CIVIL PRACTICE

Michael Anthony Bottar[†]

Samantha C. Riggi[†]

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[†] Michael Anthony Bottar is a graduate of Colgate University and *summa cum laude* graduate of Syracuse University College of Law. The author is a member of Bottar Law, PLLC.

[†] Samantha C. Riggi is a graduate of Siena College and Syracuse University College of Law. The author is a member of Bottar Law, PLLC.

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INTRODUCTION

During this *Survey* year,[1] New York's Court of Appeals and Appellate Divisions published hundreds of decisions that impacted 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).

1. July 1, 2022 through June 30, 2023.

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 203

Chapter 821 of the Laws of 2022 amended the CPLR section 203 by adding a new subdivision (h), to read as follows:

> (h) Claim and action upon certain instruments. Once a cause of action upon an instrument described in subdivision four of section two hundred thirteen of this article has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute.

B. CPLR 205-a

Chapter 821 of the Laws of 2022, effective December 30, 2022, amended the CPLR to add a new section 205-aa, to read as follows:

> 205–a. Termination of certain actions related to real property
> (a) If an action upon an instrument described under subdivision four of section two hundred thirteen of this article is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, or upon a final judgment upon the merits, the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and

that service upon the original defendant is completed within such six-month period. For purposes of this subdivision:

1. a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff; and

2. in no event shall the original plaintiff receive more than one six-month extension.

(b) Where the defendant has served an answer and the action upon an instrument described under subdivision four of section two hundred thirteen of this article is terminated in any manner, and a new action upon the same transaction or occurrence or series of transactions or occurrences is commenced by the original plaintiff, or a successor in interest or assignee of the original plaintiff, the assertion of any cause of action or defense by the defendant in the new action shall be timely if such cause of action or defense was timely asserted in the prior action.

C. CPLR 213

Chapter 821 of the Laws of 2022, effective December 30, 2022, amended the CPLR to amend subdivision 4 of section 213, by adding two new paragraphs (a) and (b) to read as follows:

(a) In any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.

(b) In any action seeking cancellation and discharge of record of an instrument described under subdivision four of section fifteen hundred one of the real property actions and proceedings law, a defendant shall be estopped from asserting that the period allowed by the applicable statute of limitation for the commencement of an action upon the instrument has not expired because the instrument was not validly accelerated prior to, or by way of commencement of a prior action, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.

D. CPLR 321(d)

Chapter 710 of the Laws of 2022, effective December 16, 2022, amended CPLR section 321 to provide a new subsection (d), as follows:

(d) Limited scope appearance.

> 1. An attorney may appear on behalf of a party in a civil action or proceeding for limited purposes. Whenever an attorney appears for limited purposes, a notice of limited scope appearance shall be filed with the court. The notice of limited scope appearance shall be signed by the attorney entering the limited scope appearance and shall define the purposes for which the attorney is appearing. Upon such filing, and unless otherwise directed by the court, the attorney shall be entitled to appear for the defined purposes.
>
> 2. Unless otherwise directed by the court upon a finding of extraordinary circumstances and for good cause shown, upon completion of the purposes for which the attorney has filed a limited scope appearance, the attorney shall file a notice of completion of limited scope appearance which shall constitute the attorney's withdrawal from the action or proceeding.

E. CPLR 3217

Chapter 821 of the Laws of 2022, effective December 30, 2022, amended CPLR section 3217 to provide a new subdivision (e), to read as follows:

> (e) Effect of discontinuance upon certain instruments. In any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute.

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

statutes 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]

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 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."[4]

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.[5] Therefore, the Court found that the subsequent Executive Orders continued to toll the statutory time limits.[6]

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. The *Brash v. Richards* decision was revisited by the Third Department in *Matter of Roach v. Cornell Univ*., this *Survey* year.[7]

There, the supreme court dismissed the petitioner's application to review a determination denying him tenure and promotion on April 20, 2020.[8] On March 11, 2021, petitioner commenced an CPLR article 78 proceeding seeking to annul the University's decision as arbitrary and capricious, and the respondent's answer sought dismissal as time-barred, noting it was not filed within four months of the expiration of the Executive Orders tolling the statute of limitations for civil

2. Exec. Order No. 202.8, 8 N.Y.C.R.R. § 202.8 (McKinney 2020).
3. Exec. Order No. 202.72, 8 N.YC.R.R. § 202.72 (McKinney 2020).
4. Brash v. Richards, 149 N.Y.S.3d 560, 562 (App. Div. 2d Dep't 2021).
5. *Id.* at 563.
6. *Id.*
7. *See generally* Matter of Roach v. Cornell Univ., 172 N.Y.S.3d 215, 218 (App. Div. 3d Dep't 2022).
8. *Id.* at 217.

actions/proceedings during the COVID-19 pandemic.[9] The supreme court concluded that the action was timely commenced but should be dismissed on the merits.[10]

On appeal, the Third Department observed that pursuant to the Second Department's decision in *Brash v. Richards*, the March 20, 2020, Executive Order expressly used the word "toll" and, "although the . . . executive orders issued after [this one] did not use [that same word, they] all . . . stated that the Governor 'hereby continue[s] the suspensions, and modifications of law, and any directives, not superseded by a subsequent directive,' made in the prior executive orders."[11] The Court agreed with the Second Department that the subsequent orders continued the toll and therefore, that the statute of limitations began to run on November 4, 2020.[12] However, because "the claim accrued when the toll was in effect and the toll extended to November 3, 2020, petitioner had four months from that date to commence the instant proceeding . . . [and] he failed to do so until March 11, 2021,a week too late, rendering it time-barred."[13]

1. CPLR 203: Methods of computing periods of limitations generally.

CPLR section 203 concerns the methods of computing periods of time limitation as to

> (a) [a]ccrual of cause of action and interposition of claim . . . (b) [c]laim in complaint where action commenced by service . . . (c) [c]laim in complaint where action commenced by filing . . . (d) [d]efense or counterclaim . . . (e) [e]ffect upon defense or counterclaim of termination of action because of death or by dismissal or voluntary discontinuance . . . (f) [c]laim in amended pleading . . . [and] (g) time computer from actual or imputer discovery of facts.[14]

CPLR section 203(f)—i.e., the relation-back doctrine—was at issue before the Court of Appeals in *34-06 73, LLC v. Seneca Ins. Co*.[15] There, the Court of Appeals held that the supreme court abused its discretion when it granted the plaintiff's motion to amend their complaint at trial to include an otherwise untimely reformation claim based

9. *Id.* at 216–17.
10. *Id.* at 217.
11. *Id.* at 218 (citing *Brash*, 149 N.Y.S.3d at 562).
12. *Matter of Roach*, 172 N.Y.S.3d at 218.
13. *Id.*
14. N.Y. C.P.L.R. 203 (McKinney 2023).
15. 34-06 73, LLC v. Seneca Ins. Co, 198 N.E.3d 1282, 1283 (N.Y. 2022).

on mutual mistake and a preexisting oral agreement.[16] The reformation claim could not, according to the Court, relate back to the plaintiff's original pleading because it did not place the defendant on "notice of the transactions, occurrences, or series of transactions or occurrences" to be proved in support of that claim.[17] The plaintiff's allegation that they "complied 'with all conditions precedent and subsequent pursuant to the [policy terms]'"was fatal to their "assertion that the complaint provide[d] notice of the transactions or occurrences to be proved in support of a reformation claim."[18] Rather, according to the Court, it suggests the opposite because by asserting total compliance, the plaintiffs necessarily disclaimed any challenge to the policy's terms – specifically the protective safeguards and endorsement (PSE) purportedly included by "mistake."[19] Additionally, the reformation claim was "based on a purported oral agreement . . . that preceded the contract's formation, whereas the breach of contract claim in the original complaint was based on the written policy which include[d] the PSE and with which [the] plaintiffs alleged full compliance."[20] Critically, per the Court, "nothing in the standalone breach of contract claim put [the] defendant on notice that there was a prior oral agreement that excluded the PSE and that the PSE's inclusion in the written policy was a mistake."[21] Therefore, the Court found that the "'transactions, or occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading' did not give notice of reformation because they [were] factually distinct and discordant from [the] plaintiff's allegation of a breach of the written policy."[22]

2. CPLR 205: Termination of action

Pursuant to CPLR section 205, where an action is timely commenced and terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction, a dismissal for neglect to prosecute, or a final judgment on the merits, the plaintiff "may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely

16. *Id.* at 1289.
17. *Id.* at 1283 (quoting N.Y. C.P.L.R. 203(f) (McKinney 2023)).
18. *34-06 73, LLC*, 198 N.E.3d at 1287.
19. *Id.*
20. *Id*. at 1288.
21. *Id.*
22. *Id.*

commenced . . . at the time of commencement of the prior action" and that service upon the defendant is effected within six-months.[23]

In *MTGLQ Invs., LP v. Zaveri*, a residential foreclosure action, the plaintiff appealed from the supreme court's order granting the defendant's motion for summary judgment dismissing the complaint against her as time-barred.[24] By way of background, in 2012, the plaintiff's predecessor commenced a residential foreclosure action against the defendant which remained dormant, and, on March 2, 2016, it was "pre-marked off" the supreme court's calendar in a clerk's minute entry.[25] A year later, pursuant to CPLR section 3404, the action was deemed abandoned and dismissed.[26] The plaintiff's predecessor subsequently made a motion to vacate the dismissal which was denied and the plaintiff appealed, which was dismissed for failure to timely perfect.[27] The plaintiff then commenced the instant foreclosure action on April 2, 2019.[28]

Although the statute began to run on April 2, 2012, the Court held that the action was timely commenced pursuant to CPLR section 205(a).[29] In rejecting the defendant's argument that the action terminated when it was deemed abandoned and dismissed on March 2, 2017, it noted that

> [w]here [the] plaintiff has sought to appeal as of right from the denial of a motion to vacate the dismissal . . . the action terminate[d] for purposes of CPLR section 205(a) when the appeal "is truly 'exhausted,' either by a determination on the merits or by dismissal of the appeal, even if it is dismissed as abandoned.[30]

Here, the dismissal of the 2012 action did not constitute a final termination because of the motion to vacate and appeal.[31] Rather, according to the Fourth Department, the action terminated on November 30, 2018, when the Court dismissed the appeal and given that the action was commenced within six months of that dismissal, it was timely commenced.[32]

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23. N.Y. C.P.L.R. 205-a (McKinney 2023).
24. MTGL Invs., LP v. Zaveri, 177 N.Y.S.3d 816, 816 (App. Div. 4th Dep't 2022).
25. *Id.* at 817.
26. *Id.*
27. *Id.*
28. *Id.*
29. *See MTGLQ Invs.,* 177 N.Y.S.3d at 817.
30. *Id.* at 817 (quoting Malay v. City of Syracuse, 33 N.E.3d 1270, 1273 (N.Y. 2015).
31. *Id.*
32. *Id.* at 817–18.

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.[33]

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

Among them, CPLR section 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 *Davis v. Siben & Siben*, the defendant represented the plaintiff in an underlying action sounding in negligence, wrongful death and conscious pain and suffering as it related to the plaintiff's son.[36] On October 1, 2014, "the defendant moved to [withdraw] as counsel in the action, which . . . was granted [provided] the defendant serve the plaintiff with a notice of entry within 20 days, and that the defendant file proof that service had been effected."[37] Accordingly, the defendant served the plaintiff with notice of entry on November 10, 2014.[38]

On January 11, 2018, the plaintiff commenced an action against the defendant, pro se, sounding in legal malpractice and fraudulent misrepresentation.[39] The defendant moved for summary judgment, which was granted, affirmed on appeal.[40] According to the Second Department, although the statute accrued at the time of the malpractice, pursuant to the doctrine of continuous representation, the time to sue is tolled until the attorney's continuing representation of the client terminates.[41] Therefore, because "the defendant was relieved as counsel no later than on November 10, 2014, when it fulfilled the obligations set by the Supreme Court . . . [and the] action was commenced more than three years later, on January 11, 2018, the legal malpractice claims were untimely."[42]

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33. N.Y. C.P.L.R. 214 (McKinney 2023).
34. *Id*.
35. C.P.L.R. 214(6).
36. Davis v. Siben & Siben, LLC, 177 N.Y.S.3d 906, 906 (App. Div. 2d Dep't 2022).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Davis*, 177 N.Y.S.3d at 906.
42. *Id.* at 907.

4. 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

> [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 section 214-a(a)), and the exception based upon a failure to diagnose cancer or malignant tumor (Lavern's Law), the provision under CPLR section 208 which provides that the statute of limitations is tolled throughout the period of infancy, but limits such toll to ten years in medical malpractice actions.[44]

The latter exception was at issue before the Second Department in *Rojas v. Tandon*.[45] There, the plaintiff sued sounding in negligence in January 2020 to recover damages she suffered when she was dropped in the delivery room following her birth in March 1999.[46] She argued that the CPLR section 208 toll limitation for medical malpractice actions did not apply as her action was for negligence and the supreme court agreed.[47]

> On appeal, the Second Department reversed, holding that the defendant established . . . that the conduct at issue derived from the duty owed to the plaintiff by the defendant as a result of the physician-patient relationship and was substantially related to the plaintiff's medical treatment [and] [i]n opposition, the plaintiff failed to raise a question of fact as to whether the allegations sounded in ordinary negligence.[48]

According to the Court, relevant to its analysis as to "whether conduct should be deemed medical malpractice or ordinary negligence, the critical factor is the nature of the duty owed to the plaintiff that the

43. *See* N.Y. C.P.L.R. 214-a (McKinney 2018).

44. *Id.*; *Lavern's Law*, SCAFFIDI & ASSOCIATES: COUNSELOR'S AT LAW BLOG, https://scaffidilaw.com/laverns-law/ (last visited Feb. 3, 2024); N.Y. C.P.L.R. 208 (McKinney 2019).

45. *See generally,* Rojas v. Tandon, 173 N.Y.S.3d 625, 626 (App. Div. 2d Dep't 2022).

46. *Id*

47. *Id.*

48. *Id.* at 627.

defendant is alleged to have breached."[49] Indeed, per the Second Department, "[a] negligent act or omission by a health care provider that constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment . . . constitutes medical malpractice."[50]

The continuous treatment doctrine was considered by the Second Department in *Proano v. Gutman*.[51] The matter involved a medical malpractice and wrongful death action arising out of the decedent's treatment for liver cancer who died of liver cancer on November 9, 2013.[52] A lawsuit was filed on November 9, 2015, against a number of defendants, including the decedent's primary care physician, Jorge L. Gardyn and his group ("Gardyn defendants").[53] "The evidence reflect[ed] . . . that the decedent was diagnosed with liver cancer after an MRI conducted on April 3, 2013, by a nonparty," and that "the decedent's subsequent visit with the Gardyn defendants in October 2013 was for aspects of the decedent's general medical care" — not his cancer treatment.[54] Accordingly, as "there was no actual course of treatment by the Gardyn defendants for liver cancer or for symptoms related to liver cancer subsequent to March 2013, there could be no resultant continuous treatment tolling the statute of limitations."[55] Therefore, the Appellate Division affirmed dismissal of the plaintiff's complaint as against the Gardyn defendants.[56]

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

1. 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, 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

49. *Id.*
50. *Rojas*, 173 N.Y.S.3d at 627.
51. *See generally*, Proano v. Gutman, 180 N.Y.S.3d 279, 283 (App. Div. 2d Dep't 2022).
52. *Id.* at 283.
53. *Id.*
54. *Id.* at 284.
55. *Id.*
56. *Proano*, 180 N.Y.S.3d at 283.

state; or owns, uses or possesses any real property situated within the state.[57]

In *State v. Vayu, Inc.,* the plaintiff, the State of New York on behalf of a public university (Stony Brook), brought an action for breach of contract against a manufacturer of unmanned aerial vehicles (UAVs), a Delaware corporation headquartered in Michigan.[58] According to the plaintiff, Stony Brook purchased two UAVs from the defendant intending to use them to deliver medical supplies to remote areas in Madagascar, but they did not function as expected and, upon returning the UAVs to the defendant, the defendant failed to replace them or provide a refund.[59] The defendant moved to dismiss the complaint for lack of personal jurisdiction and the plaintiff opposed, asserting jurisdiction pursuant to New York's long-arm statute, CPLR 302(a)(1).[60]

According to the Court of Appeals, "[w]hen assessing whether there is personal jurisdiction over a defendant pursuant to the 'transacts any business' clause . . . [the] courts must ask 'whether what the defendant did in New York constitutes a sufficient 'transaction' to satisfy the statute.'"[61] This inquiry, according to the Court, is a fact-based one, that requires analysis of whether the defendant's actions were "purposeful"— i.e., "volitional acts by which the non-domiciliary 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'"[62]

In performing its fact-based analysis, the Court observed that the facts demonstrated a clear intent by the defendant to purposefully engage in business activities by projecting itself into the State via calls and emails for two years.[63] The Court further rejected the lower courts' rationale for granting the defendant's motion to dismiss, observing that the communications related not only to the sale of the drones, but also to a continuing business relationship between the defendant and Stony Brook, and involved an active dialogue between the principals.[64]

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57. *See* N.Y. C.P.L.R. 302(a)(1)-(4) (McKinney 2023).

58. State v. Vayu, Inc., 206 N.E.3d 1236, 1238 (N.Y. 2023).

59. *Id.* at 1239.

60. *Id.* at 1238.

61. *Id.* (*quoting* DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 86 (6th ed., Dec. 2022 Update)).

62. *Id.* (*quoting* Paterno v. Laser Spine Inst., 23 N.E.3d 988, 992–93 (N.Y. 2014)).

63. *Vayu, Inc.,* 206 N.E.3d at 1239.

64. *Id.* at 1239–40.

As to the second prong of New York's long-arm statute, which requires the cause of action to arise from the defendant's relevant business transaction in the state, the Court of Appeals held that requirement was "easily met," as the plaintiff's claims are based on the sale of two UAVs and the defendant's contacts in New York were directly related to efforts to resolve the dispute over the operability of the purchased UAVs.[65]

Finally, as to due process, the Court held that the defendant "sought, negotiated and then entered a contractual relationship with a New York State entity . . . [and then] furthered that relationship through numerous [telephone] and email communications."[66]

Therefore, according to the Court, the defendant "should reasonably have anticipated being haled into court here," and it held that the defendant's motion to dismiss the complaint should have been denied.[67]

In another case, *Aybar v. US Tires & Wheels of Queens, LLC ("Aybar III")*, the Second Department addressed the second prong of CPLR 302(a)(1)— i.e., the "arising from" business transaction in New York.[68] There, in 2002, the third-party defendant Ford Motor Company ("Ford") manufactured a vehicle and sold it to an independently-owned Ford dealership in Ohio.[69] In 2009, the vehicle entered New York when it was sold and registered to a New York resident, who later sold it to the plaintiff, another New York resident.[70]

In 2012, the plaintiff brought the vehicle to the defendant, US Tires and Wheels of Queens, LLC ("US Tires"), in New York, for service.[71] US Tires inspected new tires, which were manufactured by third-party defendant Goodyear Tire & Rubber Company ("Goodyear"), and installed them.[72] Two months later, the plaintiff was driving on a highway as part of a return trip from Disney World with members of his family as passengers, when one of the tires failed.[73] Three people, including a child, died and three were seriously injured.[74]

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65. *Id.* at 1241.
66. *Id.* at 1242.
67. *Id.* at 1242–43.
68. Aybar v. US Tires & Wheels of Queens, LLC, 178 N.Y.S.3d 73, 76 (App. Div. 2d Dep't 2022).
69. *Id*.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Aybar*, 178 N.Y.S.3d at 76.
74. *Id.*

Several actions were subsequently filed, all involving direct or third-party claims against Ford (incorporated in Delaware with principal place of business in Michigan) and Goodyear (incorporated with principal place of business in Ohio).[75]

As to the first — *Aybar v. Aybar* ("*Aybar I*") —the injured passengers and representatives of the estates of passengers asserted negligence claims against the owner and driver, Aybar, as well Ford and Goodyear.[76] Ford and Goodyear moved to dismiss on lack of personal jurisdiction, and in opposing, the plaintiffs argued that they were subject to general jurisdiction.[77] The supreme court denied the motions, finding that although there was no specific jurisdiction under New York's long-arm statute (CPLR 302), there was general jurisdiction (CPLR 301).[78] On appeal to the Second Department, the plaintiffs did not argue that New York also had specific jurisdiction or long-arm jurisdiction and therefore, the Second Department reversed the supreme court's order, holding that Goodyear's and Ford's contacts with New York did not support a finding of general jurisdiction under due process and because the plaintiffs did not raise specific or long-arm jurisdiction, it could not consider it.[79] The Court of Appeals affirmed.[80]

In the second action —*Aybar v. Goodyear Tire & Rubber Co*. ("*Aybar II*") —Aybar, the owner and driver, commenced a lawsuit against Goodyear, among others, alleging strict products liability, negligence and breach of warranty.[81] Goodyear also moved to dismiss for lack of personal jurisdiction, and the supreme court found that there was no specific or long-arm jurisdiction over Goodyear, but that Goodyear was subject to general jurisdiction under CPLR 301 because (1) its activities "in New York were so continuous and systematic that it was essentially 'at home'" in New York, and (2) Goodyear consented to general jurisdiction by registering to do business in New York.[82] Goodyear appealed and on appeal, neither Goodyear nor the plaintiffs raised the issue of specific or long-arm jurisdiction, and the

75. *Id.*

76. Aybar v. Aybar, 93 N.Y.S.3d 159, 160–61 (App. Div. 2d Dep't 2019), *aff'd* 177 N.E. 3d 1257 (N.Y. 2021).

77. *Id.* at 161.

78. *Id.* at 163.

79. *Id.*

80. Aybar v. Aybar, 177 N.E.3d 1257, 1259, (N.Y. 2021).

81. Aybar v. Goodyear Tire & Rubber Co., 106 N.Y.S.3d 361, 362 (App. Div. 2d Dep't 2019).

82. *Id.* at 361–62.

Second Department again declined to consider it.[83] As to general jurisdiction, the Second Department again found that there was no general jurisdiction over Goodyear and that Goodyear did not consent to general jurisdiction by registering to do business in New York.[84]

In *Aybar III*, the plaintiffs, including Aybar, commenced a lawsuit against US Tires for negligently inspecting and installing the Goodyear tires onto Aybar's vehicle in New York.[85] US Tires commenced a third-party action against Ford and Goodyear seeking indemnification and contribution and both asserted lack of personal jurisdiction.[86] In opposing the responding motions from Ford and Goodyear challenging jurisdiction, US Tires argued that New York could exercise specific jurisdiction pursuant to CPLR 302.[87]

The supreme court denied Ford and Goodyear's motions.[88] As to general jurisdiction, the court declared that it was restricted by *Aybar I* and *Aybar II*, but as to specific jurisdiction, it "held that US Tires demonstrated that Ford and Goodyear fell within the reach of New York's long-arm jurisdiction statute."[89]

In affirming, the Second Department first observed that in order for a claim to arise from a business transaction for purposes of CPLR 302(a)(1), there must be an articulable nexus or substantial relationship between the cause of action sued upon, or an element thereof, and the defendant's business transactions in New York.[90] The case before the court, unlike *Aybar I* and *II*, was not a direct action against Ford or Goodyear.[91] However, even though US Tires did not manufacture or sell its own tires, "its business center[ed] around repairs to automobiles, as well as the sale and installation of tires from [foreign] companies such as Goodyear and Ford . . . [and t]he alleged negligence occurred at US Tires' place of business, in New York."[92] In other words, third-party causes of action against Ford and Goodyear for

83. *Id.* at 362.
84. *Id.*
85. Aybar v US Tires & Wheels of Queens, LLC., 178 N.Y.S.3d 73, 78 (App. Div. 2d Dep't 2022).
86. *Id.*
87. *Id.*
88. *Id.* at 78–79.
89. *Id.* at 79.
90. *Aybar*, 178 N.Y.S.3d at 82.
91. *Id.* at 81.
92. *Id* at 81–82.

indemnification and contribution "could not exist but for US Tires' alleged negligence, which occurred in New York."[93]

The Second Department also rejected the position of Ford and Goodyear that the claims do not arise out of their New York activities, noting that the inquiry before the Court is considered "permissive," and that the claim need not "arise out of" nor be causally related to their transactions, but need only be "sufficiently related to their transactions in New York, or have some 'articulable nexus.'"[94] Further, the Court observed that Ford and Goodyear "purposely availed themselves of the New York market to sell motor vehicles and tires [and] [b]y doing so, and on such a grand scale as befitting titans in their respective industries . . . they would undoubtadly benefit from the sale of replacement parts and services from third-party companies."[95]

2. 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 "[i]f 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."[96]

The above provision was at issue before the Second Department in *Edwards v. Brooklyn Hosp. Ctr*.[97] There, the plaintiffs commenced a lawsuit on November 2, 2018, and on February 25, 2019, the plaintiffs served the summons with notice upon the defendant Brooklyn Hospital Center and, relying on a hospital clerk's representation that she could accept legal papers on behalf of the defendant Nelson Menezes, the plaintiffs attempted to serve Menezes by leaving the summons with notice with the clerk.[98]

On June 3, 2019, Menezes moved to dismiss the complaint for insufficient service.[99] In support of his motion, Menezes submitted an affidavit averring that although he was an attending physician at

93. *Id.* at 82.
94. *Id.*
95. *Aybar*, 178 N.Y.S.3d at 82.
96. N.Y. C.P.L.R. 306-b (McKinney 2023).
97. *See* Edwards v. Brooklyn Hosp. Ctr, 172 N.Y.S.3d 630, 631 (App. Div. 2d Dep't 2022).
98. *Id.* at 630–31.
99. *Id.* at 631.

Brooklyn Hospital, he did not maintain an office there.[100] The plaintiff then attempted to serve him at his office and cross-moved pursuant to CPLR 306-b to extend the time to serve Menezes in the interest of justice.[101] The supreme court granted the cross-motion and deemed the serve effectuated on July 29, 2019, to have been timely.[102]

In affirming, the Court observed that the "interest of justice" standard requires a careful analysis of the facts of the case and a balance of the competing interests presented by the parties.[103] Dissimilar to a motion premised on good cause, a motion for an extension of time to serve in the interest of justice does not require the plaintiff to establish reasonably diligent efforts at service but diligence, or lack thereof, along with any other relevant factors — "including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" — may be considered.[104]

On the facts before it, the Second Department found that an extension of time was warranted in the interest of justice, as the plaintiffs demonstrated that the lawsuit was timely commenced; service was timely attempted and believed to have been made within 120 days of the action; that a meritorious cause of action existed; the statute of limitations expired; and that the extension of time does not prejudice Menezes.[105] Accordingly, the Second Department affirmed the trial court's decision granting the plaintiff's cross-motion for an extension of time to serve.[106]

3. CPLR 308: Defendant's appearance

CPLR 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;

100. *Id.*
101. *Id.*
102. *Edwards*, 172 N.Y.S.3d at 631.
103. *Id.* (citing Wachovia Bank, N.A. v. Greenberg, 140 N.Y.S.3d 562, 564 (App. Div. 2d Dep't 2021)).
104. *Id.* (quoting *Wachovia Bank N.A.*, 140 N.Y.S.3d at 564).
105. *Id.*
106. *Id.* at 630.

(5) and such manner as the court, upon motion, directs when service is impracticable under paragraphs one, two and four.[107]

CPLR 308(2) was at issue before the Second Department in *Deutsche Bank v. Lubonty*.[108] In this mortgage foreclosure action, the Second Department affirmed the supreme court's denial of the defendant's motion to dismiss for lack of personal jurisdiction.[109] In its decision, the court noted that although a process server's affidavit gives rise to a presumption of proper service, "[a] sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit will defeat" that presumption.[110] However, on the facts before it, the defendant's affidavit, which was submitted to rebut the presumption of service, was "unsubstantiated and conclusory," in that he solely averred that he resided in another state, without more.[111] Accordingly, because "[b]are and unsubstantiated denials are insufficient to rebut the presumption of service," the Appellate Division affirmed the trial court's denial of the defendant's motion.[112]

CPLR 308(2) was again at issue before the Second Department in *K.J. v. Longo*.[113] There, the third-party plaintiff served the third-party defendants by delivering the "summons and complaint to a person of suitable age and discretion at the third-party defendant's usual place of abode on February 11, 2019, and by mailing to the same address the next day."[114] The proof of service was filed on April 2, 2019, beyond the twenty-day filing period required by CPLR 308(2), and the third-party plaintiff moved for default judgment.[115] The third-party defendants opposed the motion and the supreme court denied it.[116]

On appeal, the Second Department affirmed, noting that while the failure to file a timely proof of service is a curable procedural irregularity, the third-party plaintiff did not obtain an order permitting late filing of proof of service.[117] "Accordingly, the late filings were

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107. N.Y. C.P.L.R. 308 (McKinney 2023).

108. Deutsche Bank Nat'l Trust Co. v. Lubonty, 171 N.Y.S.3d 556, 563 (App. Div. 2d Dep't 2022).

109. *Id.*

110. *Id.* (quoting Deutsche Bank Nat'l Trust Co. v. O'King, 51 N.Y.S.3d 523, 525 (App. Div. 2d Dep't 2017).).

111. *Id.*

112. *Id.* (quoting HSBC Bank USA, N.A. v. Archibong, 66 N.Y.S.3d 625, 625 (App. Div. 2d Dep't 2018)).

113. K.J. v. Longo, 171 N.Y.S.3d 916, 916 (App. Div. 2d Dep't 2022).

114. *Id*.

115. *Id.*

116. *Id.*

117. *Id.*

nullities and the third-party defendants' time to answer never began to run."[118] Therefore, according to the Second Department, because the third-party defendants were not in default, the third-party plaintiff's motion for leave to enter a default judgment against them was properly denied.[119]

CPLR 308(4) was at issue before the First Department in *Schnur v. Balestriere*.[120] There, the Appellate Division held that the supreme court properly denied the plaintiffs' motion for a default judgment for their failure to submit adequate proof of service under CPLR 308(4).[121] According to the court, service pursuant to CPLR 308(4), "is only appropriate where personal service or service by delivery on a person of suitable age and discretion at the actual place of business or dwelling place 'cannot be made with due diligence.'"[122] On the facts before it, such "diligence was not demonstrated," as "[t]he process server should have at least attempted to leave the summons and complaint with the club manager, security guard, or bouncer before resorting to nail and mail service."[123] The plaintiffs' failure to do so, or demonstrate any due diligence whatsoever, required denial of their motion.[124]

Dissimilarly, in *Wang v. Wu*, the Second Department held that the plaintiff's service pursuant to CPLR 308(4) was, in fact, proper.[125] In a complaint asserting various causes of action based on alleged violations of Labor Law article 6 and the Domestic Workers' Bill of Rights, "the plaintiff allege[d] that she was employed by the defendants as a 'live-in' nanny and housekeeper who provided childcare and housekeeping services for the defendants' two children at their home in Syosset."[126] According to the affidavits of service, the defendants were served at the Syosset property pursuant to CPLR 308(4), after two prior attempts to serve them by personal delivery.[127] The defendants

118. *K.J.*, 171 N.Y.S.3d at 917. (citations omitted).
119. *Id*.
120. Schnur v. Balestriere, 175 N.Y.S.3d 50, 52 (App. Div. 1st Dep't 2022).
121. *Id.*
122. *Id.* (citing N.Y. C.P.L.R. 308(1)-(3)).
123. *Id.* (citations omitted).
124. *Id.*
125. Zhiying Wang v. Bin Wu, 174 N.Y.S.3d 132, 134 (App. Div. 2d Dep't 2022).
126. *Id.* at 132.
127. *Id.* at 133–34.

moved to dismiss claiming that they did not reside at the Syosset property and the supreme court denied the motion.[128]

On appeal, the Second Department affirmed, noting that the affidavits, which reflected three attempts to effect personal service at different times and on different days, constituted prima facie evidence of proper service pursuant to the nail and mail method.[129] The Second Department further rejected the defendant's affidavits that they did not reside at the Syosset property, noting that they were conclusory, and unsubstantiated, and without any evidence or documentation showing that they lived anywhere other than at the Syosset property.[130] The Court further observed that it was "undisputed that the defendants' children lived at the Syosset property where the plaintiff was employed" and that the defendant owned the property. Although the defendants' averred that they only visited the property during the summer months and at Christmas time, the Second Department held that it was their dwelling place or usual place of abode within the state.[131]

4. CPLR 320: Defendant's appearance

CPLR 320 sets forth the mechanism by which the a defendant must appear including by service of an answer, notice of appearance, or by making a motion.[132] Pursuant to CPLR 320(c), when the court's jurisdiction is not based upon personal service on the defendant, an appearance is not equivalent to personal service: (1) in a case specified in subdivision three of section 314; and (2) in any other case specified in section 314, *if* an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted by motion or in the answer as provided in rule 2311, *unless* the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained.[133]

In *U.S. Bank N.A. v. Rodriguez*, the First Department affirmed a denial of the defendant's motion to vacate a default judgment, noting that "[s]ubject to the provisions of subdivision (c), an appearance of the defendant is equivalent to personal service of the summons upon [her], unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as

128. *Id.* at 134.
129. *Id.*
130. *Wang*, 174 N.Y.S.3d at 134.
131. *Id.*
132. N.Y. C.P.L.R. 320 (McKinney 2023).
133. *Id.* 320(c)(1)-(2).

provided in rule 3211."[134] There, the "[d]efendant's assertion that [the] US Bank lacked standing in the . . . order to show cause combined with her attempt to seek affirmative relief, such as enforcement of a short sale or a return to the settlement conference part, demonstrated a challenge to the merits of the action."[135] Therefore, "although both [the] defendant and her [attorney] stated that the defendant did not receive the summons and complaint, or 'any 'court papers,' their failure to move at the time to dismiss the complaint for lack of personal jurisdiction failed to preserve their objection pursuant to CPLR 320(b)."[136]

C. Article 5: Venue

1. CPLR 511: Change of place of trial

CPLR 511 sets forth the provisions required for a motion or demand for change of place of trial on ground of improper venue,[137] and was at issue before the Second Department in *Golfinopoulos v. Gerasimou*.[138]

There, the plaintiff commenced a lawsuit in New York County on the basis that one of the defendants — Preston A. Leschins — resided there.[139] On July 31, several other defendants ("the Gerasimou defendants") served a demand for a change of venue from New York County to Queens County, the residence of the plaintiff and some of the defendants.[140] Three days later, on August 3, 2020, the plaintiff objected and served an affidavit in response to the demand.[141]

As observed by the Second Department, "CPLR 511(b) provides a mechanism pursuant to which a defendant may serve a demand to change the place of a trial upon the ground of improper venue to a county the defendant specifies as being proper,"[142] and if the plaintiff does not consent, "the defendant may move to change the place of trial

134. U.S. Bank N.A. v. Rodriguez, 156 N.Y.S3d 837, 837 (App. Div. 1st Dep't 2022), *aff'd on other grounds*, 2024 N.Y. Slip Op. 50047(U) (quoting C.P.L.R. 320(b)).

135. *Id.*

136. *Id.*

137. *See* N.Y. C.P.L.R. 511 (McKinney 2023).

138. Golfinopoulos v. Gerasimou, 177 N.Y.S.3d 325, 325 (App. Div. 2d Dep't 2022).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 326 (quoting HVT, Inc. v. Safeco Ins. Co. of Am., 908 N.Y.S.2d 222, 226–27, (App. Div. 2d. Dep't 2010)).

within fifteen days after service of the demand."[143] In noticing such a motion, it may be noticed to be heard "as if the action were pending in the county he or she specified, *unless* the plaintiff, within five days after service of the demand, serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by the plaintiff is proper."[144]

In the case before it, as the plaintiff did not consent, the Gerasimou defendants made a motion pursuant to CPLR 510(1) and 511, to change the venue of the action from New York County to Queens County.[145] However, per the Appellate Division, because "the plaintiff timely served an affidavit of his attorney containing factual averments that were sufficient to show that the county designated by him was proper," the Gerasimou defendants' motion should have been made in New York County, where the action was pending, and not Queens.[146] Accordingly, the Gerasimou defendants' failure to make the motion in the proper county was fatal.[147]

D. Article 10: Parties Generally

Article 10 of the CPLR addresses necessary and permissive joinder of parties, nonjoinder, impleader, and pleadings.

In *Braxton v. Erie Cnty. Med. Ctr.*, a medical malpractice action, the Fourth Department reversed an order granting summary judgment to the defendant hospital.[148] According to the Appellate Division, contrary to the trial court's decision, the plaintiff was not required to provide the name of every allegedly negligent actor who, e.g., failed to read the plaintiff's decedent's CT, or failed to timely order a urinalysis.[149] Rather, the allegedly negligent actors engaged in allegedly negligent conduct within the scope of his or her employment for the plaintiff put the defendant on notice of the claims against it based on the allegations in the amended complaint, which was amplified by the plaintiff's bill of particulars to the defendant which noted the various

143. *Golfinopoulos*, 177 N.Y.S.3d at 326 (quoting N.Y. C.P.L.R. 511(b) (McKinney 2023)).

144. *Id.*

145. *Id.* at 325–26.

146. *Id.* at 326.

147. *Id.*

148. Braxton v. Erie Cnty Med. Ctr. Corp., 173 N.Y.S.3d 757, 758–79 (App. Div. 4th Dep't 2022).

149. *Id.* at 761 (citing Goodwin v. Pretorius, 962 N.Y.S.2d 539, 541 (App. Div. 4th Dep't 2013).

failures and omissions by the defendants' employees.[150] "Indeed, [the defendant was] in the best position to identify its own employees and contractors and, as the creator of the plaintiff's decedent's medical records. . . had notice of who treated the [plaintiff's] decedent and of any allegations of negligence by its nursing staff."[151]

E. Article 31: Disclosure

1. CPLR 3101: Scope of disclosure

CPLR 3101 provides the scope of disclosure and that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of burden of proof."[152] However, that is not without its limits.

Indeed, in *Stern v. Golub Corp*., the plaintiff, who was injured when struck while shopping in the defendant's supermarket by a motorized shopping cart, sought reports of every motorized shopping cart accident in every Price Chopper store for the ten years preceding the accident and for the defendant's entire claim file.[153] The supreme court denied the plaintiff's motion and the Fourth Department affirmed.[154] According to the Appellate Division, "[a]though CPLR 3101(a) provides for 'full disclosure of all matter material and necessary in the prosecution or defense of an action,' it is well settled that a party need not respond to discovery demands that are overbroad."[155]

In another case out of the Fourth Department, *Tousant v. Aragona*, the court found that a request for the production and information from the plaintiff's cell phone was reasonably calculated to produce relevant and material information.[156] *Tousant* involved a motor vehicle action and, in seeking the information from the cell phone, the defendants sought to determine whether he was using the phone at or near the time of the accident.[157] The supreme court "denied the motion insofar as it sought production of the phone," because there was

150. *Id.*

151. *Id.*

152. N.Y. C.P.L.R. 3101 (McKinney 2023).

153. Stern v. Golub Corp., 169 N.Y.S.3d 568, 568–69 (App. Div. 4th Dep't 2022).

154. *Id.* at 568 (citing In re. Greenfield v. Bd. of Assessment Rev. for Town of Babylon, 965 N.Y.S.2d 555, 557 (App. Div. 2d Dep't 2013).

155. *Id.* (quoting Kregg v. Maldonado, 951 N.Y.S.2d 301, 302 (App. Div. 4th Dep't 2012)).

156. Tousant v. Aragona, 172 N.Y.S.3d 789, 791 (App. Div. 4th Dep't 2022) (quoting Forman v. Henkin, 30 N.Y.3d 656, 661 (App. Div. 2d Dep't 2018)).

157. *Id.* at 790–91.

no basis to suggest it was being used for texting, "but granted the motion to the extent it sought cell phone records from the [plaintiff's] service provider," and the Appellate Division affirmed (Appeal #1).[158]

Eventually, however, the cell phone records subsequently obtained established that the plaintiff was not talking on his phone at the time of the accident, but did not indicate whether he opened or sent text messages during the relevant time period.[159] The defendants also established that the plaintiff was traveling at close to eighty miles per hour seconds before the accident, which occurred on a residential road near an elementary school, and that the plaintiff did not brake before colliding with the school bus, suggesting he may have been distracted.[160] Of note, the court observed that "[i]f there is *any* possibility that the information is sought in good faith for possible use as evidence-in-chief or for cross-examination or in rebuttal, it should be considered [matter] material in the action."[161] Accordingly, on their subsequent application (Appeal #2), the Fourth Department held that the defendants adequately demonstrated whether the plaintiff was using his cell phone constituted discoverable information and therefore required production of it.[162]

At issue before the Second Department in *Mercado v. Schwartz*[163] was CPLR 3101(d)(1), which provides that "[i]n an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts."[164]

There, the plaintif, a patient, signed an agreement prior to undergoing surgery performed by the defendant physician, which, among other routine medical releases prior to undergoing surgery, provided that in the event of a medical malpractice action, each party had the right to depose the other's expert witness at least 120 days before trial (the "provision").[165] During the pendency of the lawsuit, the parties entered into a preliminary conference stipulation and order which provided that "[e]xpert [d]isclosure shall be provided by all parties pursuant to CPLR 3101."[166] Accordingly, the plaintiffs moved for a

158. *Id.* at 791.
159. *Id.*
160. *Id.* at 791–92.
161. *Tousant*, 172 N.Y.S.3d at 792 (quoting Vargas v. Lee, 96 N.Y.S.3d 587, 590 (App. Div. 2d Dep't 2019)) (emphasis in original).
162. *Id.*
163. Mercado v. Schwartz, 174 N.Y.S.3d 82, 87 (App. Div. 2d Dep't 2022).
164. N.Y. C.P.L.R. 3101(d)(1) (McKinney 2023).
165. *Mercado*, 174 N.Y.S.3d at 85.
166. *Id.* at 86.

declaration that the provision was void and unenforceable, and the defendants cross-moved for a declaration that it was valid and enforceable.[167] The supreme court granted the plaintiff's motion and denied the defendants' motion, and the defendants appealed.[168]

In affirming, the Second Department held that the provision was unenforceable as against public policy.[169] In so holding, the Appellate Division held that the language of CPLR relating to expert disclosure reflected the Legislature's intent to limit the requirements for disclosure of the identity of experts in actions for medical, dental, or podiatric malpractice based on a concern that medical experts might be discouraged from testifying by their colleagues.[170] The provision, according to the Court, "clearly obviates the intent of the Legislature to permit the plaintiffs in medical malpractice actions to avoid disclosing the names of their experts until trial."[171]

The Second Department also observed that requiring experts to be made available for a deposition 120 days before trial contradicts the provision in CPLR 3101(d)(1)(i) that provides trial courts the discretion to "make whatever order may be just" if a party "retains an expert in an insufficient period of time before the commencement of trial to provide appropriate notice."[172] Indeed, per the Court, "[t]his statutory provision reflects the important public policy of allowing courts to retain discretion in their role as gatekeeper in determining the admissibility of expert testimony."[173]

2. 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.[174]

Milazzo v. Best Market involved a slip and fall action at a grocery store owned by the defendants.[175] Throughout the course of discovery,

167. *Id.*
168. *Id.*
169. *Id.*
170. *Mercado*, 174 N.Y.S.3d at 88.
171. *Id.*
172. *Id.* (quoting C.P.L.R. 3101(d)(1)).
173. *Id.*
174. N.Y. C.P.L.R. 3126 (McKinney 2023).
175. Milazzo v. Best Mkt., 169 N.Y.S.3d 808, 809 (App. Div. 2d Dep't 2022).

surveillance footage of the accident, including "approximately 2 minutes and 45 seconds of footage prior to the plaintiff's fall" was disclosed.[176] However, "[d]ue to storage limitations of the video surveillance system," the "remainder of the surveillance footage from the date of the plaintiff's accident was automatically deleted 30 days" later, including footage for the one-hour period of time prior to the plaintiff's fall.[177] Accordingly, the plaintiff moved for spoliation sanctions for the spoliation of the footage for the one-hour prior to the plaintiff's fall that was missing, and the supreme court denied the motion.[178]

On appeal, the Second Department affirmed.[179] As noted by the Court, pursuant to the *Pegasus* requirements for imposing spoliation sanctions,

> the party having control over the evidence [at issue must have] possessed an obligation to preserve it at the time of its destruction, [and] that the evidence [must have been] destroyed with a culpable state of mind, and that the [destruction of] evidence [must be] relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense.[180]

Because the plaintiffs did not establish that the defendants "negligently or intentionally failed to preserve the footage . . . depicting a larger time period, or that their failure to do so deprived" the plaintiff of the ability to prove her claim, spoliation was not warranted.[181]

F. Article 32: Accelerated Judgment

1. CPLR 3213: Motion for summary judgment in lieu of complaint.

CPLR 3213 provides the mechanism for a court to dispose of a cause of action for summary judgment in lieu of a complaint.[182]

In *Counsel Fin. Holdings v. Sullivan L.*, the Fourth Department addressed a defendants' "appeal from a judgment awarding [the]

176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Milazzo*, 169 N.Y.S.3d at 809–10 (quoting Pegasus Aviation I, Inc. v Varig Logistica S.A., 46 N.E.3d 601, 602 (N.Y. 2015)).
181. *Id.* at 810.
182. N.Y. C.P.L.R. 3213 (McKinney 2023).

plaintiff damages in the amount of $6,865,243.34."[183] There, by way of motion for summary judgment in lieu of a complaint, the "plaintiff sought to recover on a revolving promissory note" and guaranty for payment and performance for the note.[184] The supreme court granted the motion and the Appellate Division affirmed.[185]

In rejecting the defendants' contention that a line of credit may not be the subject of a motion for summary judgment in lieu of a complaint pursuant to CPLR. 3213, the court noted that the note contains an "unambiguous promise to pay as and when required, as well as provisions governing default and acceleration of the debt upon default."[186] It further "decline[d] to follow the First Department precedent advanced by the defendants, and . . . conclude[d] that the guaranty's references to ensuring the performance of the note's obligations do not negate its status as an instrument for the payment of money only."[187] Of note, as of the date of this *Survey*, the split among the departments has not been resolved.

G. Article 50: Judgments Generally

1. CPLR 5015: Relief from judgment or order

Pursuant to CPLR 5015,

> [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:
>
> [1] excusable default . . .
>
> [2] newly-discovered evidence . . .
>
> [3] fraud, misrepresentation, or other misconduct of an adverse party . . .
>
> [4] lack of jurisdiction to render the judgment or order; or[5] reversal, modification or vacatur of a prior judgment or order upon which it is based.[188]

The first ground for relief from an order pursuant to CPLR 5015(a)(1) — i.e., excusable default — was at issue before the Second

183. Couns. Fin. Holdings, LLC v. Sullivan L., L.L.C., 173 N.Y.S.3d 816, 817 (App. Div. 4th Dep't 2022).

184. *Id.*

185. *Id.*

186. *Id.* at 818 (citing C.P.L.R. 3213).

187. *Id.* at 818 (citing PDL Biopharma, Inc. v. Wohlstadter 47 N.Y.S.3d 25, 27–28 (App. Div. 1st Dep't 2017); Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Int'l," N.Y. Branch v. Navarro, 36 N.E.3d 80, 82, 84 (N.Y. 2015)).

188. N.Y. C.P.L.R. 5015(a)(1) (McKinney 2024).

Department in *Codrington v. Churcher*.[189] There, the supreme court granted the defendant's summary judgment motion upon the plaintiff's failure to appear at oral argument, and the plaintiff subsequently moved to vacate the order, asserting an excuse of law office failure.[190] The supreme court denied the plaintiff's motion, and the plaintiff appealed.[191]

In affirming, the Appellate Division noted that in order to vacate the order, the plaintiff needed to demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion for summary judgment.[192] As to "[t]he determination of what constitutes a reasonable excuse," such decision "lies within the Supreme Court's discretion" and, although it can "accept law office failure as a reasonable excuse," where that claim is unsupported by a "detailed and credible explanation of the default at issue," it requires denial, as "mere neglect" is inexcusable.[193] Therefore, because the plaintiff's allegations were "undetailed, conclusory, and unsubstantiated," they were insufficient to demonstrate a reasonable excuse for default and the supreme court's order denying vacatur of the dismissal, was appropriate.[194]

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.

Effective July 27, 2022, section 202.16(e)(2) & (f)(4) of the Uniform Rules of the Uniform Civil Rules for the Supreme and County Court were amended, to provide:

> (e) Certification of Paper and Obligations of Counsel Appearing Before the Court . . .
>
> > (2) Counsel who appear before the court must be familiar with the case with regard to which they appear and be fully

189. Codrington v. Churcher, 174 N.Y.S.3d 865, 866 (App. Div. 2d Dep't 2022).

190. *Id.* (citing C.P.L.R. 5015(a)(1)).

191. *Id.*

192. *Id.* (citing C.P.L.R. 5015(a)(1)); U.S. Bank Nat'l Ass'n v. Stathakis, 163 N.Y.S.3d 236, 238 (App. Div. 2d Dep't 2022)).

193. *Id.* (citing Stango v. Byrnes, 158 N.Y.S.3d 221, 223 (App. Div. 2d Dep't 2021); N.Y. C.P.L.R. 2005 (McKinney 2024); Ki Tae Kim v. Bishop, 67 N.Y.S.3d 655, 657 (App. Div. 2d Dep't 2017); OneWest Bank, FSB v. Singer, 59 N.Y.S.3d 480, 482 (App. Div. 2d Dep't 2017)).

194. *Codrington*, 174 N.Y.S.3d at 866 (citing Redding v. JQ III Assocs., 164 N.Y.S.3d 472, 473 (App. Div. 2d Dep't 2022); N.Y. C.P.L.R. 5015(a)(1)).

> 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 of Rule 202.27 and/or may be treated as a failure to appear for purposes of Rule 130-2.1, provided that, in matrimonial actions and proceedings, consistent with applicable case law on defaults in matrimonial actions, failure to comply with this rule may, either in lieu of or in addition to any other direction, be considered in the determination of any award of attorney fees or expenses.

(f) Preliminary Conference.

> (4) Unless the court excuses their presence, the parties personally must be present in court at the time of the compliance conference. If the parties are present in court, the judge personally shall address them at some time during the conference. Where both parties are represented by counsel, counsel shall consult with each other prior to the compliance conference in a good faith effort to resolve any outstanding issues. Notwithstanding NYCRR §202.11, no prior consultation is required where either or both of the parties is self-represented. Counsel shall, prior to or at the compliance conference, submit to the court a writing with respect to any resolutions reached, which the court shall "so order" if approved and in proper form.

Effective July 1, 2022, sections 202.5(a)(2), 8-b(a), 8-c, & 8-g, were amended in several respects and affect print type, margins, backgrounds, word count limits, statements of material facts, and sur-reply papers.

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.