the forum selection clause of the parties' Repurchase Agreement did not apply to their Separation Agreement.[97] In so holding, it noted that contrary to the plaintiff's contention, the agreements did not constitute a single, integrated agreement, because they were not executed for the same purpose and did not concern the subject matter or arise from the same transaction.[98] According to the court, "[w]hile the parties executed both agreements at the cessation of their relationship, and the agreements refer to each other, they are not independent" as "[t]he Repurchase Agreement memorializes a one-time repurchase transaction" and, "[b]y contrast, the Separation Agreement memorializes a discrete, ongoing, conditional transaction with a different purpose."[99] Because neither agreement provides that the parties intended forum selection clause of the Repurchase Agreement to be imputed to the Separation Agreement, the First Department affirmed the trial court's decision granting the defendant's motion to dismiss the complaint with prejudice.[100]

In *J.G. v. Goldfinger*, the First Department reversed the trial court's decision which granted the defendants motion to dismiss the

94. *See id.*

95. *See id.* (citing Freeford Ltd. v. Pendleton, 53 A.D.3d 32, 38–39, 857 N.Y.S.2d 62, 67 (1st Dep't. 2008)).

96. *See id.* (citing Bank Hapoalim (Switz.) Ltd. v. Banca Intesa S.P.A., 26 A.D.3d 286, 287, 810 N.Y.S.2d 172, 173–74 (1st Dep't 2006)).

97. *See* 185 A.D.3d 413, 413, 127 N.Y.S.3d 79, 79 (1st Dep't 2020) (citing TVT Records v. Island Def Jam Music Grp., 412 F.3d 82, 89 (2d Cir. 2005)).

98. *See id.* (citing Fernandez v. Cohen, 110 A.D.3d 557, 558, 973 N.Y.S.2d 183, 185 (1st Dep't 2013); and then citing Freeford Ltd. v. Pendleton, 53 A.D.3d 32, 39, 857 N.Y.S.2d 62, 67 (1st Dep't 2008)).

99. *Id.*

100. *See id.* at 413–14, 127 N.Y.S.3d at 79–80 (first citing Indosuez Int'l Fin. B.V. v. Nat'l Rsrv. Bank, 98 N.Y.2d 238, 247–48, 774 N.E.2d 696, 701–02, 746 N.Y.S.2d 631, 636–37 (2002); then citing State Bank of India v. Taj Lanka Hotels, Ltd., 259 A.D.2d 291, 291, 686 N.Y.S.2d 44, 45 (1st Dep't 1999); and then citing Kent v. Universal Film Mfg. Co., 200 A.D.539, 550, 193 N.Y.S. 838, 846–47 (1st Dep't 1922)).

complaint pursuant to CPLR 327(a), noting that the plaintiffs are New York residence and their choice of home forum, while not dispositive, is the "most significant factor in the equation."[101] The court further noted that the corporate defendants had connections to New York, in that its managing directors were New York residents, it held board meetings in New York and they affirmatively pleaded New York as their primary place of business in another case.[102] In rejecting the defendants' argument that a majority of the critical witnesses were located in Aguilla, they only identified three, one of which was incarcerated and would be available to testify via video connection and the others for whom they submitted no evidence that they would not testify voluntarily in New York.[103]

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

1. CPLR 603: Severance and Separate Trials

Pursuant to CPLR 603, "[i]n furtherance of convenience or to avoid prejudice the court may . . . order the trial of any claim or issue prior to the trial of others."[104]

In *Mejia v. Doe*, the plaintiff commenced an action against two defendants – Finkelstein and Schirrippa – to recover damages for personal injuries arising from two separate motor vehicle accidents that occurred on May 30, 2014 and June 16, 2016, respectively.[105] Schirrippa filed an answer with a cross-claim seeking contribution and indemnification against Finkelstein and Finkelstein subsequently moved pursuant to CPLR 603 to sever the cause of action against it from the cause of action asserted against Schirrippa.[106] The motion court granted Finkelstein's motion and the Second Department reversed.[107]

As noted by the Appellate Division, the causes of action asserted against the defendants involve common factual and legal issues and the interests of judicial economy and consistency of verdicts would be

101. 189 A.D.3d 579, 579, 134 N.Y.S.3d 186, 186 (1st Dep't 2020) (quoting Bacon v. Nygard, 160 A.D.3d 565, 566, 76 N.Y.S.3d 27, 28 (1st Dep't 2018)).

102. *See id.* (citing Weston v. Club Mediterranee, S.A., 197 A.D.2d 453, 454, 602 N.Y.S.2d 616, 617–18 (1st Dep't 1993)).

103. *See id.* at 580, 134 N.Y.S.3d at 186.

104. N.Y. C.P.L.R. 603 (McKinney 2021).

105. *See* 186 A.D.3d 1356, 1356, 129 N.Y.S.3d 14, 14 (2d Dep't 2020).

106. *See id.*

107. *See id.*

served by having a single trial.[108] Contrary to Finkelstein's contention, the Second Department found that the medical records submitted by the plaintiff in opposition to the motion sufficiently demonstrated that a common question exists as to whether certain injuries which the plaintiff allegedly sustained in the first automobile accident, were exacerbated by the second.[109] Further, the court held that the defendant did not establish that a single trial would result in prejudice, or that any such prejudice could not be mitigated by the trial court with the appropriate jury instruction.[110] Accordingly, the Second Department reversed.[111]

D. Article 21: Papers

1. CPLR 2101: Form of Papers

CPLR 2101 provides the manner in which papers shall conform.[112] According to CPLR 2101(b), each paper served or filed shall be in the English language and where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it "shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate."[113]

In *Salazar v. Kellari Parea, LLC*, the Second Department affirmed a summary judgment order dismissing the action, noting that the supreme court's determination that a translator's affidavit, which accompanied the plaintiff's English affidavit, failed to comport with the requirements of CPLR 2101(b) because it did not list the translator's qualifications, or state that the translation was accurate.[114]

108. *See id.* at 1357, 129 N.Y.S.3d at 15 (citing Naylor v. Knoll Farms of Suffolk Cnty., Inc., 31 A.D.3d 726, 727, 818 N.Y.S.2d 460, 460 (2d Dep't 2006)).

109. *See id.* (first citing Longo v. Fogg, 150 A.D.3d 724, 725, 55 N.Y.S.3d 61, 62–63 (2d Dep't 2017); then citing Dolce v. Jones, 145 A.D.2d 594, 595, 536 N.Y.S.2d 134, 135 (2d Dep't 1988); then citing Cieza v. 20th Ave. Realty, Inc., 109 A.D.3d 506, 506–07, 970 N.Y.S.2d 311, 312 (2d Dep't 2013); and then citing Romandetti v. Cnty. of Orange, 289 A.D.2d 386, 386, 734 N.Y.S.2d 629, 629 (2d Dep't (2001)).

110. *See Mejia*, 186 A.D.3d at 1357, 129 N.Y.S.3d at 15 (citing Sumi Chuang Yeh v. Leonardo, 134 A.D.3d 695, 696, 20 N.Y.S.3d 561, 653 (2d Dep't 2015); and then citing Zili v. City of New York, 105 A.D.3d 949, 950–51, 963 N.Y.S.2d 684, 684 (2d Dep't 2013)).

111. *See id.* at 1356, 129 N.Y.S.3d at 14.

112. *See* N.Y. C.P.L.R. 2101 (McKinney 2021).

113. *Id.* 2101(b).

114. 189 A.D.3d 1490, 1491–92, 138 N.Y.S.3d 559, 560–61 (2d Dep't 2020).

Though, even assuming that the affidavit was admissible, the court acknowledged it nonetheless failed to raise a triable issue of fact.[115]

E. Article 22: Stay, Motions, Orders and Mandates

1. CPLR 2214: Motion Papers; Service; Time

CPLR 2214 governs the time for service of notice of papers and supporting affidavits.[116] According to CPLR 2214(b), "[a] notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard," and "[a]nswering affidavits shall be served at least two days before such time" (8-2).[117] If a motion is served at least sixteen days before the time in which the motion is to be heard, answering affidavits and any notice of cross-motion, with supporting papers, shall be served at least seven days before and any reply or responding affidavits shall be served at least one day before such time (16-7-1).[118]

In *Elusma v. Jackson*, the defendants moved for summary judgment dismissing the complaint and despite the plaintiffs' opposition papers having been submitted after the return date, the trial court nonetheless considered them and denied the defendant's motion.[119] According to the Second Department, the supreme court improvidently exercised its discretion in considering the plaintiffs' opposition papers, noting that the plaintiffs' "vague and unsubstantiated proffered excuse of law office failure did not constitute a reasonable excuse for late service of their opposition papers."[120] Despite so holding, the Second Department held that the defendants failed to establish their *prima facie* entitlement to summary judgment on the issue of liability.[121]

Similarly, in *Garner v. Rosa Coplon Jewish Home & Infirmary*, the Fourth Department affirmed the trial court's decision declining to

115. *See id.* at 1492, 138 N.Y.S.3d at 561 (citing Buchholz v. Trump 767 Fifth Ave., LLC, 5 N.Y.3d 1, 8–9, 831 N.E.2d 960, 963–64, 798 N.Y.S.2d 715, 718–19 (2005); and then citing Fishelson v. Kramer Props., LLC, 133 A.D.3d 706, 708, 19 N.Y.S.3d 580, 583 (2d Dep't 2015)).

116. *See* N.Y. C.P.L.R. 2214 (McKinney 2021).

117. *Id.* 2214(b).

118. *See id.*

119. *See* Elusma v. Jackson, 186 A.D.3d 1326, 1327, 130 N.Y.S.3d 500, 501 (2d Dep't 2020).

120. *Id.* (first citing N.Y. C.P.L.R. 2214(b), (c) (McKinney 2021); then citing Nakollofski v. Kingsway Props., LLC, 157 A.D.3d 960, 961, 70 N.Y.S.3d 230, 231 (2d Dep't 2018); and then citing Taylor Appraisals v. Prokop, 99 A.D.3d 985, 985, 952 N.Y.S.2d 451, 451 (2d Dep't 2012)).

121. *Id.* at 1327, 130 N.Y.S.3d at 501.

consider the plaintiff's opposition papers to a summary judgment motion.[122] There, the court's scheduling order stated that responsive papers were to be served within 30 days of receipt of the moving papers, to which the plaintiff conceded but argued that they were timely pursuant to CPLR 2214(b).[123] The Fourth Department disagreed, noting that the plaintiff failed to seek leave of court to file after the deadline set forth in the scheduling order, and failed to submit any reason for the delay other than a claim amounting to law office failure to which the lower court found incredible.[124] In its decision, the Appellate Division observed, "[i]f the credibility of court orders are the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."[125]

F. Article 30: Remedies and Pleading

1. CPLR 3012-a: Certificate of merit in medical, dental and podiatric malpractice actions.

CPLR 3012-a provides that in an action for medical, dental or podiatric malpractice, the complaint shall be accompanied by a certificate (certificate of merit).[126]

Pursuant to CPLR 3012-a(a)(1), the certificate must be executed by the plaintiff's attorney that he or she has reviewed the facts of the case and has consulted with at least one physician, dentist or podiatrist, who is knowledgeable in the relevant issues involved and the attorney has concluded based on such review and consultation that there is a reasonable basis for the commencement of such action.[127]

Alternatively, CPLR 3012-a(a)(2) provides that if the attorney was unable to obtain the consultation because of the statute of limitations, the certificate shall be filed within ninety days.[128]

In *Fortune v. New York City Health and Hospitals Corporations*, the family of a patient who had a history of mental illness brought a medical malpractice action against medical providers arising from a patient's suicide the day after he was discharged from the hospital.[129] Rather than attach a certificate of merit to the summons and complaint

122. 189 A.D.3d 2105, 2105, 134 N.Y.S.3d 879, 880 (4th Dep't 2020).

123. *Id.* at 2106, 134 N.Y.S.3d at 881.

124. *Id.*

125. *Id.* (quoting Kihl v. Pfeffer, 94 N.Y.2d 118, 122, 700 N.Y.S.2d 87, 90, 722 N.E.2d 55, 58 (1999)).

126. N.Y. C.P.L.R. 3012-a(a) (McKinney 2020).

127. *Id.*

128. *Id.*

129. 193 A.D.3d 138, 139–40, 142 N.Y.S.3d 54, 55 (1st Dep't. 2021).

as set forth in CPLR 3012-a(a)(1), the plaintiff's attorney certified pursuant to CPLR 3012-a(a)(2) that he was unable to timely obtain a consultation with a physician.[130] Plaintiffs thereafter failed to file the certificate within 90 days and two years later, in response to plaintiffs' motion seeking leave to file a late notice of medical malpractice action pursuant to CPLR 3406(a), the defendants moved to dismiss the complaint for failure to comply with CPLR 3012-a.[131]

The motion court denied the defendants' motion to dismiss holding that dismissal was not warranted because the statute did not authorize such relief, and that the plaintiffs were not required to demonstrate a reasonable excuse and a meritorious cause of action.[132] On appeal, the First Department agreed.[133]

According to the First Department, CPLR 3012-a is analogous to noncompliance with CPLR 3406(a), which was reviewed by the Court of Appeals in *Tewari v. Tsoutsouras*, which held that the statute did not warrant dismissal and failure to timely file a CPLR 3406(a) notice could not be analogized to a pleading default and thus did not require a showing of a reasonable excuse and a meritorious action to obtain a reasonable extension of time to comply.[134] According to the First Department, "[h]ad the legislature intended to permit dismissal for failure to comply with CPLR 3012-a, the statute would empower the court to do so."[135] Moreover, the First Department noted that "a showing of a meritorious action and a reasonable excuse is required to vacate a pleading default and the failure to make this showing necessarily mandates dismissal of the pleading. However, since this sanction is improper in the context of a CPLR 3011-a violation, it follows that the failure to comply with this provision is not a pleading default and a plaintiff is not required to make this showing."[136]

Therefore, the appropriate course for a plaintiff who failed to comply with CPLR 3012-a, is for the defendant to "request a

130. *Id.* at 140, 142 N.Y.S.3d at 55.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Fortune*, 193 A.D.3d at 142, 142 N.Y.S.3d at 57–58 (citing Tewari v. Tsoutsouras, 75 N.Y.2d 1, 11, 550 N.Y.S.2d 572, 576, 549 N.E.2d, 1143, 1147 (1989)).

135. *Id.* at 143, 142 N.Y.S.3d at 58.

136. *Id.* (first citing Kolb v. Strogh, 158 A.D.2d 15, 21, 558 N.Y.S.2d 549, 552 (2d Dep't 1990); then citing *Tewari*, 75 N.Y.2d at 12, 550 N.Y.S.2d at 577, 549 N.E.2d at 1148).

conditional order compelling compliance, which can result in dismissal of the action at the discretion of the court."[137]

2. CPLR 3025: Amended and Supplemental Pleadings.

CPLR 3025 concerns amendment and supplemental pleadings.[138] CPLR 3025(a) provides that a party may amend their pleading once without leave of court within twenty days after its service, or at any time before the period responding to it expires, or within twenty days after service of a pleading responding to it.[139] CPLR 3025(b) governs the amendment of pleadings by leave of the Court and provides that leave to amend "shall be freely given."[140] It further provides that any motion to amend a pleading "shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."[141]

In *Hewitt v. Palmer Veterinary Clinic*, the Court of Appeals affirmed the trial court's decision which struck certain allegations in the plaintiff's supplemental bill of particulars that the defendant was negligent based on a failure to use anesthesia or otherwise follow the standard of care in its treatment of a dog, which bit her in the defendant-veterinarian's waiting room.[142] Importantly, the Court recognized that the claims sought to be added sounded in professional negligence (medical malpractice), versus those that had been originally plead which sounded only in negligence.[143] According to the Court, those allegations sought to be plead, several years after the commencement of the action, introduced a new theory of liability into the case relating to the standard of care owed to the patient dog and its owner, as compared with the duty that the defendant-veterinarian owed to the plaintiff.[144]

Similarly, in *Velocci v. Stop & Shop*, in an attempt to circumvent the fact that he had failed to plead it in his bill of particulars, the plaintiff requested that the court take judicial notice of section 28-301.1 of the 2008 Building Code, which imposes a general duty on

137. *Id.* at 144, N.Y.S.3d at 58. (first citing CPRL 3126(3) (McKinney 2020); then citing *Tewari*, 75 N.Y.2d at 13–14, 550 N.Y.S.2d at 578, 549 N.E.2d at 1149; and then citing Bowles v. State, 208 A.D.2d 440, 443, 617 N.Y.S.2d 712, 715 (1st Dep't 1994)).

138. N.Y. C.P.L.R. 3025 (McKinney 2021).

139. *Id.*

140. *Id.* 3025(b).

141. *Id.*

142. 35 N.Y.3d 541, 546, 159 N.E.3d 228, 230, 134 N.Y.S.3d 312, 314 (2020).

143. *Id.* at 549, 159 N.E.3d at 232, 134 N.Y.S.3d at 316.

144. *Id.*

owners to maintain their buildings in a safe condition.[145] The First Department affirmed the trial court's decision rejecting the plaintiff's request, holding that the plaintiff's failure to plead it in his bill of particulars, and seek leave to amend, was fatal to his application.[146]

In *Kamara v. 767 Fifth Partners, LLC*, however, the First Department affirmed the denial of the plaintiff's motion to amend the complaint to add a cause of action for wrongful death.[147] In so holding, the First Department indicated that the plaintiff was "required to submit competent medical proof [i.e., a Certificate of Merit] of a causal connection" between the decedent's work-related injury and his death, which the plaintiff claimed were due to complications stemming from an epidural injection.[148] Of import, the holding in *Kamara* from the Second Department's 2008 holding in *Lucido v. Mancuso*, which abolished this rule and held that it was contrary to the legislative intent of the CPLR.[149] Accordingly, there is now a split in the departments.[150]

In *Federated Fire Protections Systems Corp. v. 56 Leonard Street, LLC,* the First Department affirmed the denial of plaintiff's motion seeking leave to file a second amended complaint, noting that the plaintiff failed to submit a proposed amendment in connection with its motion, and further that any attempt to replead by the plaintiff would have been futile.[151]

In *Rodriguez v. Extell West 57th Street LLC,* the defendants moved to amend their answer to assert the affirmative defense of the doctrine of collateral estoppel and/or res judicata, based on an adverse

145. 188 A.D.3d 436, 441, 133 N.Y.S.3d 569, 574 (1st Dep't 2020).

146. *Id*. (citing Miki v. 335 Madison Ave., LLC, 93 A.D.3d 407, 408, 940 N.Y.S.2d 38, 39 (1st Dep't 2012).

147. 188 A.D.3d 602, 602, 132 N.Y.S.3d 762, 762–63 (1st Dep't 2020).

148. *Id*. at 602, 132 N.Y.S.3d at 763 (first citing Frangiadakis v. 51 W. 81st St. Corp., 161 A.D.3d 478, 479, 73 N.Y.S.3d 420, 420–21 (1st Dep't 2018); then citing MBIA Ins. Corp. v. Greystone & Co., Inc., 74 A.D.3d 499, 500, 901 N.Y.S.2d 522, 522 (1st Dep't 2010); and then citing Gambles v. Davis, 32 A.D.3d 224, 225, 820 N.Y.S.2d 18, 20 (1st Dep't 2006)).

149. 49 A.D.3d 220, 231–32, 851 N.Y.S.2d 238, 246 (2d Dep't 2008).

150. *See Kamara*, 188 A.D.3d at 602, 132 N.Y.S.3d at 762–63; *Lucido*, 49 A.D.3d at 231–32, 851 N.Y.S.2d at 246.

151. 188 A.D.3d 414, 414, 131 N.Y.S.3d 860, 860 (1st Dep't 2020) (first citing Velarde v. City of New York, 149 A.D.3d 457, 457, 51 N.Y.S.3d 73, 74, (1st Dep't 2017); then citing N.Y. C.P.L.R. 3025(b) (McKinney 2020); then citing Mendoza v. Akerman Senterfitt LLP, 128 A.D.3d 480, 483, 10 N.Y.S.3d 18, 20 (1st Dep't 2015); and then citing Eighth Avenue Garage Corp. v. H.K.L. Realty Corp., 60 A.D.3d 404, 404, 875 N.Y.S.2d 8, 9 (1st Dep't 2009)).

Workers Compensation Board decision.[152] In rejecting the plaintiff's argument that he would have to alter his trial strategy to account for the decision, the First Department held that such an argument was insufficient to establish prejudice where the plaintiff had been, or should have been, aware of the decision for years.[153]

In *Roam Capital, Inc. v. Asia Alternatives Management LLC*, the First Department reversed the motion court's order which denied the plaintiff's motion for leave to amend to amend its complaint.[154] As noted by the Appellate Division, pursuant to CPLR 3025(a), a party may amend his pleading once without leave of the court "at any time before the period responding to it expires."[155] According to the Court, a motion to dismiss extends the defendant's time to answer the complaint "until ten days after service of notice of entry of that order" deciding the motion (*see* CPLR 3211(f)), and because the court had not yet decided the defendant's motion to dismiss at the time the plaintiff moved to amend its complaint, the plaintiff need not move pursuant to Section 3025(b) of CPLR, and instead could have amended as a right pursuant to Section 3025(a) of CPLR.[156]

G. Article 31: Disclosure

1. CPLR 3126: Penalties for refusal to comply with order or to disclose.

CPLR 3126 provides, "[i]f any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just," including striking out pleadings or parts thereof.[157]

In *Moore v. Nizam*, the First Department affirmed the motion court's decision striking the plaintiff's complaint and dismissing the action as against.[158] There, the plaintiff failed to explain why he did

152. 187 A.D.3d 618, 619, 131 N.Y.S.3d 125, 126 (1st Dep't 2020).

153. *Id.* (citing Jacobson v. McNeil Consumer & Specialty Pharms., 68 A.D.3d 652, 654–55, 891 N.Y.S.2d 387, 390 (1st Dep't 2009)).

154. 194 A.D.3d 585, 585, 144 N.Y.S.3d 339, 340 (1st Dep't 2021).

155. *Id.* (citing N.Y. C.P.L.R. 3025(a) (McKinney 2021)).

156. *Roam Capital, Inc.*, 194 A.D.3d at 585–86, 144 N.Y.S.3d at 340 (first citing Nimkoff Rosenfeld & Schechter, LLP v. O'Flaherty, 71 A.D.3d 533, 533, 895 N.Y.S.2d 824, 824 (1st Dep't 2010); and then citing Gowen v. Helly Nahmad Gallery, Inc., 60 Misc. 3d 963, 979, 77 N.Y.S.3d 605, 618 (Sup. Ct. N.Y. Cty. 2018), *aff'd* 169 A.D.3d 580, 580, 95 N.Y.S.3d 62, 63 (1st Dep't 2019)).

157. N.Y. C.P.L.R. 3126 (McKinney 2021).

158. 192 A.D.3d 641, 642, 141 N.Y.S.3d 310, 310 (1st Dep't 2021).

not comply with six discovery orders issued between 2018 and 2019 directing him to serve a supplemental individualized bill of particulars as to a defendant.[159] According to the First Department, the "[p]laintiff's disagreement with the discovery orders does not excuse his noncompliance, where he repeatedly and explicitly agreed to provide the individualized bill of particulars, and failed to challenge any of the court's discovery orders . . . he, instead, simply ignored them."[160]

Similarly, in *Yes Contracting Inc. v. Clst Enterprises LLC*, the First Department affirmed a decision denying the defendants' motion to vacate an order which granted the plaintiff's motion to strike the defendants' answer and counterclaims.[161] There, the Appellate Division noted that the record "amply support[ed] the court's finding that defendants willfully refused to comply with numerous court orders directing discovery," and refused to produce an individual for a deposition, warranting discovery sanctions.[162]

In *Miller v. Miller*, a tort action concerning alleged harassment, the defendant moved to dismiss the plaintiff's complaint for delay in production, and the loss of certain electronically-stored information related to email accounts of the plaintiff and her husband that had been preserved on two hard drives, one of which was later discovered to be inoperable.[163]

As noted by the Fourth Department, "[a]lthough such an extreme sanction [of dismissal] is generally limited to cases where the destruction of evidence was willful or contumacious, dismissal may be warranted where the moving party establishes that the negligent destruction of evidence 'depriv[ed] the party seeking a sanction of the means of proving his [or her] claim or defense. The gravamen of this burden is a showing of prejudice.'"[164] In the case before it, while the

159. *Id.* (first citing N.Y. C.P.L.R. 3126 (McKinney 2021), then citing Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc., 11 N.Y.3d 843, 845, 901 N.E.2d 732, 733–34, 873 N.Y.S.2d 239, 240–41 (2008), and then citing Henderson-Jones v. City of New York, 87 A.D.3d 498, 504–05, 928 N.Y.S.2d 536, 542 (1st Dep't 2011)).

160. *Id.* (citing Watson v. City of New York, 157 A.D.3d 510, 515, 69 N.Y.S.3d 294, 299 (1st Dep't 2018).

161. 193 A.D.3d 535, 535, 147 N.Y.S.3d 12, 13 (1st Dep't 2021).

162. *Id.* (first citing Brown v. Astoria Fed. Sav., 51 A.D.3d 961, 962, 858 N.Y.S.2d 793, 794 (2d Dep't 2008) and then citing Jones v. Green, 34 A.D.3d 260, 261, 825 N.Y.S.2d 446, 446 (1st Dep't 2006)).

163. 189 A.D.3d 2089, 2093–94, 137 N.Y.S.3d 853, 858–59 (4th Dep't 2020).

164. *Id.* at 2094, 137 N.Y.S.3d at 859 (first citing Mahiques v. Cnty. of Niagara, 137 A.D.3d 1649, 1651, 28 N.Y.S.3d 171, 174 (4th Dep't 2016); then citing

hard drives appeared to have been negligently forgotten in plaintiff's attorney's safe for approximately seven years, the plaintiff and her husband had the hard drives imaged by a vendor for the purpose of preservation, and there was no evidence that anyone tampered with the hard drives.[165] Further, the defendant failed to establish that the absence of the access to the "native electronic files due to the loss of information in the inoperable hard drive substantially prejudiced, much less precluded, its ability to mount a defense."[166] Therefore, according to the Fourth Department, the supreme court did not abuse its discretion in refusing to dismiss the amended complaint as a spoliation sanction.[167]

H. Article 32: Accelerated Judgment

1. CPLR 3212: Motion for Summary Judgment.

CPLR 3212 provides the mechanism for a Court to dispose of a cause of action for summary judgment.[168]

CPLR 3212(b) governs the supporting proof and provides that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions."[169]

In *National Auditing Services & Consulting, LLC v 511 Property, LLC*, the First Department held that the plaintiff's failure to submit the answer with its moving papers was a mere irregularity and no substantial right of any party was prejudiced.[170]

In *Yassin v. Blackman*, an action to recover damages for personal injuries in a motor vehicle accident, the plaintiff moved for summary judgment on the issue of liability.[171] In support of the plaintiff's motion, he submitted his own affidavit containing his version of the event and a copy of an uncertified police accident report containing a

Giambrone v. Niagara Mohawk Power Corp., 175 A.D.3d. 1808, 1809, 109 N.Y.S.3d 532, 534 (4th Dep't 2019); and then citing Koehler v. Midtown Athletic Club, LLP, 55 A.D.3d 1444, 1445, 864 N.Y.S.2d 823, 825 (4th Dep't 2008)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *See* N.Y. C.P.L.R. 3212 (McKinney 2020).

169. *Id.* 3212(b).

170. 186 A.D.3d 1160, 1161, 129 N.Y.S.3d 327, 327 (1st Dep't 2020) (citing Mew Equity, LLC v. Sutton Land Servs., LLC, 144 A.D.3d 874, 877 42 N.Y.S.3d 175, 179 (2d Dep't 2016)).

171. 188 A.D.3d 62, 64, 131 N.Y.S.3d 53, 55 (2d Dep't 2020).

statement attributable to the defendant driver that he had swiped the plaintiff's vehicle when trying to pass it.[172]

On appeal before the Second Department, the Appellate Division reversed noting that the defendants raised a triable issue of fact.[173] In so doing, however, the Court took an "opportunity to clarify [its] case law regarding the admissibility of a party's statement recorded in an uncertified police report."[174] According to the Court, the use of a statement recorded in a police accident report involves two levels of hearsay, each of which must fit within a hearsay exception to render the statement contained within the report admissible.[175] The report itself must be admissible and even when a police report is properly certified, the hearsay statements of nonparties or unknown sources contained therein may not be admitted for their truth unless they satisfy an exception to the hearsay rule.[176] Thus, "where a police report has not been certified, and a foundation for its admissibility has not been laid by some other method, the report and its contents constitute inadmissible hearsay."[177] It should be noted, however, that the Second Department made mention that its holding involved a situation in which a party affirmatively proffered a police accident report in support of a motion for summary judgment and made no holding as to whether an uncertified police accident report may be received in opposition to a motion for summary judgment if it is not the only evidence submitted.[178]

2. CPLR 3216: Want of Prosecution

CPLR 3216 provides the mechanism for a Court to dispose of a cause of action when a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party, or who unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms.[179]

172. *Id.*

173. *Id.* at 69, 131 N.Y.S.3d at 58.

174. *Id.* at 65, 131 N.Y.S.3d at 56.

175. *Id.* (citing Memenza v. Cole, 131 A.D.3d 1020, 1022, 16 N.Y.S.3d 287, 289 (2d Dep't 2015)).

176. *Yassin*, 188 A.D.3d at 66, 131 N.Y.S.3d at 56 (citing Noakes v. Rosa, 54 A.D.3d 317, 318, 862 N.Y.S.2d 573, 574 (2d Dep't 2008)).

177. *Id.* (citing Johnson v. Lutz, 170 N.E. 517, 518, 258 N.Y. 124, 128 (1930)).

178. *Id.* at 67, 131 N.Y.S.3d at 57 (citing Stock v. Otis Elevator Co., 52 A.D.3d 816, 816–17, 861 N.Y.S.2d 722, 723 (2d Dep't 2008)).

179. N.Y. C.P.L.R. 3216 (McKinney 2021).

In *Nash v. Schopfer*, the supreme court granted the defendant's motion to dismiss the complaint and the Fourth Department affirmed.[180] According to the Appellate Division, to defeat a motion to dismiss for want of prosecution, the plaintiff must show both a justifiable excuse for the delay, and the existence of a meritorious cause of action.[181] In the case before it, the plaintiff filed a summons and complaint in May 2016 and during the next two years, the plaintiff failed to respond to defendant's discovery requests and failed to comply with a scheduling order.[182] On September 27, 2018, the defendant served a demand upon the plaintiff to file a note of issue within 90 days but the plaintiff did not file the note of issue until January 24, 2019, after the 90-day period expired.[183] In consideration of "the totality of the relevant circumstances," the Fourth Department held that the plaintiff "failed to pursue [his] lawsuit with any diligence" and displayed "dilatory tactics and [an] apparent lack of interest," warranting a dismissal of the complaint.[184]

I. Article 50: Judgements Generally

1. CPLR 5016: Entry of Judgment.

CPLR 5016 governs what constitutes an entry of judgment, a judgment upon a verdict, a judgment upon decision, a judgment after death of a party, and final judgment after interlocutory judgment.[185]

CPLR 5016(d) provides that "[no] verdict or decision shall be rendered against a deceased party, but if a party dies before entry of judgment and after a verdict, decision or accepted offer to compromise pursuant to rule 3221, judgment shall be entered in the names of the original parties unless the verdict, decision or offer is set aside."[186]

In *Matter of Estate of Uccellini*, a judgment creditor brought a petition to determine validity and priority of judgment filed against an estate.[187] There, prior to his death, the decedent and his company were defendants in an action commenced by the petitioner.[188] Prior to his

180. 187 A.D.3d 1535, 1536, 132 N.Y.S.3d 486, 486 (4th Dep't 2020).

181. *Id.* at 1536, 132 N.Y.S.3d at 487 (citing Nicholas v. Agents Serv. Corp., 133 A.D.2d 912, 913, 520 N.Y.S.2d 282, 283 (3d Dep't 1987)); and then citing N.Y. C.P.L.R. 3216(e) (McKinney 2021)).

182. *Id.*

183. *Id.*

184. *Id.* (citing *Nicholas*, 133 A.D.2d at 914, 520 N.Y.S.2d 282 at 283).

185. N.Y. C.P.L.R. 5016 (McKinney 2021).

186. *Id.* 5016(d).

187. 192 A.D.3d 1231,1232, 143 N.Y.S.3d 704, 705 (3d Dep't 2021).

188. *Id.*

death, the decedent and petitioner entered into a settlement stipulation which provided that if the decedent or the company failed to remit the agreed-upon amount within 60 days, the court would issue a judgment for the full amount in dispute, including interests and costs.[189] Payment was not remitted and the decedent died prior to the court issuing the judgment and order.[190]

Decedent's estate made partial payments to the petitioner and once the will was admitted to probate, petitioner filed a verified claim against the estate.[191] The petitioner commenced a proceeding pursuant to SCPA 1809 arguing that, although the judgment was entered after decedent's death, the petitioner was entitled to priority over other creditors.[192] A co-executor of decedent's estate objected, arguing that petitioner was not entitled to priority because the judgment was not perfected prior to decedent's death.[193] The supreme court determined that the petitioner was not entitled to priority and the petitioner appealed.[194]

On appeal, the petitioner argued that former Civil Practice Act § 478 – the predecessor to CPLR 5016(d) – and case law, support a broad interpretation of CPLR 5016(d), by which the settlement stipulation would be deemed to qualify as an "accepted offer to compromise" pursuant to CPLR 3221.[195]

First, the Third Department indicated that an accepted offer to compromise pursuant to CPLR § 3221 (CPLR § 5016(d)), refers to a "precise mechanism" which allows a party against whom a claim is asserted to, ten days before trial, "serve upon the claimant a written offer to allow judgment to be taken against him [or her] for a sum or property or to the effect therein specified, with costs then accrued."[196] If within ten days thereafter the claimant serves a written notice that

189. *Id.*

190. *Id.*

191. *Id.*

192. In re *Uccellini*, 192 A.D.3d at 1232, 143 N.Y.S. at 705 (citing N.Y. SURR. CT. PROC. ACT § 1811(2)(c) (McKinney 2021).

193. *Id.*

194. *Id.*

195. *Id.* at 1233, 143 N.Y.S.3d at 705 (first citing N.Y. C.P.L.R. 5016(d) (McKinney 2021); then citing N.Y. C.P.L.R. 3221 (McKinney 2021); then citing *In re* Herrick, 170 Misc. 465, 466, 10 N.Y.S.2d 471, 472 (Sur. Ct. 1939), then citing 2A Carmody-Wait 2d § 11:13; then citing 27A Carmody-Wait 2d § 159:101; then citing 22 N.Y. JUR. 2D ACTIONS § 124; and then citing Nicholson v. McMullen, 176 Misc. 693, 695, 28 N.Y.S.2d 287, 289 (Sup. Ct. N.Y. Cnty. 1941)).

196. In re *Uccellini*, 192 A.D.3d at 1233, 143 N.Y.S.3d at 706 (citing N.Y. C.P.L.R. 5016(d)).

he or she accepts the offer, either party may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly.[197] As noted by the Court, there was no written offer or acceptance; rather, the stipulation at issue occurred on the record and the filing in the clerk's office occurred after the petitioner secured the judgment and order from the supreme court.[198]

As noted by the Third Department, the underlying judgment is based upon a stipulation of settlement placed upon the record, rather than a verdict or decision, therefore CPLR §5016(d) does not expressly apply.[199] Further, in declining to adopt the petitioner's broad interpretation, the Third Department indicated that the Legislature, in creating CPLR § 5016(d), set forth three distinct situations where a post-mortem judgment may be entered against the decedent in his or her own name, thus bestowing priority to the creditor.[200] According to the Third Department, "none of [those] three provisions was met" and therefore the surrogate's court properly determined that the petitioner was not entitled to priory.[201]

III. COURT RULES

The New York State Office of Court Administration ("OCA") made material changes to the rules relating to the actions in the Supreme Court during this *Survey* year.

A. Section 202.1(f)(g)

Effective February 1, 2021, section 202.1 of the Uniform Rules of the Uniform Civil Rules for the Supreme and County Court were amended to create new subdivisions (f) and (g) as follows:

> (f) Counsel who appear before the court must be familiar with the case with regard to which they appear and be fully prepared and authorized to discuss and resolve the issues which are scheduled to be the subject of the appearance. Failure to comply with this rule may be treated as a default for purposes

197. *Id.* (citing N.Y. C.P.L.R. 3221).

198. *Id.* (first citing 41 N.Y. JUR. 2D DECEDENTS' ESTATES § 1921; and then citing N.Y. CIVIL PRACTICE: C.P.L.R., ¶ 5016.14 (Mathew Bender & Co., Inc., ed., 10th ed. 2021)).

199. *Id.* at 192 A.D.3d at 1232–33, 143 N.Y.S.3d at 705.

200. *In re* Uccellini, 192 A.D.3d 1231 at 1233, 143 N.Y.S.3d 704 at 706 (citing N.Y. C.P.L.R. 5016(d)).

201. *Id.* at 1233–24, 143 N.Y.S.3d at 706 (citing N.Y. SURR. CT. PROC. ACT § 1811(2)(c) (McKinney 2021)).

of Rule 202.27 and/or mav be treated as a failure to appear for purposes of Rule 130.2.1.

(g) It is important that counsel be on time for all scheduled appearances.[202]

B. Section 202.20

Effective February 1, 2021, the Uniform Civil Rules for the Supreme and County Court were amended to add new section 202.20, as follows:

Section 202.20 Interrogatories.

Interrogatories are limited to 25 in number, including subparts, unless the court orders otherwise. This limit applies to consolidated actions as well.[203]

Effective February 1, 2021, the Uniform Civil Rules for the Supreme and County Court were amended to add new section 202.20-b, as follows:

Limitations on Depositions.

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

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

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

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

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

(d) For the purposes of this Rule, each deposition of an officer, director, principal or employee of an entity who is also a fact witness, as opposed to an entity representative pursuant to CPLR 3106(d), shall constitute a separate deposition.

(e) For the purposes of subsection (a)(2) of this Rule, the deposition of an entity shall be treated as a single deposition even though more than one person may be designated to testify

202. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.1(f)–(g) (2021).
203. *Id.* § 202.20.

on the entity's behalf. Notwithstanding the foregoing, the cumulative presumptive durational limit may be enlarged by agreement of the parties or upon application for leave of Court, which shall be freely granted.

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

(g) Nothing in this Rule shall be construed to alter the right of any party to seek any relief that it deems appropriate under the CPLR or other applicable law.[204]

C. Section 202.20-e

Effective February 1, 2021, the Uniform Civil Rules for the Supreme and County Court were amended to add new section 202.20-e, as follows:

Section 202.20-e Adherence to Discovery Schedule.

(a) Parties shall strictly comply with discovery obligations by the dates set forth in all case scheduling orders. Applications for extension of a discovery deadline shall be made as soon as practicable and prior to the expiration of such deadline. Noncompliance with such an order may result in the imposition of an appropriate sanction against that party or for other relief pursuant to CPLR 3126.

(b) If a party seeks documents from an adverse party as a condition precedent to a deposition of such party and the documents are not produced by the date fixed, the party seeking disclosure may ask the court to preclude the nonproducing party from introducing such demanded documents at trial.[205]

D. Section 202.20-f

Effective February 1, 2021, the Uniform Civil Rules for the Supreme and County Court were amended to add new section 202.20-f, as follows:

Section 202.20-f Disclosure Disputes.

(a) To the maximum extent possible, discovery disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice.

204. *Id.* § 201.20-b.
205. *Id.* § 202.20-e.

> (b) Absent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. Such consultation must take place by an in person or telephonic conference. In the event that a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference. The unreasonable failure or refusal of counsel to participate in a conference requested by another party may relieve the requesting party of the obligation to comply with this paragraph and may be addressed by the imposition of sanctions pursuant to Part 130. If the moving party was unable to conduct a conference due to the unreasonable failure or refusal of an adverse party to participate, then such moving party shall, in an affidavit or affirmation, detail the efforts made by the moving party to obtain such a conference and set forth the responses received.
>
> (c) The failure of counsel to comply with this rule may result in the denial of a discovery motion, without prejudice to renewal once the provisions of this rule have been complied with, or in such motion being held in abeyance until the informal resolution procedures of the court are conducted.[206]

E. Section 202.8-b

Effective February 1, 2021, the Uniform Civil Rules for the Supreme and County Court were amended to add new section 202.8-b.[207] Under new Rule 202.8-b, affidavits, affirmations, briefs, and memoranda of law shall be limited to 7,000 words.[208] Reply documents are limited to 4,200 words.[209] Every brief, memorandum, affirmation, and affidavit shall include a certification by counsel who has filed the document setting forth the word count and certifying that the document complies.[210]

206. *Id.* § 202.20-f.
207. 22 N.Y.C.R.R. § 202.8-b (2021).
208. *Id.* § 202.8-b(a)(i).
209. *Id.* § 202.8-b(a)(ii).
210. *Id.* § 202.8-b(c).

F. Section 202.8-g

Effective February 1, 2021, the Uniform Civil Rules for the Supreme and County Court were amended to add new section 202.8-g.[211] Under the new Rule 202.8-g, summary judgment motions shall include a short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.[212] The responding party shall include a correspondingly numbered paragraph responding to each numbered paragraph indicating the material fact requiring trial.[213] Each numbered paragraph of the movant's statement of material facts will be deemed admitted unless the responding party controverts it.[214]

G. Section 202.8-f

Effective February 1, 2021, the Uniform Civil Rules for the Supreme and County Court were amended to add new section 202.8-f, as follows:

> *Section 202.8-f. Oral Argument.*
>
> *(a) Each court or court part shall adopt a procedure governing request for oral argument of motions, provided that, in the absence of the adoption of such a procedure by a particular court or part, the provisions of paragraph (b) shall apply. The procedure to be adopted shall set forth whether oral argument is required on all motions or whether the court will determine, on a case-bv-case basis, whether oral argument will be heard and how counsel shall request argument and, if oral argument is permitted, when counsel shall appear.*
>
> *(b) Any party may request oral argument of a motion by letter accompanying the motion papers. Notice of the date selected by the court shall be given, if practicable, at least 14 days before the scheduled oral argument. At that time, counsel shall be prepared to argue the motion, discuss resolution of the issues presented and/or schedule a trial or hearing.*
>
> *(c) Oral arguments may be conducted by the court by electronic means.*[215]

211. *Id.* § 202.8-g.
212. 22 N.Y.C.R.R § 202.8-g-a (2021).
213. *Id.* § 202.8-g(b).
214. *Id.* § 202.8-g(c).
215. *Id.* § 202.8-f.

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.