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

1. The *Survey* timeperiod is July 1, 2021 through June 30, 2022.

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-i

Chapter 593, section 4 of the Laws of 2021, effective April 7, 2022, added CPLR section 214-i to provide as follows:

> Certain actions arising out of consumer credit transactions to be commenced within three years.
>
> An action arising out of a consumer credit transaction where a purchaser, borrower or debtor is a defendant must be commenced within three years, except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law. Notwithstanding any other provision of law, when the applicable limitations period expires, any subsequent payment toward, written or oral affirmation of or other activity on the debt does not revive or extend the limitations period.

B. CPLR § 514

Chapter 556, of the laws of 2021, effective December 3, 2021, amended CPLR section 501 to reference a new section 514. Subdivision (2) provides that:

> In any contract involving the sale, lease or otherwise providing of consumer goods, any portion of the contract or any clause which purports to designate, restrict, or limit the venue in which a claim shall be adjudicated or arbitrated shall be deemed void as public policy. Nothing in this section shall be deemed to affect the validity of any other aspect of a contract.

C. CPLR § 3012

Chapter 593, section 6 of the laws of 2021, effective May 7, 2022, amended CPLR 3012(a) to provide as follows:

> Section 3012(a) Service of Pleadings.

> The complaint may be served with the summons, *except that in an action arising out of a consumer credit transaction, the complaint shall be served with the summons*. A subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. In any other case, a pleading shall be served in the manner provided for service of papers generally. Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds. (emphasis added)

D. CPLR § 3101

Chapter 136, section 1 of the laws of 2022, effective February 24, 2022, amended CPLR 3101 to provide as follows:

> Section 3101 (f) Contents of insurance agreement.
>
> (1) *No later than ninety days after service of an answer pursuant to rule three hundred twenty or section three thousand eleven or three thousand nineteen of this chapter, any* defendant, third-party defendant, or defendant on a cross-claim or counter-claim shall provide to the plaintiff, third-party plaintiff, plaintiff on counter-claim, and any other party in the action proof of the existence and contents of any insurance agreement *in the form of a copy of the insurance policy in place at the time of the loss or, if agreed to by such plaintiff or party in writing, in the form of a declaration page*, under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment. *A plaintiff or party who agrees to accept a declaration page in lieu of a copy of any insurance policy does not waive the right to receive any other information required to be provided under this subdivision, and may revoke such agreement at any time, and upon notice to an applicable defendant of such revocation, shall be provided with the full copy of the insurance policy in place at the time of the loss*. Information and documentation*, as evidenced in the form of a copy of the insurance policy in place at the time of the loss or the declaration page,* pursuant to this subdivision shall include:
>
> (i) all primary, excess and umbrella policies, contracts or agreements issued by private or publicly traded stock companies, mutual insurance companies, captive insurance entities, risk retention groups, reciprocal insurance exchanges, syndicates, including, but not limited to, Lloyd's Underwriters as defined in section six thousand one hundred sixteen of the

insurance law, surplus line insurers and self-insurance programs *insofar as such documents relate to the claim being litigated*;

(ii) *if the insurance policy in place is provided*, a complete copy of any policy, contract or agreement *under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment as* referred to in this paragraph, including, but not limited to, declarations, insuring agreements, conditions, exclusions, endorsements, and similar provisions;

(iii) the contact information, including *the name* and e-mail address, of an assigned individual responsible for adjusting the claim at issue; and

(iv) *total limits* available under any policy, contract or agreement, *which shall mean the actual funds, after taking into account erosion and any other offsets, that can be used* to satisfy a judgment described in this subdivision or to reimburse for payments made to satisfy the judgment;

(2) A defendant, third-party defendant, or defendant on a cross-claim or counter-claim required to produce to a plaintiff or third-party plaintiff or plaintiff on a counter-claim all information set forth in paragraph one of this subdivision *must* make reasonable efforts to ensure that the information remains accurate and complete, and provide updated information to any party to whom this information has been provided *at the filing of the note of issue, when entering into any formal settlement negotiations conducted or supervised by the court, at a voluntary mediation, and when the case is called for trial*, and for sixty days after any settlement or entry of final judgment in the case inclusive of all appeals.

(3) For purposes of this subdivision, an application for insurance shall not be treated as part of an insurance agreement. *Disclosure of policy limits under this section shall not constitute an admission that an alleged injury or damage is covered by the policy.*

(4) Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial.

(5) *The requirements of this subdivision shall not apply to actions brought to recover motor vehicle insurance personal injury protection benefits under article fifty-one of the insurance law or regulation sixty-eight of title eleven of the New York codes, rules and regulations.*(emphasis added)

E. CPLR § 3122-b

Chapter 832, section 3 of the Laws of 2021, effective December 31, 2021, added CPLR section 3122-b to provide as follows:

> Section 3122-b. Certificate of insurance disclosure.
>
> Information provided pursuant to subdivision (f) of section thirty-one hundred one of this article shall be accompanied by a certification by the defendant, third-party defendant, or defendant on a cross-claim or counter-claim and a certification by any attorney appearing for the defendant, third-party defendant, or defendant on a cross-claim or counter-claim, sworn in the form of an affidavit or affirmation where appropriate, stating that the information is accurate and complete, and that reasonable efforts have been undertaken, and in accordance with paragraph two of subdivision (f) of section thirty-one hundred one of this article will be undertaken, to ensure that this information remains accurate and complete.

F. CPLR § 3213

Chapter 593, section 10 of the Laws of 2021, effective May 7, 2022, amended CPLR section 3213 to provide as follows:

> Section 3213. Motion for summary judgment in lieu of complaint.
>
> When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise. *The additional notice required by subdivision (j) of rule 3212 shall be applicable to a motion made pursuant to this section in any action*

> *to collect a debt arising out of a consumer credit transaction where a consumer is a defendant.* (emphasis added)

G. CPLR § 3215

Chapter 831, section 2 of the Laws of 2021, effective April 30, 2022, amended CPLR 3215(f), to provide as follows:

> Section 3215 (f) Proof.
>
> On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, and proof of the facts constituting the claim, the default and the amount due, including, if applicable, a statement that the interest rate for consumer debt pursuant to section five thousand four of this chapter applies, by affidavit made by the party, or where the state of New York is the plaintiff, by affidavit made by an attorney from the office of the attorney general who has or obtains knowledge of such facts through review of state records or otherwise. Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney. When jurisdiction is based on an attachment of property, the affidavit must state that an order of attachment granted in the action has been levied on the property of the defendant, describe the property and state its value. Proof of mailing the notice required by subdivision (g) of this section, where applicable, shall also be filed.
>
> * * *
>
> Section (i) Default judgment for failure to comply with stipulation of settlement.
>
> (1)Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply with the stipulation, for entry without further notice of a judgment in a specified amount with interest, if any, from a date certain, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with a complaint or a concise statement of the facts on which the claim was based, *and, if applicable, a statement that the interest rate for consumer debt pursuant to section five thousand four of this chapter applies.*
>
> (2)Where, after commencement of an action, a stipulation of settlement is made, providing, in the event of failure to comply

> with the stipulation, for entry without further notice of a judgment dismissing the action, the clerk shall enter judgment on the stipulation and an affidavit as to the failure to comply with the terms thereof, together with the pleadings or a concise statement of the facts on which the claim and the defense were based. (emphasis added)

H. CPLR § 5019

Chapter 593, section 3 of the Laws of 2021, effective December 31, 2021, amended subdivision (c) of CPLR section 5019 to provide as follows:

> Section 3122(c). Change in judgment creditor.
>
> A person other than the party recovering a judgment who becomes entitled to enforce it, shall file in the office of the clerk of the court in which the judgment was entered or, in the case of a judgment of a court other than the supreme, county or a family court which has been docketed by the clerk of the county in which it was entered, in the office of such county clerk, a copy of the instrument on which his authority is based, acknowledged in the form required to entitle a deed to be recorded, or, if his authority is based on a court order, a certified copy of the order. Upon such filing the clerk shall make an appropriate entry on his docket of the judgment. *This subdivision shall not apply when there is a change to the owner of a debt through a sale, assignment, or other transfer where no judgment exists*. (emphasis added)

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.[2] The date was repeatedly extended.

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.[3]

2. Brash v. Richards, 149 N.Y.S.3d 560, 563 (App. Div. 2d Dep't 2021) (citing 9 N.Y.C.R.R. § 8.202.8 (2023)).

3. Exec. Order No. 202.8, *reprinted in* 9 N.Y.C.R.R. § 8.202.8 (2020).

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

In a June 2, 2021, decision issued by the Appellate Division, Second Department, the court 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."[4] 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.

In the case before it, *Brash v. Richards*, an order was served with notice of entry on October 2, 2020, and a notice of appeal was served and filed on November 10, 2020.[5] As noted by the Second Department, 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.[6] Therefore, the court found that the subsequent executive orders continued to toll the statutory time limits, and the notice of appeal was timely.[7]

1. CPLR § 213: Actions to be Commenced Within Six Years: Where not Otherwise Provided for; on Contract; on Sealed Instrument; on Bond or Note, and Mortgage upon Real Property; by State Based on Misappropriation of Public Property; Based on Mistake; by Corporation Against Director; Officer or Stockholder; Based on Fraud

Pursuant to CPLR section 213(2), "an action upon a contractual obligation or liability, express or implied" (with exceptions), must be commenced within six years.[8]

The above provision was addressed by the Fourth Department in *Morrow v. Brighthouse Life Insurance Co. of New York*.[9] There, the allegations concerned an alleged breach of a life insurance policy.[10] In determining when the breach occurred, the appellate division

4. *Brash*, 149 N.Y.S.3d at 563.
5. *Id.* at 562.
6. *Id.* at 563.
7. *Id.*
8. N.Y. C.P.L.R. 213(2) (MCKINNEY 2023).
9. Morrow v. Brighthouse Life Ins. Co. of N.Y., 161 N.Y.S.3d 604, 606 (App. Div. 4th Dep't 2021).
10. *Id.* at 606.

observed, a breach of contract cause of action accrues at the time of the breach, even if the damage does not occur until later.[11] Accordingly, the court held that any breach occurred when the policy, which stated that the beneficiary was named in the application and referred the reader to an attached copy of the application that listed the son's girlfriend as a beneficiary, was issued in May 2006.[12] Therefore, the fact that the plaintiff alleged that she did not discover the breach until she made a claim under the policy in May 2011 was of no consequence, as the plaintiff failed to commence a cause of action more than six years from when the contract was signed and therefore it was untimely.[13]

2. 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 section 214 provides for actions which must be commenced within three years.[14] Among them, CPLR section 214(6) provides that "an action to recover damages for malpractice, other than medical, dental or podiatric malpractice," must be commenced within three years.[15] However, the continuous representation doctrine may operate to toll the limitations period "where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim"[16] and "where the continuing representation pertains specifically to [that] matter."[17]

The above provision was at issue before the Fourth Department in *Ray-Roseman v. Lippes Mathias Wexler Friedman, LLP*.[18] There,

11. *Id.* at 607 (Ely-Cruikshank Co. v. Bank of Montreal, 615 N.E.2d 985, 986 (N.Y. 1993)).

12. *Id.*

13. *Id.* (quoting Yarbro v. Wells Fargo Bank, N.A., 33 N.Y.S.3d 727, 728 (App. Div. 1st Dep't 2016)) (citing Deutsche Bank Nat'l Tr. Co. v. Flagstar Cap. Mkts., 112 N.E.3d 1219, 1220–21 (N.Y. 2018)).

14. *See* N.Y. C.P.L.R. 214 (MCKINNEY 2023).

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

16. McCoy v. Feinman, 785 N.E.2d 714, 722 (N.Y. 2002).

17. Int'l Electron Devices (USA) LLC v. Menter, Rudin & Trivelpiece, P.C., 898 N.Y.S.2d 388, 389 (App. Div. 4th Dep't 2010) (quoting Shumsky v. Eisenstein, 750 N.E.2d 67, 70 (N.Y. 2001)).

18. Ray-Roseman v. Lippes Mathias Wexler Friedman, LLP, 153 N.Y.S.3d 319, 320 (App. Div. 4th Dep't 2021).

the plaintiffs commenced an action against the defendants "alleging, inter alia, legal malpractice arising from their representation of plaintiffs with respect to a 2014 business loan transaction and subsequent foreclosure litigation."[19] The defendants moved "to dismiss as time-barred the legal malpractice claim against them insofar as it is predicated on the 2014 loan transaction."[20]

According to the Fourth Department, the defendants met their initial burden of establishing that the malpractice claim insofar as it related to the 2014 loan transaction was commenced beyond the three-year statute of limitations, and the burden shifted to the plaintiffs to raise a triable issue of fact whether "'the statute of limitations was tolled or otherwise inapplicable, or whether . . . plaintiff[s] actually commenced the action within the applicable limitations period.'"[21]

In finding that the plaintiffs raised a triable issue of fact as to whether the continuous representation doctrine applied, the court noted that the "plaintiffs submitted communication between the Florida attorney and defendants in which the Florida attorney indicated that defendants' role as New York counsel included '*enforcement*' of the 2014 loan transaction documents," and that "the 2014 loan transaction and the foreclosure proceedings were close in time, as evidenced by . . . supplemental billing invoices for legal services, which demonstrated a representation from the loan transaction to the foreclosure proceeding without a break."[22] Accordingly, the Fourth Department held that questions of fact existed "regarding the extent of defendants' representation of plaintiffs and, more specifically, whether 'enforcement' of the loan documents contemplated a continued representation until the loan was paid in full and the transaction completed."[23]

3. CPLR § 214-a: Action for Medical, Dental or Podiatric Malpractice to be Commenced Within Two Years and Six Months; Exceptions

CPLR section 214-a provides that:

19. *Id.* at 320.
20. *Id.*
21. *Id.* at 321 (first citing Rider v. Rainbow Mobile Home Park, 145 N.Y.S.3d 246, 247 (App. Div. 4th Dep't 2021)).
22. *Id.* (citing Carbone v. Brenizer, 50 N.Y.S.3d 783, 784 (App. Div. 4th Dep't 2017).
23. *Ray-Roseman*, 153 N.Y.S.3d at 321.

> An 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.[24]

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 reasonably 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)).[25]

In *Caraballo v. New York Presbyterian Hospital/Weill Cornell Medical Center*, the First Department affirmed the defendant's motion to dismiss the complaint against it as untimely.[26] There, the plaintiff's last visit to the NYPH-affiliated endocrinology clinic was on July 28, 2015, and the course of treatment continued through his scheduled appointment on September 1, 2015, but terminated after he missed that appointment and did not reschedule.[27] In rejecting "[p]laintiff's conclusory assertion in his affidavit that he still considered himself to be a patient of the NYPH endocrinology clinic through July 2016," the appellate division observed that the understanding that treatment was ongoing must be shared by both physician and patient.[28] The court also observed that his affidavit was inconsistent with his conduct at his October 21, 2015 appointment at Mount Siani, where he stated he "[w]as seeing" a different endocrinologist but wanted to be treated at Mount Sinai from then on.[29] Accordingly, because the plaintiff's complaint was not filed within two and a half years from July 28, 2015, the action was time-barred.[30]

In *Chvetsova v. Family Smile Dental*, a patient brought an action against defendants dentist and dental clinic sounding in medical malpractice, lack of informed consent, and breach of contract, alleging

24. *See* N.Y. C.P.L.R. 214-a (MCKINNEY 2023).

25. *Id.*

26. Caraballo v. N.Y. Presbyt. Hosp./Weill Cornell Med. Ctr., 153 N.Y.S.3d 845, 845 (App. Div. 1st Dep't 2021).

27. *Id.* (citing Richardson v. Orentreich, 477 N.E.2d 210, 211 (N.Y. 1985)).

28. *Id.* (citing Plummer v. N.Y.C. Health & Hosps. Corp., 774 N.E.2d 712, 715 (N.Y. 2002)).

29. *Id.*

30. *Id.* at 845.

that defendants failed to diagnose the patient's bone condition prior to recommending and performing surgery in 2008.[31] More specifically, the plaintiff alleged that, as a result of the defendants' negligence, she had to undergo numerous corrective surgeries and related treatment from 2008, up through and including her last visit with the defendants on December 24, 2012, and reconstructive maxillofacial surgery from a different provider thereafter.[32] The defendants moved to dismiss the complaint as time barred and the plaintiff cited the continuous treatment doctrine.[33] The supreme court granted the defendants' motion and the plaintiff appealed.

On appeal before the Second Department, the court found that the plaintiff raised a question of fact as to whether her subsequent visits for treatment on her upper jaw constituted a continuation of the course of treatment for the same condition that allegedly arose as a result of malpractice committed at the outset of the patient-dentist relationship.[34] More specifically, the court noted that the plaintiff submitted an affirmation of her current treating dentist, who opined that the plaintiff initially sought treatment from defendants in order to obtain a permanent prosthetic replacement for the missing teeth in her upper jaw, and that the plaintiff's dentist further opined that the numerous surgeries that the plaintiff underwent on her upper jaw to repair and replace implants and prostheses were related to the defendants' initial alleged malpractice.[35] The appellate division also held that the record presents questions of fact as to whether the plaintiff timely initiated return visits to complain and seek corrective treatment from the defendants, such that his purported discharge of the plaintiff did not sever the course of treatment at any point between 2008 and the plaintiff's final visit on December 24, 2012.[36]

Accordingly, the Second Department reversed the supreme court's decision and reinstated the plaintiff's causes of action based on medical malpractice and lack of informed consent.[37]

31. Chvetsova v. Fam. Smile Dental, 163 N.Y.S.3d 98, 100 (App. Div. 2d Dep't 2022).
32. *Id.*
33. *Id.*
34. *Id.* at 101.
35. *Id.*
36. *Chvetsova*, 163 N.Y.S.3d at 102.
37. *Id.*

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

1. CPLR § 302: Personal Jurisdiction by Acts of Non-Domiciliaries

CPLR section 302 enables a court to exercise personal jurisdiction over any non-domicilary, or his or her executor or administrator, under certain circumstances including, *inter alia*, if he, she, or an agent, transacted business or contracts to supply goods or services in the state; commits a tortious act within the state; commits a tortious act outside the state, causing injury to a person or property within the state; or owns, uses or possesses any real property situated within the states.[38]

In *New York v. Vayu, Inc*., the Third Department affirmed the supreme court's dismissal of a motion for lack of personal jurisdiction pursuant to CPLR section 302(a)(1).[39] There, the State University of New York at Stony Brook entered into an agreement to purchase two unmanned aerial vehicles (UAVs) from defendant, a corporation based in Michigan and incorporated in Delaware that designs and manufactures UAVs.[40] The agreement provided for the UAVs to be delivered to Stony Brook's Global Health Institute in Madagascar and to be used for delivery of medical supplies to remote areas of that country.[41] Following the delivery of the UAVs, SUNY Stony Brook alleged that the UAVs were defective and returned them to defendant in Michigan.[42] When defendant failed to replace them or provide a refund, an action asserting breach of contract among other claims was asserted against them and defendant moved to dismiss the complaint due to lack of personal jurisdiction.[43]

According to the Third Department, personal jurisdiction was not established because the defendant did not purposefully avail itself of the privilege of conducting activities within New York simply by transacting business in New York.[44] In noting the various communications between the parties to discuss the ongoing issues with the UAVs, to create a relationship, and to submit grants for projects that

38. *See* N.Y. C.P.L.R. 302(a)(1)–(3) (MCKINNEY 2023).
39. New York v. Vayu, Inc., 151 N.Y.S.3d 206, 210 (App. Div. 3d Dep't 2021).
40. *Id.* at 208.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Vayu*, 151 N.Y.S.3d at 209.

would take place entirely and solely outside of New York, the court held that the communications did not result in more sales in New York, or seek to advance defendant's business contacts within New York, and the quantity of the communication did not matter.[45] Rather, the business transacted—the sale of the UAVs to SUNY Stony Brook for use in Madagascar—was a one-time occurrence.[46] The court also observed that the UAVs were shipped to Madagascar (i.e., not New York) and subsequently returned to the defendant in Michigan, and the grant applied for was not intended to benefit New York.[47]

Accordingly, the appellate division held that the defendant could not reasonably have expected to defend this action in New York and, thus, the supreme court properly dismissed the complaint for lack of personal jurisdiction.[48]

2. CPLR § 305: Summons; Supplemental Summons; Amendment

CPLR 305 provides what a summons and supplemental summons shall contain, the information a summons must contain if the complaint is not served with the summons, and amendment.[49]

Pursuant to CPLR 305(c), "[a]t any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced."[50]

The above provision was at issue before the Second Department in *Jordan-Covert v. Petroleum Kings LLC*.[51] There, the plaintiff was injured when her vehicle was struck by a truck driven by defendant Marin, and owned by his employer, Petroleum Kings, LLC (Kings).[52] She later commenced an action against Marin and Petroleum Kings Transport, LLC (Transport)—a distant legal entity from Kings, but they shared the same address, and the registered agent for Transport was the CEO of Kings.[53]

45. *Id.* at 210.
46. *Id.*
47. *Id.*
48. *Id.*
49. *See* N.Y. C.P.L.R. 305 (MCKINNEY 2023).
50. C.P.L.R. 305(c).
51. *See generally* Jordan-Covert v. Petroleum Kings, LLC, 156 N.Y.S.3d 396, 398 (App. Div. 2d Dep't 2021).
52. *Id.* at 399.
53. *Id.*

Kings moved to dismiss on the ground of lack of personal jurisdiction, and the plaintiff crossed-moved to amend caption to name Kings instead of Transport.[54] The supreme court denied the plaintiff's cross-motion, and the Second Department reversed.[55]

According to the Second Department, a motion to cure a "misnomer in the description of a party defendant . . . should be granted even after the statute of limitations has run where '(1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought'".[56] In the case before it, the correct defendant—Kings—misnamed in the original process as Transport, was properly served within 120 days after the action was timely commenced, and there was no evidence of any prejudice to Kings as the complaint included the vehicle registration number for the vehicle driven by Marin and owned by Kings.[57]

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 and Order to Show Cause

CPLR section 306-b provides for the time frame by which a plaintiff must effect service.[58] According to CPLR section 306-b, "[if] service is not made upon the defendant within the time provided in this section, 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."[59]

At issue before the First Department in *Chen v. New York Hospital Medical Center*, was whether the supreme court's decision that denied the plaintiff's motion for an extension of time and dismissed the complaint, was proper.[60] In answering the question in the affirmative, the appellate division noted that the defendant did not receive actual notice of the plaintiff's claims against her until June 2019, after the statutes of limitations for medical malpractice and lack of informed

54. *Id.*

55. *Id.*

56. *Jordan-Covert*, 156 N.Y.S.3d at 400 (quoting Ober v. Rye Town Hilton, 557 N.Y.S.2d 937, 939 (App. Div. 2d Dep't 1990)) (citing Duncan v. Emerald Expositions, LLC, 130 N.Y.S.3d 96, 99 (App. Div. 2d Dep't 2020)).

57. *Id*.

58. *See* N.Y. C.P.L.R. 306(b) (MCKINNEY 2023).

59. *Id*.

60. Chen v. N.Y. Hosp. Med. Ctr. of Queens, 160 N.Y.S.3d 19, 20 (App. Div. 1st Dep't 2021).

consent had expired, and more than six years after the alleged malpractice occurred.[61] Accordingly, given the plaintiff's lack of diligence and prolonged delay in notifying the defendant of the action, both of which resulted in substantial prejudice to her, an extension of time to serve was unwarranted and dismissal of the amended complaint against her was appropriate.[62]

4. CPLR § 308: Personal Service Upon a Natural Person

CPLR section 308 provides the method by which service can be made upon a natural person, including (1) delivering the summons within the state to the person to be sued; (2) substitute service at the actual place of business, dwelling place, or usual place of abode and mailing; (3) delivering to a person designated under rule 318; (4) nail and mail; (5) and such manner as the court, upon motion, directs when service is impracticable under paragraphs one, two and four.[63]

CPLR section 308(2) was at issue before the Second Department in *Oberlander v. Moore*.[64] There, the plaintiff brought claims against the defendant alleging a violation of Judiciary Law section 487.[65] The defendant moved to dismiss on the ground of lack of personal jurisdiction, which was granted by the supreme court.[66] On appeal, the appellate division affirmed, noting that although the defendant was served in compliance with the timeframe set forth in CPLR section 306-b, the summons with notice was delivered to a person of suitable age and discretion at Moore's actual place of business on March 27, 2018, the second act required by CPLR 308(2)—i.e., mailing— was not performed within the 120-day period.[67] In rejecting the plaintiffs' contention, the Second Department noted that <u>both</u> the delivery and mailing components of CPLR section 308(2) must be performed within 120 days of the filing of process.[68]

CPLR section 308(5) was at issue before the Third Department in *Joseph II v. Luisa JJ*.[69] In a divorce action seeking sole custody of the parties' child, the supreme court directed substituted service of the

61. *Id.*
62. *Id.* at 20–21.
63. N.Y. C.P.L.R. 308 (MCKINNEY 2023).
64. Oberlander v. Moore, 142 N.Y.S.3d 593, 594–95 (App. Div. 2d Dep't 2022).
65. *Id.* at 594.
66. *Id.*
67. *Id.* at 594–95.
68. *Id.*
69. Joseph II. v. Luisa JJ., 160 N.Y.S. 3d 119, 123 (App. Div. 3d Dep't 2021).

summons and complaint upon the defendant, who resided in Italy via email.[70]

On appeal, the Third Department held that the plaintiff failed to submit evidence demonstrating the impracticability of service upon the defendant at her residence in Italy.[71] According to the appellate division, pursuant to the Hague Convention, to which both the U.S. and Italy were signatories, requests for service of documents must be sent to a central authority within the receiving state, which then serves the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law.[72] The impracticality provision of CPLR section 308 (5), requires the movant to make competent showings as to actual efforts made to effect service.[73] As noted by the court, the only proof submitted by the plaintiff was an email, dated more than two months after commencement of the action, from an associate at a process service company estimating that service upon defendant in Italy in accordance with the Hague Convention would take roughly 18-20 weeks in total.[74] There was, however, no evidence that the 18-20 week estimate was atypical, or that service of process under the Hague Convention was impracticable, therefore service pursuant to CPLR section 308 (5) was not warranted.[75]

5. CPLR § 327: Inconvenient Forum

CPLR section 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.[76]

In *Kainer v. UBS AG*, a 5-1 Court of Appeals' decision, the court held that a court may dismiss a case on forum non conveniens grounds without first determining whether it has personal jurisdiction over the defendants.[77]

There, the action involved a dispute over ownership of proceeds from a $10.7 million sale in New York of a painting stolen by the Nazi

70. *Id*. at 121.
71. *Id.* at 123.
72. *Id.*
73. *See id.*
74. *See Joseph II.*, 160 N.Y.S. 3d at 123.
75. *See id.* at 123–24.
76. N.Y. C.P.L.R. 27 (MCKINNEY 2023).
77. *See* Kainer v. UBS AG, 181 N.E.3d 537, 541 (N.Y. 2021).

regime from decedent, a former resident of Germany who lived as a refugee in Switzerland during WWII, then relocated to, and died in France.[78] The trial court granted the defendant's motion to dismiss on forum non conveniens grounds, which was affirmed by appellate division, and leave to appeal was granted by the Court of Appeals.[79]

In noting that where there are "special and unusual circumstances favoring acceptance of a suit between nonresident parties based on an out-of-state [claim]," it held that it is "error of law for the courts below to exclude consideration of such circumstances in deciding whether to exercise [their] discretion in favor of accepting or of rejecting jurisdiction."[80] However, notwithstanding, the Court observed that "special circumstances that impact even compelling state interests do not mandate retention of a case with only a tenuous connection to New York."[81]

In determining whether special circumstances were present, the court answered the question in the affirmative, noting that the origins of the plaintiffs' claims were unique, the horrific circumstances of World War II and the Holocaust, and that it has "long been the public policy of the United States that steps should be taken expeditiously to achieve a just and fair solution to claims involving such art that has not been restituted if the owners or their heirs can be identified."[82] Further, New York has a compelling interest in protecting the integrity of its art market and preventing the illicit trafficking of stolen art in the state.[83]

However, in the record before it, the courts below did consider the relevant factors including the public policies at issue, but determined that the balance of factors militated in favor of dismissal.[84] Such factors favoring dismissal included the burden on New York courts in determining which foreign law was applicable and applying that law; the potential availability of Switzerland as an alternative forum given that all of the plaintiffs were litigating against one of the defendants there; the substantial nexus of plaintiffs' claims to Europe;

78. *See id.* at 539.

79. *See id.* at 539–40.

80. *Id.* at 541 (quoting Varkonyi v. S.A. Empresa de Viacao Airea Rio Grandense, 239 N.E.2d 542, 544 (N.Y. 1968)).

81. *Id.* (citing Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Brothers Co., 12 N.E.3d 456, 457–61 (N.Y. 2014)).

82. *Kainer*, 181 N.E.3d at 541.

83. *See id.* (citing Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (1991)).

84. *See id.*

and that none of the plaintiffs and only two of the defendants resided in, or were located in, New York.[85]

The court also reaffirmed precedent holding that, contrary to federal law, the availability of another suitable forum is not a prerequisite for applying the forum non conveniens doctrine in New York.[86]

In a dissenting opinion, Judge Fahey argued that dismissal on forum non conveniens grounds was inconsistent with the "interest of substantial justice," and highlighted the "public policy of New York and the United States in resolving claims of Nazi-looted art on the merits" and the possibility that no suitable alternative forum exists for the plaintiffs' claims.[87]

C. Article 5: Venue

CPLR section 510 provides the manner in which a court may change the place of trial.[88] According to CPLR section 510, the court may change the place of trial of an action where: (1) the county designated for that purpose is not a proper county; or (2) there is reason to believe that an impartial trial cannot be had in the proper county; or (3) the convenience of material witnesses and the ends of justice will be promoted by the change.[89]

In *Lividini v. Goldstein*, the plaintiff commenced a medical malpractice action in Bronx County on the theory that the defendant physician, who also worked in the Bronx, constituted an "individually-owned business" with a "principal office" in Bronx County, and that the venue was properly predicated on his practice activities including providing a Bronx mailing address to the New York State Education Department for professional licensing purposes.[90] The defendant's ambulatory surgery center and its owner/operator moved pursuant to

85. *See id.* at 541 n.3.

86. *See id.* (citing Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 249 (N.Y. 1984)).

87. *See Kainer*, 181 N.E.3d at 545–46 (Fahey, J., dissenting) (first disagreeing that "the dismissal on forum non conveniens grounds is consistent with 'interest of substantial justice'"; and then asserting that "Swiss law places significant hurdles to the recovery of stolen art, and almost insurmountable obstacles to the recovery of artwork stolen by the Nazis from Jews and others during World War II and the years preceding it") (quoting Bakalar v. Vavra, 619 F.3d 136, 140 (2d Cir. 2010)) (citing N.Y. C.P.L.R. 327(a) (MCKINNEY 2023)).

88. *See* N.Y. C.P.L.R. 510 (MCKINNEY 2023).

89. *See id*.

90. *See* Lividini v. Goldstein, 176 N.E.3d 690, 691 (N.Y. 2021) (citing N.Y. C.P.L.R. 503(d) (MCKINNEY 2023)).

CPLR section 510(1) to change venue from Bronx County to Westchester County, on the grounds that the plaintiff was a Westchester County resident, the defendants were located in Westchester County, and the plaintiff was treated at the surgery center by a physician who was a resident of Westchester County and employed by defendant owner.[91] The supreme court granted the defendants' motion to change venue, the appellate division reversed, and the Court of Appeals reinstated.[92]

According to the court, the physician's detailed affidavit averring that he spent substantially less time and cared for substantially fewer patients in the Bronx than in Westchester County supported the defendants' assertion that his "principal office" was in Westchester County, not the Bronx.[93] Further, it found that there was no basis in the record to infer that the physician was ever required to identify (or in fact identified) any particular county as the location of his principal office, a designation not contemplated in the relevant professional licensing statutes.[94] In reversing the appellate division, the court noted that "[w]hile the registration documents confirmed the undisputed fact that [the physician] also worked in the Bronx, the venue statute does not deem an individually-owned business a resident of every county where it has an office or transacts business. To conclude otherwise would read the phrase "principal office" out of the statute."[95]

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

1. CPLR § 2214: Motion Papers; Service; Time

CPLR section 2214 governs the time for service of notice of papers and supporting affidavits.[96] According to CPLR section 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 answering affidavits shall be served at least two days before such time.[97] 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

91. *See id.* (citing N.Y. C.P.L.R. 510(1)).
92. *See id.*
93. *See id.* at 691–92 (citing C.P.L.R. 503(d)).
94. *See id.* at 692 (citing N.Y. EDUC. LAW §§ 6502(5), 6530(1) (McKinney 2023)).
95. *See Lividini*, 176 N.E.3d at 692 (citing N.Y. C.P.L.R. 503(d)).
96. *See* N.Y. C.P.L.R. 2114.
97. N.Y. C.P.L.R. 2214(b)

days before and any reply or responding affidavits shall be served at least one day before such time.[98] However, the court may, for good cause, accept late papers.

For instance, in *Wilson v. Tully Rinckey*, the Third Department held that the supreme court did not abuse its discretion in permitting the plaintiff to submit late opposition papers to the defendants' motion to dismiss.[99] According to the appellate division, the supreme court retains the discretion to accept late opposition papers upon a showing of a valid excuse and the plaintiff appropriately explained that the delay in submitting timely opposition was due to serious medical and health reasons of the plaintiff's attorney.[100] The appellate division also considered the lack of prejudice to the defendant, the fact that the defendant was given an opportunity to submit a reply, and the public policy of resolving cases on the merits.[101]

E. Article 30: Remedies and Pleading

1. CPLR § 3025: Amended and Supplemental Pleadings

CPLR section 3025 concerns amendment and supplemental pleadings.[102] CPLR section 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.[103] CPLR section 3025(b) governs the amendment of pleadings by leave of the court and provides that leave to amend "shall be freely given."[104] 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."[105]

In *Lennon v. 56th and Park (NY) Owner, LLC*, a personal injury action stemming from a workplace injury at a construction site, the Second Department held that the supreme court providently exercised its discretion by granting the defendants' motion for leave to amend

98. *Id*.
99. Wilson v. Tully Rinckey PLLC, 160 N.Y.S.3d 430, 431 (App. Div. 3d Dep't 2021).
100. *Id.*
101. *Id.* (citing Heath v. Normile, 15 N.Y.S.3d 509, 511 (N.Y. App. Div. 3d Dep't 2015)).
102. N.Y. C.P.L.R. 3025 (MCKINNEY 2023).
103. N.Y. C.P.L.R. 3025(a)
104. N.Y. C.P.L.R. 3025(b)
105. *Id.*

their answer to assert collateral estoppel as an affirmative defense based on a prior determination by an administrative law judge denying the plaintiff's workers' compensation claim.[106]

As noted by the court, leave to amend "shall be freely given upon such terms as may be just," and the decision as to whether to grant or deny leave to amend is discretionary.[107] Leave to amend need not be granted if the party opposing the motion proves that it will be prejudiced or surprised by the proposed amendment, or that the amendment is palpably insufficient or patently devoid of merit.[108] Accordingly, the Second Department observed that the decision as to whether the court providently exercised its discretion requires a consideration of fairness, common sense, judgment, the timeliness or untimeliness of the motion to amend, how long the party seeking amendment was aware of the pertinent facts, whether there was a reasonable excuse for any delay, whether the opposing party had prior notice of the amendment's subject matter, and any other relevant factor.[109]

In review, the appellate division found that the proposed amendment was not palpably insufficient, or patently devoid of merit, as the administrative law judge determined (and the Workers' Compensation Board affirmed), that the incident at issue did not occur or did not occur in a manner that caused any injury, raising, at a minimum, a colorable defense to the plaintiff's action.[110] Indeed, as noted by the court, the plaintiff personally testified and was represented by counsel at the workers' compensation hearing, and knew that his claim had been denied while the action was pending.[111] Therefore, the plaintiff could not allege surprise by the potential collateral estoppel impact of the workers' compensation proceeding, and any lateness of defendants' motion for leave to amend did not result in prejudice to the plaintiff.[112]

106. Lennon v. 56th and Park (NY) Owner, LLC, 153 N.Y.S.3d 535, 548 (App. Div. 2d Dep't 2021).

107. *Id.* at 542 (citing N.Y. C.P.L.R. 3025(b)).

108. *Id.* at 544.

109. *Id.* at 542–43 (citing King v. Marwest, LLC, 143 N.Y.S.3d 673, 676 (App. Div. 2d Dep't 2021)).

110. *Id.* at 547.

111. *See Lennon*, 153 N.Y.S.3d at 547 (citing Ryan v. N.Y. Tel. Co., 467 N.E.2d 487, 491 (N.Y. 1984)).

112. *See id.* at 547–48.

F. Article 31: Disclosure

1. CPLR § 3121: Physician or Mental Examination

CPLR section 3121 provides that after the commencement of an action in which the mental or physical condition of a party is in controversy, any party may serve notice on another party to submit to a physical or mental examination by a designated physician.[113]

In *Gilliam v. UNI Holdings*, a personal injury action, one month after the plaintiff was deposed, the defendant served an independent medical examination (IME) notice upon the plaintiff for March 6, 2019, but she did not appear.[114] The defendant then served a second IME notice on April 3, 2019, which scheduled the exam for May 15, 2019.[115] The day before, however, the plaintiff underwent a discectomy to her lumbar spine (April 2, 2019), and filed a supplemental bill of particulars seven days later in which she disclosed the lumbar surgery.[116]

After completing the IME in May, the defendant moved to dismiss, claiming that "the plaintiff's surgery resulted in the spoliation of critical evidence, and alternatively, sought an order issuing spoliation sanctions for the plaintiff's failure to appear for an [I]ME and intentional destruction of evidence."[117] In sum, "the defendant argued that the plaintiff was obligated to preserve the condition of her spine as it was evidence and the surgery 'drastically' altered the spine's condition, thereby prejudicing the defendant."[118] The defendant also stated that "there was nothing submitted by the plaintiff suggesting that the surgery was urgent," and therefore her pre-IME discectomy amounted to a "willful alteration of evidence."[119]

According to the First Department, the condition of one's body is not the type of evidence that is subject to a spoliation analysis, and to the extent that lower court decisions hold that spoliation analysis encompasses the condition of one's body, they should not be followed.[120] As noted by the court:

113. *See* N.Y. C.P.L.R. 3121 (MCKINNEY 2023).
114. *See* Gilliam v. Uni Holdings, 159 N.Y.S.3d 401, 403 (App. Div. 1st Dep't 2021).
115. *See id.*
116. *See id.*
117. *Id.*
118. *Id.*
119. *Gilliam*, 159 N.Y.S.3d at 403.
120. *See id.* at 405.

> To so hold would improperly subject a plaintiff's health condition to an unsuitable legal analysis [and i]nstead, a failure to appear for an [I]ME, regardless of whether the failure to appear is preceded by medical treatment for the condition at issue, should be analyzed the same as other failures to comply with court-ordered discovery.[121]

2. CPLR § 3126: Penalties for Refusal to Comply with Order or to Disclose

CPLR section 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.[122]

The above provision was at issue before the Second Department in *Ambroise v Palmana Realty Corp.*, where the supreme court sua sponte dismissed the compliant pursuant to CPLR 3126 and the appellate division reversed.[123] At the outset, the court noted that a court may impose discovery sanctions, including the striking of a pleading, where a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed" and "[t]he nature and degree of a penalty to be imposed under for discovery violations is addressed to the court's discretion."[124] It further observed that while public policy favors resolution of actions on the merits, "a court may resort to the drastic remedies of striking a pleading or precluding evidence upon a clear showing that a party's failure to comply with a disclosure order was the result of willful and contumacious conduct," through "the party's repeated failure to adequately respond to discovery demands or to comply with discovery orders."[125]

In the case before it, however, the Second Department found the record to be insufficient to establish that the plaintiff engaged in willful and contumacious conduct warranting the drastic remedy of

121. *Id.* at 404.

122. N.Y. C.P.L.R. 3126 (MCKINNEY 2023).

123. Ambroise v. Palmana Realty Corp., 153 N.Y.S.3d 572, 574 (App. Div. 2d Dep't 2021).

124. *Id.* (first quoting N.Y. C.P.L.R. 3126; then quoting Crupi v. Rashid, 67 N.Y.S.3d 478, 478 (App. Div. 2d Dep't 2018)).

125. *Id.* (first quoting Nationstar Mortg. v. Jackson, 144 N.Y.S.3d 81, 83 (App. Div. 2d Dep't 2021); then quoting Cobo v. Pennwalt Corp. Stokes Div., 127 N.Y.S. 3d 141, 144 (App. Div. 2d Dep't 2020)).

dismissal of the complaint.[126] Specifically, "[o]n July 3, 2019, less than a month after the defendant moved . . . to compel responses to certain discovery demands, the court directed the defendant to settle an order, among other things, striking the complaint."[127] However, "no prior order had been issued directing the plaintiff to comply with discovery demands," and "shortly after the court directed the defendant to settle the order, the plaintiff produced the documents on July 19, 2019."[128] Accordingly, the Second Department reversed the dismissal of plaintiff's complaint.[129]

G. Article 32: Accelerated Judgment

1. CPLR § 3215: Default Judgment

In *U.S. Bank National Association v. Cadoo*, an action to foreclose a mortgage, the defendants appealed a supreme court order which denied that part of their motion to dismiss the complaint based upon lack of personal jurisdiction.[130] More specifically, the "mortgage foreclosure action was commenced on August 20, 2014, and the affidavits of service reflected that the defendant [Cadoo] was served with the summons and complaint pursuant to CPLR 308(2) in September 2014, and again by personal delivery outside of the state in December 2014."[131] As to defendant Cohen, "the plaintiff made an ex parte application on or about August 28, 2015, to permit service . . . by publication, and to file and serve a supplemental summons and amended complaint, adding Cohen's unknown successors and/or heirs as defendants in the action."[132] The supreme court granted the plaintiff's application and the plaintiff electronically filed through New York State Courts Electronic Filing (NYSCEF) a supplemental summons, an amended complaint, and an amended notice of pendency on January 6, 2016.[133] Service of the supplemental summons upon Cohen and/or his unknown successors or heirs was effectuated by publication on several dates from January 12, 2016, through February 2, 2016.[134]

126. *Id.*
127. *Id.*
128. *Ambroise*, 153 N.Y.S.3d at 574.
129. *Id.*
130. U.S. Bank Nat'l Ass'n v. Cadoo, 152 N.Y.S.3d 714, 715 (App. Div. 2d Dep't 2021).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*

On October 13, 2016, however, the supreme court issued an order directing dismissal of the action if the plaintiff did not proceed to entry of judgment within 90 days, based upon the court's finding "that issue has not been joined and the plaintiff has failed to proceed to entry of judgment within one year of default."[135] The action was marked dismissed on or about February 10, 2017, and the plaintiff moved to vacate the order and restore the action.[136]

The defendants opposed the plaintiff's motion to restore the action, which the court ultimately granted.[137] Shortly thereafter, the plaintiff moved for leave to enter a default judgment and an order of reference.[138] The defendants cross-moved to dismiss the complaint on the ground that Cadoo was never properly served with the amended complaint.[139] The supreme court denied the cross-motion, finding that by opposing the plaintiff's motion to vacate the conditional order of dismissal without raising a jurisdictional objection, and by waiting more than one year after the action was restored to cross-move for dismissal based on lack of personal jurisdiction, Cadoo had waived any claim that the court lacked personal jurisdiction over him.[140]

On appeal, the Second Department reversed in part.[141] The outset, the Appellate Division observed that "[a] defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss," and that a person who "participates in the merits of an action . . . appears informally and confers jurisdiction on the court."[142] However, according to the court:

> Certain types of limited involvement in an action by a defendant do not waive jurisdictional defenses, such as "where the defendant's only participation in the action is the submission of a motion to vacate a default judgment for lack of personal

135. *U.S. Bank Nat'l Ass'n*, 152 N.Y.S.3d at 715.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *U.S. Bank Nat'l Ass'n*, 152 N.Y.S.3d at 715–16.
141. *Id.*
142. *Id.* at 715–716 (quoting Cadlerock Joint Venture, L.P. v. Kierstedt, 990 N.Y.S.2d 522, 524 (App. Div. 2d Dep't 2022)) (citing Roslyn B. v. Alfred G., 635 N.Y.S.2d 283, 284 (App. Div. 2d Dep't 1995)).

jurisdiction" or, as most relevant here, "cross-moving to dismiss the complaint pursuant to CPLR 3215(c)."[143]

Accordingly, the Second Department held that the defendants did not waive their jurisdictional defense by failing to raise the defense in their opposition to the motion to vacate the dismissal, though nonetheless affirmed on separate grounds.[144]

H. Article 50: Judgments Generally

CPLR section 5015 governs relief from a judgment or order.[145] CPLR section 5015(a)(4) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of . . . lack of jurisdiction to render the judgment or order."[146]

CPLR section 5015(a)(4) was at issue in *US Bank National Assoc. v. Westchester County Public Administrator*, a mortgage foreclosure action in which the lower court denied the defendant's motion to vacate default judgment.[147] There, in support of its motion, the defendant denied the detailed and specific contradiction of the allegations in the process server's affidavit to defeat the presumption of proper service.[148] However, the court noted that bare and unsubstantiated denials are insufficient to rebut the presumption of service, and a minor discrepancy between the appearance of the person allegedly served and the description of the person served contained in the affidavit of service is generally insufficient to raise an issue of fact warranting a hearing.[149] Further, as noted by the court, the discrepancies must be substantiated by something more than a claim by the parties allegedly served that the descriptions of their appearances were incorrect.[150] Accordingly, the court held that the defendant's submissions in support of their motion pursuant to CPLR section 5015(a)(4) to vacate the judgment of foreclosure and sale, were insufficient to defeat the

143. *Id.* at 716 (emphasis added) (first quoting *Cadlrock*, 990 N.Y.S.2d at 524; then quoting U.S. Bank N.A. v. Itshak, 133 N.Y.S.3d 491, 491 (App. Div. 2d Dep't 2020)) (citing N.Y. C.P.L.R. 3125(c) (MCKINNEY 2023)).

144. *Id.*

145. N.Y. C.P.L.R. 5015.

146. N.Y. C.P.L.R. 5015(a)(4).

147. US Bank Nat'l Ass'n v. Westchester Cnty., 156 N.Y.S.3d 375, 377 (App. Div. 2d Dep't 2021).

148. *Id*. at 378.

149. *Id*.

150. *Id*.

presumption of proper service created by the affidavits of the plaintiff's process server.[151]

I. Article 55: Appeals Generally

CPLR section 5515 governs the method in which an appeal shall be taken, including its service and filing.[152] CPLR section 5515(1) provides that an appeal is taken when, in addition to being duly served, the notice of appeal is "fil[ed] . . . in the office where the judgment or order of the court of the original instance is entered."[153]

The above provision was at issue before the Court of Appeals in *Miller v. Annucci*.[154] There, in opposition to respondents' motion to dismiss, the petitioner—a *pro se* inmate's—submitted documents and an affidavit asserting that, before the deadline for filing his appeal, he delivered to a prison employee the notice of appeal addressed to the clerk's office and a service copy addressed to respondents, as well as records showing that he requested deduction of the cost of postage from his inmate account.[155] The appellate division granted the respondents' motion and dismissed, without explanation.[156]

Before the Court of Appeals, the petitioner argued that inmate "mail box" rule should have applied, to deem the notice of appeal timely filed upon delivery to prison authorities for forwarding to the appropriate court.[157] The court rejected his argument, noting that CPLR section 5515(1) provides that an appeal is taken when, in addition to being duly served, the notice of appeal is "filed," and thus, by its express terms, the CPLR indicates that filing occurs only when the clerk's office received the notice of appeal.[158]

It further noted that the "mailbox rule" for filing would contravene the clear distinctions between filing and service drawn by the legislature (complete upon mailing, CPLR 2103(b)(2)), and held it was not free to disregard the statutory text defining when filing and service occurs, or to otherwise endorse an exception to the relevant CPLR provisions that have not been adopted by the legislature.[159]

151. *Id*.
152. N.Y. C.P.L.R. 5515 (MCKINNEY 2022).
153. N.Y. C.P.L.R. 5515(1).
154. Miller v. Annucci, 174 N.E.3d 368, 369 (N.Y. 2021).
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Miller*, 174 N.E.3d at 369.

Notwithstanding, the court remanded the matter to the Appellate division to determine if it should exercise its discretion to excuse the untimely filing under CPLR 5520(a) which provides, in relevant part, that if an appellant "either serves or files a timely notice of appeal . . . , but neglects through mistake or excusable neglect to do another required act within the time limited," the court from or to which the appeal is taken may grant an extension of time to cure the omission."[160]

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. Several are outlined below.

Effective July 1, 2022, section 202.5(a)(2) of the Uniform Rules for Supreme and County Court was amended, as follows:

> Section 202.5(a)(2) Papers filed in court.
>
> (2)*Unless otherwise directed by the court.* Each electronically-submitted memorandum of law, affidavit and affirmation, exceeding 4500 words*, which was prepared with the use of a computer software program,* shall include bookmarks providing a listing of the document's contents and facilitating easy navigation by the reader within the document. (emphasis added)

Effective December 1, 2021, section 202.5-c of the Uniform Rules for the Supreme and County Court was created, as follows:

> Section 202.5-c. Electronic Document Delivery System.
>
> (a) Court documents may be transmitted to the courts of the unified court system by means of the electronic document delivery system ("EDDS") only to the extent and in the manner provided in this section. For purposes of this section, "clerk of the court" shall mean the county clerk where the court is the Supreme Court or a County Court and the chief clerk of the court where it is any other court.
>
> (b) How to use the EDDS. In order for a party to a court action or proceeding to use the EDDS to transmit one or more court documents to a court. such party must:
>
> (1) have use of a computer or other electronic device that permits access to the Internet, an email address and telephone number, and a scanner to digitize documents or some other

160. *Id.*

device by which to convert documents into an electronically transmissible form; and

(2) access a web site provided by the UCS for the transmission of the document(s) by the EDDS and. using that web site: (i) select a court to be the recipient of the document(s) and, where the Chief Administrator has authorized use of the EDDS for the filing of documents in an action or proceeding and the party is using the EDDS for such purpose, so indicate, (ii) enter certain basic information about the action or proceeding; (iii) upload the document(s) thereto in pdf or some other format authorized by the Chief Administrator of the Courts; and (iv) if a fee is required for the filing of the document(s), follow the on-line instructions for payment of that fee.

(c) When may the EDDS be used. The EDDS may be used for the transmission of documents in such courts and in such classes of cases. and for such purposes including the filing thereof with a court, as may be authorized by order of the Chief Administrator. Notwithstanding any other provision hereunder:

(1) a party may not use the EDDS to transmit documents in a court action or proceeding in a court in a county in which consensual or mandatory e-filing is available in such an action or proceeding except that EDDS may be used in such a county for the purpose of (i) converting a pending action toe-filing in accordance with section 202.5-b(2)(iv) of these rules, (ii) transmitting exhibits for a conference. hearing. or trial: or (iii) any other use as may be authorized by the Chief Administrator.

(2) unless the Chief Administrator shall otherwise provide as to a particular court or class of cases, a party may only use the ED OS for the transmission of documents for a purpose other than for filing in an action or proceeding;

(3) where the Chief Administrator authorizes use of the EDDS for the transmission of documents for filing with a court in an action or proceeding, any such documents shall not be deemed filed until the clerk of such court or his or her designee shall have reviewed the documents and determined (i) that they are complete. (ii) that any fee that is required before the documents may be filed has been paid, (iii) that the documents include proof of service upon the other party or parties to the action or proceeding when proof of service is required by law, and (iv) that all other filing requirements have been satisfied.

Effective December 15, 2021, the Uniform Civil Rules for the Supreme and County Court (Rules of Practice for the Commercial Division), promulgated Rule 37 of section 202.70(g):

Rule 37. Remote Depositions.

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

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

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

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

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

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

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

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

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

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

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

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

(f) No waiver shall be inferred as to any testimony if the defending attorney was prohibited by technical problems from interposing a timely objection or

instruction not to answer.

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

Effective July 1, 2022, section 202.8-b of the Uniform Rules for Supreme and County Court was amended, as follows:

Section 202.8-b Length of Papers.

*Where prepared by use of a computer, u*nless otherwise permitted by the court: (i) affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 7.000 words each: (ii) reply affidavits, affirmations, and memoranda shall be no more than 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief.

For purposes of paragraph (a) above, the word count shall exclude the caption, table of contents, table of authorities, and signature block.

Every brief, memorandum, affirmation, and affidavit *which was prepared by use of a computer* shall include on a page attached to the end of the applicable document, a certification by the counsel who has filed the document setting forth the number of words in the document and certifying that the document complies with the word count limit. The counsel certifying compliance may rely on the word count of the word-processing system used to prepare the document.

Where typewritten or handwritten, affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 20 pages each: and reply affidavits, affirmations, and memoranda shall be limited to 10 pages each and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief.

Where a party opposing a motion makes a cross-motion, the affidavits, affirmations, briefs, or memoranda submitted by that party shall be limited to 7,000 words each when prepared by use of a computer or to 20 pages each when typewritten or handwritten. Where a cross-motion is made, reply affidavits, affirmations, briefs or memoranda of the party who made the principal motion shall be limited to 4,200 words when prepared by use of a computer or to 10 pages when typewritten or handwritten.

> (f) The court may, upon oral or letter application on notice to all parties permit the submission of affidavits, affirmations, briefs or memoranda which exceed the -limitations set forth [in paragraph (a)] above. In the event that the court grants permission for an oversize submission, the certification required by paragraph (c) above shall set forth the number of words in the document and certify compliance with the limit, if any set forth by the court. (emphasis added)

Effective July 1, 2022, section 202.8-g of the Uniform Rules for Supreme and County Court was amended, as follows:

> Section 202.8-g Motions for Summary Judgment; Statements of Material Facts.
>
> (a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, *the court may direct that* there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.
>
> (b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.
>
> (c) Each numbered paragraph in the statement of material facts required to be served by the moving party *may* be deemed to be admitted *for purposes of the motion* unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party. *The court may allow any such admission to be amended or withdrawn on such terms as may be just.*
>
> (d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.
>
> (e) *In the event that the proponent of a motion for summary judgment fails to provide a statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion. may deny the motion without prejudice to renewal upon compliance, or may take such other action as may be just and appropriate. In the event that the opponent of*

> *a motion for summary judgment fails to provide any counter. statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion, may, after notice to the opponent and opportunity to cure, deem the assertions contained in the proponent's statement to be admitted for purposes of the motion, or may take such other action as may be just and appropriate.* (emphasis added)

Effective July 1, 2022, section 202.20 of the Uniform Rules for Supreme and County Court was amended, as follows:

> Section 202.20 Interrogatories.
>
> Interrogatories are limited to 25 in number, including subparts, unless the parties agree or the court orders otherwise. This limit applies to consolidated actions as well.

Effective July 1, 2022, section 202.20-c(c) of the Uniform Rules for Supreme and County Court was amended, as follows:

> Section 202.20-c(c) Requests for Documents.
>
> (c) *The Response shall contain, at the conclusion of thereof, the affidavit of the responding party stating:* (i) whether the production of documents in its possession, custody or control and that are responsive to the individual requests [as propounded or modified] is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to any individual requests. (emphasis added)

Effective July 1, 2022, section 202.20-h of the Uniform Rules for Supreme and County Court was amended, as follows:

> Section 202.20-h Pre-Trial Memoranda, Exhibit Book, and Requests for Jury Instructions.
>
> (a) *The court may direct that c*ounsel submit pre-trial memoranda at the pre-trial conference, or such other time as the court may set. Counsel shall comply with CPLR 2103(e). *Unless otherwise directed by the court,* a single memorandum no longer than 25 ages shall be submitted by each side *and n*o memoranda in response shall be submitted.
>
> (b) *The court may direct that o*n the first day of trial or at such other time as the court may set, counsel shall submit an indexed binder or notebook, or the electronic equivalent, of trial exhibits for the court's use. *Such submission shall include a* copy for each attorney on trial and the originals in a similar binder or notebook for the witnesses [shall be prepared and submitted]. Plaintiffs exhibits shall be numerically tabbed, and defendant's exhibits shall be tabbed alphabetically.

(c) Where the trial is by jury, counsel shall, on the first day of the trial or such other time as the court may set, provide the court with case-specific requests to charge and proposed jury interrogatories. Where the requested charge is from the New York Pattern Jury Instructions Civil, a reference to the PJI number will suffice. Submissions should be by hard copy and electronically, as directed by the court. (emphasis added)

Effective July 1, 2022, section 202.20-i of the Uniform Rules for Supreme and County Court was amended, as follows:

Section 202.20-i Direct Testimony by Affidavit.

Upon request of a party, the court may *permit* that direct testimony of *that* party's own witness in a non-jury trial or evidentiary hearing be submitted in affidavit form, provided, however, *that* the opposing party shall have the right to object to statements in the direct testimony affidavit, and the court shall rule on such objections, just as if the statements had been made orally in open court. Where an objection to a portion of a direct testimony affidavit is sustained, the court may direct that such portion be stricken. The submission of direct testimony in affidavit form shall not affect any right to conduct cross-examination or re-direct examination of the witness.

Effective July 1, 2022, section 202.20-j of the Uniform Rules for Supreme and County Court was amended, as follows:

Section 202.20-j *Adherence* to the Electronically Stored Information ("ESL") Guidelines Set Forth in Appendix Hereto.

Parties and nonparties should adhere to the Electronically Stored Information ("ESI") Guidelines set forth in Appendix A hereto. (emphasis added)

Effective July 1, 2022, section 202.26(c) of the Uniform Rules for Supreme and County Court was amended, as follows:

Section 202.26(c) Settlement and Pretrial Conferences.

(c) Consultation Regarding Expert Testimony. The court *presiding over a non-jury trial or hearing* may direct that prior, or during, the trial *or hearing*, counsel for the parties consult in good faith to identify those aspects of their respective experts' anticipated testimony that are not in dispute. The court may further direct that any agreements reached in this regard shall be reduced to a written stipulation. (emphasis added)

Effective July 1, 2022, section 202.34 of the Uniform Rules for Supreme and County Court was amended, as follows:

Section 202.34 Pre-Marking of Exhibits.

> Counsel for the parties shall consult prior to trial and shall in good faith attempt to agree upon the exhibits that will be offered into evidence without objection. *Unless otherwise directed by the court, p*rior to the commencement of the trial, each side shall mark its exhibits into evidence, subject to court approval, as to those to which no objection has been made. All exhibits not consented to shall be marked for identification only. If the trial exhibits are voluminous, counsel shall consult the clerk of the part for guidance. The court *should* rule upon the objections to the contested exhibits at the earliest possible time. Exhibits not previously demanded which are to be used solely for credibility or rebuttal need not be pre-marked. (emphasis added)

Effective July 1, 2022, section 202.37 of the Uniform Rules for Supreme and County Court was amended, as follows:

> Section 202.37 Scheduling Witnesses.
>
> At the commencement of the trial or at such time as the court may direct, each party shall identify in writing for the court the witnesses it intends to call, the order in which they shall testify and the estimated length of their testimony, and shall provide a copy of such witness list to opposing counsel. Counsel shall separately identify for the court only a list of the witnesses who may be called solely for rebuttal or with regard to credibility. The court may permit for good cause shown and in the absence of substantial prejudice, a party to call a witness to testify who was not identified on the witness list submitted by that party. The estimates of the length of testimony *and the order of witnesses* provided by counsel are advisory *only,* and the court *may permit witnesses to be called in a different order and* may permit further testimony from a witness notwithstanding that the time estimate for such witness has been exceeded. (emphasis added)

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.