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Queens Bar Bulletin

Queens County Bar Association / 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 / (718) 291-4500

Vol. 75 / No. 4 / January 2012

Criminal Law Cases

BY ILENE J. REICHMAN

Ilene J. Reichman

This past year, the New York Court of Appeals rendered a number of decisions of interest to the criminal practitioner. Some of the more significant opinions are highlighted in this article.

In *People v. Steward*, 17 N.Y.3d 104 (2011), the defendant was charged with multiple counts of first and second degree robbery and various counts of weapon possession. The victim of the robbery was the prominent radio host of a show on a popular New York City radio station. At the commencement of jury selection, the trial judge advised counsel that they would only be given five minutes to question each panel of prospective jurors. After the first round of jury selection, defense counsel objected to the limitation and argued that five minutes was not enough time to question 16 seated panelists in a case that was both complex and serious. In support of this argument, counsel cited several topics that he had hoped to discuss with the prospective jurors but had been unable to do so due to the time constraints imposed.

In reversing Steward's conviction, the Court of Appeals held that while Criminal Procedure Law § 270.15 (b) does not contain guidelines regarding the duration of voir dire, and leaves the scope of counsel's examination of prospective jurors to the trial judge's discretion, it does require that counsel "be afforded a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications". Under the particular circumstances in this case, the Court found that a five-minute time limit per round was unduly restrictive and that the defendant had suffered prejudice as a result of the restriction.

In *People v. Fernandez*, 17 N.Y.3d 70 (2011), a case involving multiple sex offenses, the complainant, who was 11 years old at the time of trial, testified that the defendant, her uncle had engaged in numerous sexual encounters with her over a four-month period. Defense counsel sought to elicit testimony from the defendant's parents that the complainant had a reputation for untruthfulness. However, the trial judge precluded such testimony on the ground that counsel had failed to lay a proper foundation because he had not established the quality of the community members' associations with the complainant or the reliability of his proposed witnesses' testimony.

In its decision rejecting the trial judge's ruling and sustaining the Appellate Division's reversal of the conviction, the Court of Appeals held in *Fernandez* that for the purpose of introducing testimony regarding a witness' bad reputation for truth and veracity, family members and family friends could be found to constitute a relevant community for such purpose, and that in a case where the complainant's credibility was the paramount issue, the erroneous preclusion of such testimony could not be considered harmless.

In *People v. Gibson*, 17 N.Y.3d 757 (2011), the Court of Appeals clarified its prior holdings regarding the right to counsel and the definition of interrogation. In *Gibson*, the defendant was suspected of committing a robbery but was taken into custody for a bench warrant in an unrelated case in which his indelible right to counsel had attached. When the defendant asked to speak with a detective whom he knew, the detective brought him to his office and offered him a cigarette in the hope that he could obtain a sample of his DNA. While the defendant spoke to the detective about a problem he was having with his landlord, he smoked the cigarette and then extinguished it in an ashtray. The detective then took the cigarette butt and had it tested. DNA from the cigarette butt was found to match the DNA left on an article of clothing believed to have been worn by the perpetrator of the robbery under investigation.

On appeal, Gibson argued that his custodial questioning by the detective and the collection of his DNA violated his indelible right to counsel and should have been suppressed. But the Court of Appeals held that the detective's offer of a cigarette to the defendant was not reasonably likely to elicit an incriminating response, and that the defendant's voluntary deposit of DNA on the cigarette was not a communicative act that disclosed the contents of his mind. Therefore,

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Season of Giving

Pictured here (left to right) Hon. Bernice D. Siegal – President, Queens County Women's Bar Association; Lawrence M. Litwack, Esq. – President, Brandeis Association; Sandra M. Munoz, Esq. – President, Latino Lawyers Association of Queens County; Richard Michael Gutierrez, Esq. – President, Queens County Bar Association; Hon. Maureen A. Healy –President, St. John's Law School Alumni Association, Queens Chapter; Thomas J. Principe, Esq. – President, St. John's Law School Alumni Association.

CPLR Update

BY DAVID H. ROSEN

David H. Rosen

Appellate Practice

Siegmund Strauss, Inc. v East 149th Realty Corp.[1] illustrates the effect of the Court of Appeals' decision in *Matter of Aho*,[2] holding that the right of direct appeal from an intermediate order terminates upon the entry of final judgment.

The dispute arose out of a failed business merger between the parties, for simplicity referred to here simply as "Strauss" (plaintiffs) and "the Rodriguezes" (defendants). The original agreement contemplated that the Rodriguezes would continue working at the premises involved in the business, and the dispute reached a head when Strauss changed the locks and excluded the Rodriguezes from the premises.

Strauss sued for a declaratory judgment that the Rodriguezes had no interest in the premises, and moved for a preliminary injunction excluding them. The motion was granted. The Rodriguezes served pleadings asserting claims for fraud, conversion and tortious interference with contracts with various other entities, improper accounting and wrongful termination, but that denied the existence of a contract and asserted no claim for breach of contract. Strauss successfully moved to dismiss these claims, on the grounds that the Rodriguezes' claims really sounded in breach of contract, since the essence of the purported fraud claims was that Strauss entered into the merger agreement with no intent of performing it.

Strauss filed a note of issue. The Rodriguezes then moved to amend their pleadings to assert claims for breach of contract, but the motion was denied, apparently as untimely. The Rodriguezes filed a notice of appeal from this order, but neither perfected nor formally withdraw it, choosing instead to pursue an appeal from any adverse final judgment.

After a bench trial, the trial court held in favor of Strauss, declaring that Strauss was entitled to possession of the premises and that the Rodriguezes had no interest in it. The Rodriguezes now appealed from this judgment, asserting that the appeal brings up for review the prior orders dismissing their original pleadings and denying leave to amend.

Recall that CPLR 5501 (a)(1) provides that an appeal from a final judgment brings up for review any intermediate order or judgment which "necessarily affects" the final judgment. Did the order dismissing the Rodriguezes pleadings necessarily affect the final judgment? No, said the First Department. The Court adopted a suggestion made by Professor Siegel, that a helpful question in making this determination is whether or not reversal of

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THE DOCKET . . .

being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St., Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

PLEASE NOTE:
The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

CLE Seminar & Event Listing

February 2012

Monday, February 13	Observation of Lincoln's Birthday - Office Closed
Monday, February 20	President's Day - Office Closed
Tuesday, February 21	Depositions-From the Plaintiff's and Defendant's Point of View

March 2012

Tuesday, March 6	New Image and E-Verify Systems at St. John's Law School
Tuesday, March 13	Commercial Leasing
Wednesday, March 14	Basic Criminal Law - Pt 1
Monday, March 19	Stated Meeting - Social Media in Your Law Practice
Wednesday, March 21	Basic Criminal Law - Pt 2
Tuesday, March 27	Article 81/Guardianship Training for the Layperson - 2:30-5:00 pm

April 2012

Friday, April 6	Good Friday - Office Closed
Monday, April 16	Judiciary, Past Presidents & Golden Jubilarians Night
Wednesday, April 18	Equitable Distribution Update
Sunday, April 29	ARTtorneys Art Show at Queens College 3:00-6:00 pm

May 2012

Thursday, May 3	Annual Dinner & Installation of Officers
Tuesday, May 15	CPLR Update Seminar
Thursday, May 17	Matrimonial Law CLE

CLE Dates to be Announced

Civil Court
Elder Law
Insurance
Supreme Court & Torts Section

NEW MEMBERS

Evelyn Ryan Britt	Xian-Ming Lei
Patrick Joseph Campbell	Joseph Milano
Neil B. Galfunt	Nadia Munoz
Stuart Haas	Morghan Leia Richardson
Anupama Karumanchi	Chi Wang
Ilana Landecker	Jacob Zev Weinstein

If you or someone you know is having a problem with alcohol, drugs or gambling, we can help.
To learn more, contact QCBA LAC for a confidential conversation. Confidentiality is privileged and assured under Section 499 of the Judiciary Laws as amended by Chapter 327 of the laws of 1993.

Lawyers Assistance Committee
Confidential Helpline 718 307-7828

E-LECTRONIC FILING In New York State

Expansion of Mandatory E-Filing

Mandatory electronic filing, first introduced in New York County Supreme Court in 2010, is expanding in 2012. Pursuant to legislation enacted last year and an administrative order of the Chief Administrative Judge, e-filing will be mandatory in the following courts and in the types of cases commenced on or after the dates indicated:

- ***In New York County Supreme Court, in all commercial, contract, and tort cases (Feb. 27, 2012).***
- ***In Westchester County Supreme Court, in all actions (except Art. 78 and election law proceedings, and matrimonial and Mental Hygiene Law matters) (Jan. 17, 2012).***
- ***In Kings County Supreme Court, in all commercial cases where the amount in controversy equals or exceeds $ 75,000 (Feb. 27, 2012).***
- ***In Bronx County Supreme Court, in all medical malpractice actions (Feb. 27, 2012).***
- ***In Surrogate's Court in Chautauqua, Erie, and Monroe Counties, in all probate and administration proceedings, and miscellaneous proceedings related thereto (March 1, 2012).***

Mandatory e-filing continues in Rockland County Supreme Court in all actions (except Art. 78 and election law proceedings, and matrimonial and Mental Hygiene Law matters).

E-filing is done through the New York State Courts Electronic Filing System ("NYSCEF"). The NYSCEF system is easy to learn and use, especially for those familiar with the Federal courts' ECF system. Information is available on the NYSCEF website, including a *User's Manual* and *FAQs*. In addition, a training course is offered, with two CLE credits awarded to attorneys who attend. There is no fee for this course. Training courses will be presented in Bronx County and for the Surrogate's Bar in Erie and Monroe Counties. Training is also offered regularly in Westchester and New York Counties; a reservation for this course in either locale can be made on-line on the NYSCEF website.

To register as a user or obtain additional information

Contact the NYSCEF Resource Center at
646-386-3033 or efile@courts.state.ny.us
The NYSCEF website may be accessed at www.nycourts.gov/efile

Publisher:
Long Islander Newspapers, LLC, under the auspices of Queens County Bar Association. The Queens Bar Bulletin is published monthly from October to May.
Advertising Offices:
Long Islander Newspapers, 149 Main Street, Huntington, New York (631) 427-7000

Send letters and editorial copy to:
Queens Bar Bulletin, 90-35 148th Street, Jamaica, New York 11435

Editor's Note: Articles appearing in the Queens Bar Bulletin represent the views of the respective authors and do not necessarily carry the endorsement of the Association, the Board of Managers, or the Editorial Board of the Queens Bar Bulletin.

"Queens Bar Bulletin"
(USPS Number: 252-520) is published monthly except June, July, August and September by Long Islander Newspapers, LLC., 149 Main Street, Huntington, NY 11743, under the auspices of the Queens County Bar Association. Entered as periodical postage paid at the Post Office at Jamaica, New York and additional mailing offices under the Act of Congress. Postmaster send address changes to the Queens County Bar Association, 90-35 148th Street, Jamaica, NY 11435.

President's Message

Several weeks ago, I wrote about the decision of the New York City Department of Finance to commence the enforcement of penalties and interest against referees for late filing of Real Property Transfer Taxes.

Recently, the Association received a letter mailed to the Honorable Fern Fisher, Deputy Chief Administrative Judge of the State of New York, regarding the responsibility of referees for the late filing of the RPTT.

All members of the Association, with an email address that had been given to staff, were sent a copy of this letter. For those members who have not received this letter and would like a copy, please contact the Association and a copy will be sent to you.

In this letter, Michael A. Cardozo, Corporation Counsel of the City of New York, states the position of the Department of Finance with regards to the enforcement of penalties and interest on late filed Real Property Tax Returns, against court appointed referees.

Rihard M. Gutierrez

Currently the law treats referees selling properties at foreclosure, as grantors, subject to the timely filing of the returns and the payment of taxes.

Unfortunately, the position taken by the Department of Finance concerning enforcement of penalties and interest, against referees places them in a precarious financial position and creates a significant problem for the court system.

Referees who receive an appointment or an Order of Reference must now decide initially, whether to accept or reject the appointment. However, once an appointment is accepted, and a sale occurs, if the referee signs the deed, it will obligate him or her to make sure there is compliance with the law. Consequently, the RPTT must be filed within thirty (30) days of the transfer otherwise the referee is liable for the payment of penalties and interest.

Customarily, once the deed and the transfer documents are signed, the referee looses any further control over the transaction. Reliance is placed upon the purchaser, usually the lending institution or its agents to timely file the RPTT.

As an arm of the court, referees should not be put in such an untenable position. Moreover, as of January 1, 2012, the Department of Finance will commence enforcement of late filings and have the right to seek a judgment against referees, even though they did nothing wrong in causing the untimely filing of the RPTT.

Until there is a change in the law, the court should consider ways it can protect and prevent referees from being subject to the harshness of this law.

To militate the unfairness of this law, perhaps the court can add language to the Order of Reference that would afford referees' protection. The exact language to be used is within the province of the court. However, the Association is willing to assist the court in formulating language that will hopefully resolve this problem.

For those referees who decide to accept an appointment from the court, the use of a hold harmless agreement might also be helpful.

Although, a hold harmless agreement might protect referees somewhat, it does not prevent the Department of Finance from seeking recourse against them, should there be a breach of the agreement.

If any members have any suggestions on how to resolve this problem, please contact the Queens County Bar Association or you can email me at Richlaw101@aol.com.

Richard M. Gutierrez
President

History Corner

THE ALMANAC MURDER TRIAL AND JUDICIAL NOTICE

By: STEPHEN DAVID FINK, ESQ.

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.
—Sir Walter Scott

Lincoln the Lawyer

By 1858 Abraham Lincoln was well known as one of the best lawyers in Illinois. He had tried many cases but his criminal experience was somewhat limited. His trials included a number of murder cases but he had lost the majority of them.

As an attorney Lincoln was also known for only taking cases in which he believed in the innocence of his client. However, the defense of William "Duff" Armstrong may have been an exception.

Lincoln Takes the Case

As a young man in the early 1830's and before he was a lawyer, Lincoln had lived in the frontier town of New Salem, Illinois. One day a local bully by the name of Jack Armstrong challenged him to a wrestling match. Lincoln won the match and earned Armstrong's respect. He became close friends of Armstrong and his wife Hannah. He would pay visits to the family and knew their son William ("Duff").

Years later, when Duff Armstrong was accused of murder, Lincoln wrote Hannah Armstrong (Jack had passed away) offering to take the case for free.

The Charges

The facts of the case are well documented. On the evening of August 29, 1857, Armstrong and Jack Norris savagely beat James Metzger while all three were quite drunk. Metzger was a large brawny man and during the fight both Norris and Armstrong allegedly struck him with a club and a make shift blackjack - type weapon called a "slung-shot." Metzger suffered severe head injuries and died two days later. Armstrong and Norris were arrested and charged with murder. Norris was quickly convicted of manslaughter based upon eyewitness testimony.

Enter Lincoln. There is some historical controversy whether Lincoln defended the case even though he knew Armstrong to be guilty. Regardless, Lincoln put aside any of his misgivings and prepared the case for trial.

The Trial

The trial was held on May 8, 1858 in the local Courthouse in Beardstown, Illinois. You can still see the actual Courtroom where the trial was held. The town is about 45 miles northwest of Springfield in the heart of Illinois farm country. The famous Courtroom is on the second floor. In fact, the reader may want to see the Henry Fonda movie *Young Lincoln* which generally depicts the trial.

The prosecution's case rested upon the testimony of its key witness, Charles Allen. He testified that on the night of the murder he saw Duff Armstrong strike Metzger under the light of a full moon.

During this testimony, eyewitnesses in the Courtroom state that Lincoln seemed oblivious as to what was happening all about him. He seemed bored and his gaze was fixed upon one spot on the blank ceiling.

However, when it was his turn to cross examine, Lincoln asked Allen several questions to establish the precise details of the night in question. Allen testified that there was a full moon and that from a distance of about 150 feet he saw Armstrong kill Metzger.

Judicial Notice

Once the direct testimony was completed Lincoln seemed to drop his bored veneer. He asked the Judge permission to enter an 1857 almanac into evidence. Permission was granted. Allen was recalled and Lincoln had him read the almanac entry for August 29, 1857, the date of the assault. The almanac established that in fact even if there had been a moon, based upon its position, by 11 o'clock it would have been unlikely that Allen could see anything from 150 feet away. During their deliberations the jurors were allowed to look at the almanac to confirm their opinion that the witness had lied.

Other Issues During Trial

The use of the almanac was not the only matter that Lincoln managed to raise during the trial. In fact the trial judge later stated that he felt it was actually the other issues that led to the jury to acquit. Specifically, before recalling Allen to discredit him, Lincoln had called a witness who testified that the weapon was his and did not belong to Duff Armstrong. Lincoln had also used a doctor as an expert witness to testify that the blow to the back of Metzger's head could not have caused the wound at the front of the victim's head.

Finally, Lincoln delivered his closing argument (in shirt sleeves) basically personally vouching for Duff Armstrong. This probably could not be done in a criminal trial today. Lincoln was well known in this section of Illinois and his word carried great weight.

Later Events

After securing the acquittal of Armstrong, Lincoln went on to bigger and better things. The trial was followed by his unsuccessful run for the Senate against Stephen A. Douglas. In fact, one of the issues in that campaign was whether Lincoln had altered the almanac that was used at the trial. This charge was certainly unfounded.

The reader is referred to **Moonlight: Abraham Lincoln and the Almanac Trial**, by John Evangelist Walsh. While the book is certainly a helpful resource, it has been criticized for being overly negative as toward Lincoln.

Judicial Notice and New York law

So more than 150 years later, what does New York say about judicial notice and the use of an almanac.

Judicial notice has a long history in New York. See e.g., *Swinnerton v. The Columbian Insurance Company* , 37 N.Y. 174, 10 Tiffany 174 (1867) [the Courts are bound to take judicial notice of the actual existence of a Civil War in 1861]. The Courts ". . . will generally take notice of whatever ought to be generally known within the limits of their jurisdiction.... Id. at 189.

Even today, the principles of judicial notice are liberally followed. For example, it has been held that a trial judge may take judicial notice of facts within her personal knowledge which were derived from an unrelated case that came before her. See, *Sam & Mary Housing Corp. v. Jo/Sal Market Corp*. 100 A.D. 2d 901, 474 N.Y.S. 2d 786 (2d Dept. 1984). However, a Court may not take judicial notice, sua sponte of the applicability of a Statute of Limitations if that defense has not been raised. See, *Paladino v. Time Warner Cable of New York City*, 16 A.D. 3d 646, 973 N.Y.S. 2d 63 (2d Dept. 2005). Judicial notice is applicable in trial Courts as well as in the Appellate Division. See, *Khatibi v. Weill*, 8 A.D. 3d 485, 778 N.Y.S. 2d 511 (2d Dept. 2004).

As a general matter scientific tracts are excluded as books of inductive science. They are not admissible at trial as affirmative evidence. See, *Foggett v. Fischer*, 23 App. Div. 207, 48 N.Y. Supp. 741 (2d Dept. 1897). However, books or publications that contain ascertained facts rather than opinions, or which by long use are accepted as standard and unvarying authority may be utilized. An almanac falls within this exception. It is simply an aid from which judicial notice can be taken.

Just as in the famous Lincoln trial, Courts today can take judicial notice of the rising or setting of the sun or moon on any particular day. See, e.g., *Brown v. McCullough*, 240 App. Div. 381, 270 N.Y. Supp. 37, 39 (1st Dept. 1934). It is error not to allow reference to an almanac to establish these times. See, e.g., *Auerbach v. Stein*, 162 Misc. 102, 293 N.Y. Supp. 545 (App. Term, 1st Dept. 1936). Also, see, *Affronti v. Crosson*, 95 N.Y. 2d 713, 723 N.Y.S. 2d 757, 761 (2001) [Census data from statistical yearbooks can be relied upon for purposes of taking judicial notice].

To the practitioner, under New York Law the result should be the same since Lincoln presented the evidence more than 150 years ago. The almanac has long been a "tool" that the New York lawyer can refer to for various purposes. See, *Montenes v. Metropolitan Street Railway Co.*, 77 A.D. 493, 78 N.Y. Supp.1059 (2d Dept. 1902).

EDITOR'S NOTE

The Ethical Roots of Our Profession

By Paul E. Kerson

We are a profession, not a business. While we must collect legal fees to remain open and support ourselves and our families, the collection of legal fees is not the goal.

Legal fees are like gasoline for your car. You bought the car to take you and your passengers all over the map. You did not buy the car for the sole and exclusive purpose of putting gasoline in it. You must have gasoline to go anywhere, but the gasoline itself is not the goal.

So it is with law. The most thoughtful among us was John Donne. He prepared for his legal career at both Oxford and Cambridge Universities, and at Thavie's Inn and Lincoln's Inn, both leading British Law Schools. Donne did not receive degrees from Oxford and Cambridge because these were Anglican institutions, and he was of the Catholic faith. Before separation of Church and State, Universities were allowed to pull this kind of thing.

Donne was elected to Parliament twice, in 1601 and 1614. He joined the Anglican Church, and was appointed Dean of St. Paul's Cathedral in London in 1615. But Donne's most important contribution came from his writings. One of the chapters of his 1624 book, "Devotions Upon Emergent Occasions" became one of the best statements of the philosophy behind the legal profession, and famous worldwide. One of its stanzas is often reprinted as a poem, "For Whom the Bell Tolls." But much of the rest of this poem, actually a book chapter, is worth reading and saving, especially when a client, adversary or judge has given you an especially hard time:

"Perchance he for whom this bell tolls may be so ill as that he knows not it tolls for him…

Paul E. Kerson

The church is catholic, universal, so are all her actions; all that she does, belongs to all. When she baptizes a child, that action oncerns me; for that child is thereby connected to that head which is my head too, and ingraffed into that body, whereof I am a member.

And when she buries a man, that action concerns me; all mankind is of one author, and is one volume; when one man dies, one chapter is not torn out of the book, but translated into a better language; and every chapter must be so translated…

No man is an island, entire of itself,
Every man is a piece of the continent,
a part of the main;
If a clod be washed away by the sea,
Europe is the less.
As well as if a promontory were.
As well as if a manor of thine own
Or of thine friend's were.
Each man's death diminishes me,
For I am involved in mankind.
Therefore, send not to know
For whom the bell tolls,
It tolls for thee."

(Henry Alford, "The Works of John Donne," Vol. III, London, John W. Parker Co. 1839, p. 574-5)

A short 312 years later, in 1936, Rabbi J.H. Hertz, the Chief Rabbi of the British Empire, wrote his widely distributed Biblical Commentary, "Pentateuch and Haftorahs," the leading book used in American synagogues for generations. Rabbi Hertz's interpretation of Deuteronomy 16:20 ("Justice, justice, thou shalt follow") matches John Donne's "For Whom the Bell Tolls" idea for idea:

"To understand the idea of justice in Israel we must bear in mind the Biblical teaching that man is created in the image of G-d; that in every human being there is a Divine spark; and that each human life is sacred, and of infinite worth.

In consequence, a human being cannot be treated as a chattel, or a thing, but must be treated as a *personality*; and, as a personality, every human being is the possessor of the right to life, honour, and the fruits of his labor. *Justice is the awe-inspired respect for the personality of others and their inalienable rights;* even as injustice is the most flagrant manifestation of disrespect for the personality of others." (Hertz, p. 821) (emphasis in original).

It is 2012. Many readers have given up on Organized Religion. Then we must turn to the thoughts of the ("G-dless") five-time Socialist Party candidate for President, Eugene Victor Debs (1855-1926). Debs was President of the American Railway Union in 1893, and was imprisoned in a Federal Penitentiary from 1918-21 for publicly opposing American involvement in World War I. Debs wrote his philosophy, which matches John Donne's and Rabbi Hertz's thought for thought:

"While there is a lower class,
I am in it,
While there is a criminal element
I am of it;
While there is a soul in prison, I am
not free."

17th century, 20th century, 19th century, Catholic, Anglican, Jewish, Socialist – the idea is just the same – we are all in this together. All people we come in contact with – clients, adversaries, office staff, judges and court personnel – are worthy of our respect, our attention and our best efforts to put more justice in the world.

Marital Quiz

BY GEORGE J. NASHAK JR.*


George J. Nashak, Jr.

Question #1 - Did the Supreme Court improvidently exercise its discretion in, sua sponte, enjoining a party from bringing any further motions without the permission of the court?

Your answer -

Question #2 - May the court properly appoint a parenting coordinator to mediate between parties and oversee the implementation of their court-ordered parenting plan?

Your answer -

Question #3 - May a court delegate to a parent coordinator the authority to resolve issues affecting the best interests of the children?

Your answer -

Question #4 - In a visitation proceeding, may a court order a parent to undergo counseling or treatment?

Your answer -

Question #5 -In a visitation proceeding, may a court order a parent to undergo counseling or treatment as a condition of future visitation or re-application for visitation rights?

Your answer -

Question # 6 - If parties acquired title to real property prior to their marriage as joint tenants with right of survivorship, does their marriage transform the joint tenancy into tenants by the entirety?

Your Answer -

Question #7 - Can the rights of the parties in Question 6 be resolved in a matrimonial action or is a partition and recoupment action necessary?

Your answer -

Questions #8 - If a so-ordered stipulation of settlement does not contain the specific recitals mandated by CSSA, are the provisions, concerning basic child support payments. "add-ons" for child care and unreimbursed health care expenses enforceable?

Your answer -

Question #9 - Does an appeal lie from an order entered upon the consent of the appealing party?

Your answer -

Question #10 - Is it necessary to have a pension valued, if the party seeking part of the pension is not asking for an immediate payout?

Your answer -

**Editor's Note: Mr. Nashak is a Past President of our Association and Vice-Chair of our Family Law Committee. He is a member of the firm of Ramo Nashak Brown & Garibaldi LLP*

ANSWERS APPEAR ON PAGE 11

Poetry Corner

Coping


Robert E. Sparrow

One thing they failed
To teach in law school
Is how to stay calm
And keep your cool

When dealing with people,
and there are all sorts -
Some frustrated and angry
And occasional good sports

The client who arrives
With a chip on his shoulder
Or one who brings
His own inch thick folder

The flirt who thinks
By her charm and wile
She'll successfully evade
An evidentiary pile

Of course, there's many
A "jailhouse lawyer"
Who knows more than you -
What an annoyer!

Occasionally, one is
Most gratified
When greeted by one
Who is most satisfied

And compliments you
On a job well done,
making practice of law
Almost fun.

So, advice to clients -
you can yell and cuss,
But, for crying out loud
leave the lawyering to us!

Robert E. Sparrow, Esq.

Laws Decline and Exhortation


Arnold H. Ragano

Political corporate contributions once limited and remiss
Buttressed from legal restrictions, recalled from dubious mist
Is lucre potential the current rule of law?
Have we succumbed to avaricious wealth?

Young aspirants with ambitions earning yearning
No love for law, jingoistic fiery burning
Desiring lucre in repressive stealth
Is this not a lecherous unremitting flaw?

Esoteric theories in legal dress abound
Unrelenting to unashamedly expound
Projected audaciously although patently unsound.

To reform the law with laudatory zeal
The reformer aims with incipient hopeful thrust
Deluded with desultory mindset keel
Solely cannot extirpate a predatory trust.

United we breach this exculpatory deceive
To regenerate ideals we will ingeniously conceive.

Arnold H. Ragano, Esq.

Criminal Law Cases

Continued From Page 1

the Court agreed with the hearing court that the detective had simply "capitalized on the situation that manifested itself through defendant's own actions."

In *People v. Santiago*, 17 N.Y.3d 661 (2011), the Court of Appeals reviewed a trial judge's preclusion of expert testimony regarding eyewitness identification. In *Santiago*, the defendant was charged with first degree assault for brutally attacking a woman, who was a stranger, on a subway station. The victim described the perpetrator as a Hispanic male, 5'8" to 5'9" tall, with a mustache and goatee, wearing a cap that concealed his face "from the middle of his top lip, down, and from the top of his eyebrows up". Two eyewitnesses to the attack provided similar descriptions to the police. Twelve days later, one of those eyewitnesses was shown a photo array containing the defendant's photo but did not make an identification. However, two days after that viewing, the victim viewed the same photo array and identified the defendant as the perpetrator of the attack. Two days after that identification, the victim identified the defendant in a lineup. That same day, the eyewitness who had failed to make a photographic identification viewed the lineup as well. Though he did not identify the defendant at that time, he later asserted that he was eighty percent sure that the defendant was the perpetrator but that he had not identified him because he was concerned about his immigration status. The next day, that eyewitness was reading a Spanish-language newspaper in which he saw a photograph of the defendant in handcuffs, accompanied by police officers.

Prior to trial, defense counsel filed a motion seeking to introduce expert testimony on the psychological factors affecting the accuracy of eyewitness identification. Counsel informed the court that his expert was prepared to testify on a variety of topics including exposure time, cross-racial and cross-ethnic inaccuracy, weapon focus, lineup fairness, lineup instructions, forgetting curve, post-event information, wording of questions, unconscious transference, simultaneous versus sequential lineups, eyewitness confidence issues and confidence malleability. Without a hearing, the trial court denied the defense motion but invited counsel to "suggest ways to address, during jury selection and in the final instructions, the topic of a witness's confidence".

After reviewing its recent decisions regarding the admission of expert testimony on eyewitness identification, the Court of Appeals reversed Santiago's conviction and ordered a new trial. The Court rejected the prosecution's argument that the denial of such expert testimony was appropriate because the victim's identification of the defendant was corroborated by the two eyewitnesses who also identified him at trial. Specifically, the Court held that it was an abuse of discretion to deny expert testimony regarding eyewitness confidence, confidence malleability, post-event information and unconscious transference and that under the circumstances presented, the error could not be deemed harmless.

In *People v. Ventura*, 17 N.Y.3d 675 (2011) , the defendant filed a timely notice of appeal from his trial conviction but was deported from the United States by the Department of Homeland Security's Immigration and Customs Enforcement Bureau prior to the disposition of his appeal. The Appellate Division then granted the prosecution's motion to dismiss the appeal, reasoning that the defendant had effectively forfeited his right to challenge his conviction because he was no longer under the control of the court.

The Court of Appeals reversed the Appellate Division's decision dismissing Ventura's appeal, holding that the "invariable importance of the fundamental right to an appeal ... makes access to intermediate appellate courts imperative" and that "[a]s a matter of fundamental fairness, all criminal defendants shall be permitted to avail themselves of intermediate appellate courts as 'the State has provided an absolute right to seek review in criminal proceedings'".

CPLR Update

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the intermediate order would require reversal of the judgment. If it would, then it "necessarily affects" the judgment, if not, not. Applying this test, the First Department noted that while reversal of the intermediate orders would give the Rodriguezes an avenue of redress for their contract claims, the reversal would not reverse the judgment as to possession of the premises.

Could they get around this by reviving the long-inactive appeal from the order denying leave to amend? No, and here is where *Matter of Aho* comes in. They never perfected the appeal, and so would need an enlargement of time in which to do so. Pursuant to *Matter of Aho*, however, once the final judgment was entered they no longer had a right to appeal from the intermediate order. Where, as here, the intermediate order does not necessarily affect the final judgment, the right to appeal terminates on entry of final judgment whether or not they have substantial rights at stake and even if they have diligently pursued the appeal. The only way they can protect themselves is by obtaining an order staying entry of the final judgment.

The Appellate Division noted that the rule sometimes acts adversely to judicial economy, where the appellate court has expended resources considering the appeal, only to have it terminated by a final judgment. The court recommended legislative attention to the issue. Leave to appeal to the Court of Appeals has been granted, at least to the extent of the affirmance of the judgment and not otherwise. Whether enough of the appeal remains to allow a reconsideration of *Matter of Aho* remains to be seen.

Arbitration

In *Matter of Kowaleski*[3] the issue was the arbitrator's failure to consider an issue he was statutorily required to consider. The Court of Appeals held that the resulting determination, even though supported by substantial evidence, nevertheless exceeded a specific limitation on his power, and so was subject to vacatur.

Petitioner was a Corrections Officer, who was terminated for certain offenses related to her conduct regarding other officers and employees. She claimed that the charges were brought in retaliation for an earlier incident in which she had reported a fellow-officer's misconduct. She filed a grievance and the matter went to arbitration.

At the arbitration, petitioner argued that the arbitrator was required to consider the retaliation defense, pursuant to Civil Service Law § 75-b, which prohibits public employers from retaliating against whistle-blowers. The arbitrator held that the terms of the Collective Bargaining Agreement limited his determination to the question of whether or not petitioner was in fact guilty of the offenses charged, and so precluded his consideration of the retaliation defense. He did indicate that he would consider the question of retaliation to the extent that it bore on credibility of witnesses and, more vaguely, as it bore on the overall question of petitioner's guilt or innocence.

At the hearing, the respondent produced substantial evidence that the petitioner had in fact committed two of the offenses charged, and that the penalty of termination was appropriate. The arbitrator found that the CBA allowed discipline only for "just cause," and only where the employer had made a "fair and objective investigation," and where the action was "non-discriminatory." The agency action was therefore upheld.

This CPLR Article 75 proceeding followed, and Supreme Court concluded that while the arbitrator had exceeded his powers by failing to consider Civil Service Law § 75-b, the award should still not be vacated since the error was one of law. Supreme Court also found that § 75-b prohibited only those disciplinary actions taken solely as retaliation for the whistle-blowing, and not those where, as here, there was evidence providing an independent basis for the discipline.

The Appellate Division majority agreed that the arbitrator committed an error of law in deeming the retaliation claim beyond his jurisdiction, but found that this was a mere error of law. There was a two-judge dissent, which would have reversed on the ground that petitioner was entitled to an explicit determination of whether the charges were in fact in retaliation for her past whistle-blowing.

The Court of Appeals agreed with the dissent and reversed. Civil Service Law § 75-b prohibits retaliation against whistle-blowers, and specifically allows the employee to raise the retaliation issue before the arbitrator, regardless of the terms of the CBA. Where the disciplinary action is taken as retaliation, it must be dismissed. Therefore, in ignoring the defense the arbitrator acted in excess of his powers and the award had to be vacated. The Court noted the possibility that disciplinary proceedings could be retaliatory even where the employee is in fact guilty. The issue under § 75-b is the existence of the retaliatory motive, and a separate inquiry into the issue is required to fulfill the statutory purpose.

Calendar Practice: **90-Day Notices**

Dismissals for failure to file a note of issue pursuant to CPLR 3216, cannot be automatic or had by mere ministerial entry in the records, held the Court of Appeals in

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PHOTO CORNER

Holiday Party 2011

Arthur Terranova, Seymour James and David Adler

Attendees at the Holiday Party

Caren Samplin, Hilary Gingold and Diana Gianturco

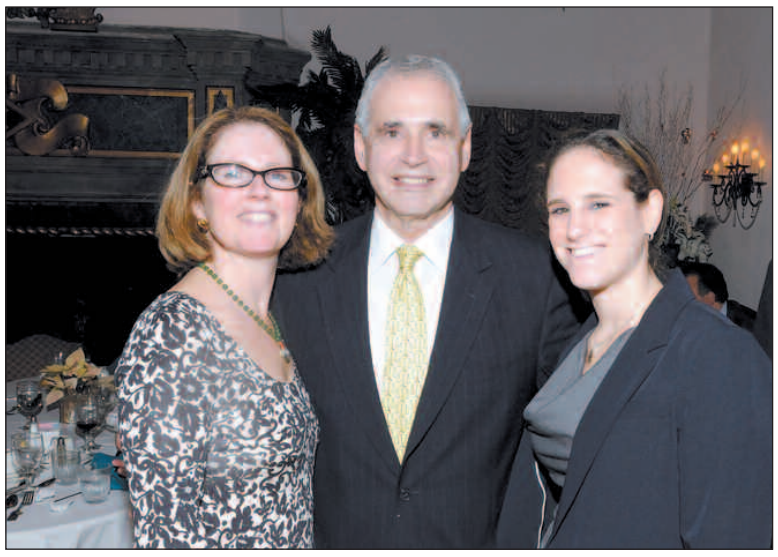
Ilene Kass, Susan Borko and Annamarie Brown

Joseph Levin, Tom Principe and Joe DeFelice

Photos by Walter Karling

PHOTO CORNER

December 15, 2011



Margaret Crowley, Hon. George Heymann and Briana Heymann

Richard Spivack, Sue Borko, Yvette and Richard Gutierrez

Sadatu Salami-Oyakhilome and Elvis Oyakhilome

Sandy Munoz, Larry Litwack, Hon. Bernice Siegal and Bernard Vishnick

Sasha displaying the gifts that our generous members donated

Photos by Walter Karling

Overcoming Bluster and Bull in the Courtroom

BY: THOMAS F. LIOTTI*

You've seen it. You have heard it. You cannot believe that it was said, but it was. You have had to dig your way out of it or wear waders to get through it. Your meter has gone off. You want to give your adversary a lie detector exam or sodium Pentothal, "the truth serum." He really should star in the sequel to Liar, Liar. He shoots from the hip. He gives new meaning to the phrase "loose cannon" or "loose lips sink ships."

Rule 1 - Count to ten, slowly, before letting your blood pressure rise to unacceptable levels. Breathe out, breathe in.

Rule 2 - Try to keep smiling. It's the only way you will get through it.

Rule 3 - Say good morning, Your Honor.

Rule 4 - While smoke is coming out of your ears, listen to your adversary, take notes and order the minutes. Decide whether to turn your hearing aids up, down or to leave them at home.

Rule 5 - Check the docket number to make sure that your adversary is talking about your case.

Rule 6 - Try to remember why you are there. Clue - If your case is not on the calendar, leave even if your adversary is speaking of you.

Rule 7 - Remember these laws -

Murphy's Law - Whatever can go wrong will, unless the court grants your application to adjourn. Failing that, ask for an early lunch or recess. Failing that, ask for a bathroom break.

The Peter Principle of Law - Everyone reaches their highest level of incompetency.

Thomas F. Liotti

Newton's Third Law - For every action there is an opposite and equal reaction or it's payback time.

Parkinson's Law - Work expands according to the amount of time in which you have to complete it. Therefore, bill by the nano second.

Rule 8 - Since contempt means the willful disobedience of a lawful court order, keep saying that you did not know that it was an order, that you did not understand it or hear it.

Rule 9 - If ever asked to describe your adversary simply say: *res ipsa loquitur*.

Rule 10 - If your adversary is speaking in tongues or quoting foreign law, read from the Bible.

Rule 11 - As your adversary argues with the judge, practice bowing, scraping and groveling.

Rule 12 - Do the Stations of the Cross on your knees at St. Patrick's Cathedral the day before the start of your trial. It worked for Imelda Marcos.

Rule 13 - Have your family priest or rabbi sit in the front row behind you together with your father, mother, spouse and infant children.

Rule 14 - Get paid first.

Rule 15 - Get paid second.

Rule 16 - If strong on the law, pound the law. If strong on the facts, pound the facts. If weak on both, pound your feet.

Rule 17 - Wait for Mr. Green.

Rule 18 - Avoid *ad hominem* comments. Instead, point with the middle finger.

Rule 19 - Wear a crash helmet, riot shield and flak jacket to court. Bring masking tape and a straitjacket for your adversary.

Rule 20 - Report to security that your adversary is a crazy person and they should have extra personnel in the courtroom and alert the judge. Inform them that they may need nets and poles to subdue him. You have heard that he is on medication but not taking it. They'll need extra handcuffs, shackles and guns drawn.

Rule 21 - The media will cover anyone making an ass of themselves. Tell the media that your adversary plans to moon the judge.

Rule 22 - Ask the judge to appoint a psychiatrist to examine your adversary. Tell the court that it should be done in-patient.

Rule 23 - Tell the judge that your adversary needs a guardian appointed.

Rule 24 - Tell the court that you have been bitten by a Tse Tse fly and that is why you cannot stay awake during your adversary's legal argument.

Rule 25 - Tell the judge that your adversary suffers from a fatal disease - foot in mouth.

Rule 26 - Ask the judge whether she has heard enough and whether you really need to say anything? Try: "Your Honor, thank you very much, we'll rest on our papers."

Rule 27 - Instead of oral argument say: "Have a great weekend, Your Honor."

Rule 28 - Put your adversary's name plate where the judge's should be and vice versa.

Rule 29 - When your adversary is not looking, put crazy glue under his legal pads, books, pens and on his seat.

Rule 30 - Give your adversary a present of Kaopectate on the record.

**Thomas F. Liotti is an attorney with offices in Garden City, New York.*

CPLR Update

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Cadichon v Facelle.[4]

Last year, this *Update* reported an earlier decision of the Court of Appeals in this case.[5] Supreme Court had served a CPLR 3216 demand upon plaintiff's counsel, and the time to file a note of issue had expired with no note being filed. The problem was that there was no actual order dismissing the complaint. Supreme Court apparently viewed the dismissal as automatic. From what, then, could the plaintiff appeal?

Plaintiff of course moved to vacate the dismissal, which Supreme Court denied, and the First Department affirmed, 3 - 2. Normally, orders denying vacatur of dismissals are not appealable, as not being final, the final determination is the dismissal itself. The Court of Appeals initially dismissed the appeal[6] from the affirmance, on its own motion, for non-finality. Upon plaintiff's motion for reconsideration, the Court recognized that Supreme Court's order was ambiguous as to whether the dismissal would be automatic or not. The Court held that where it is unclear whether or not the dismissal was by automatic operation of a statute, rule or court order, the order denying a motion to vacate is to be deemed the final appealable paper. Since here the affirmance of the denial of vacatur had a two-judge dissent, the appeal lay as of right, and the Court retained jurisdiction of the appeal.

We noted last year that the appeal might serve as a vehicle for consideration of whether CPLR 3216 dismissals were automatic or not. There have been Appellate Division opinions which approved the notion that an automatic dismissal pursuant to CPLR 3216 results when a court issues a 90-day notice and the plaintiff fails to comply.[7] It was submitted here that the CPLR says nothing which should make a CPLR 3216 dismissal "automatic," whether the requisite 90-day notice is served by the defendants or by the court, or whether or not the court issues its notice in an order.

The Court of Appeals noted that "a ministerial dismissal of the action without benefit of further judicial review" would be at variance with the language of CPLR 3216. The statute allows the trial court, on its own motion, to dismiss the action. Where there is only a ministerial entry of a dismissal, however, there has been no motion. Likewise CPLR 3216 (b)(3), in setting forth the content of the 90-day notice, requires a warning that the failure to file the note of issue will be the "basis for a motion. . .for dismissal". A ministerial dismissal is not the same thing as a motion, or a dismissal by order.[8]

Moreover, the 2008 amendment to CPLR 205(a) requires that a dismissal for neglect to prosecute must be accompanied by a statement by the judge, on the record, setting forth the specific conduct resulting in the dismissal, which must demonstrate a general pattern of delay. While that statute was inapplicable here, since it became effective only after the events at issue, the necessity of "judicial involvement" in the dismissal is emphasized. The Court once again stated its insistence on adherence to judicial deadlines. "But where, as here, the case proceeds to the point where it is subject to dismissal, it should be the trial court, with notice to the parties, that should make the decision concerning the fate of the case, not the clerk's office."

That last point should not be overlooked. The Court here goes beyond merely holding that an order is required for a 3216 dismissal. It holds that the order can only be entered after "notice to the parties." This implies that the parties will have an opportunity to be heard and, presumably, the opportunity to develop a record prior to dismissal.

Where it is the defendants who serve the 90-day notice, the action is not to be dismissed unless the defendants move for the dismissal and the plaintiff has an opportunity to show why dismissal is unwarranted. That the notice has been served by the court should result in a lesser opportunity to avoid dismissal. The Court of Appeals has held, in *Baczkowski v Collins Const. Co.*,[9] and *Di Simone v Good Samaritan Hosp.*,[10] that CPLR 3216 is "extremely forgiving" of litigation delay. The courts are authorized to dismiss under that provision, but are never required to do so. Where the plaintiff can show a reasonable excuse for delay and a meritorious claim, the courts are prohibited from dismissing the action. If the court-issued 90-day notice is regarded as setting an automatic dismissal in motion, the plaintiff is deprived of his opportunity to show why dismissal should not result until the action is already dismissed.

Judge Graffeo, writing for himself and Judges Read and Smith, dissented on the grounds that the plaintiff never raised the issue of there not having been a motion prior to dismissal. The dissent stressed that the test on the motion to vacate the dismissal was the same as would have been applied to the motion to dismiss itself. Since plaintiff failed to justify the vacatur, he could not have successfully opposed dismissal. The dissent would have sustained what it described as "sua sponte" dismissals. This is apparently meant to encompass ministerial entries of dismissal as well as ex parte orders.

Going forward, there are two sets of issues to be worked out. Where 90-day notices reach their deadlines, courts will have to determine the mode of notice to the parties, and how they will be heard, before an actual dismissal can be entered.

More importantly in the short run is the status of cases like this one, where the courts have employed the shortcut of a ministerial dismissal instead of an actual order. In the absence of an order, this case teaches that without an actual order there has been no actual dismissal, no matter what the clerk may have entered in the records. In all such cases, motions to reinstate the complaints must be granted. That is not to say that a proper dismissal motion will not lie at that point. Of course it will, and in the majority of cases will probably be properly granted. The plaintiffs will, however, at least have the opportunity to be heard, and to try to show that dismissals should not have resulted.

Last year, the First Department decided *Umeze v Fidelis Care N.Y.*,[11] one of those decisions which is interesting only for the dissent it provoked. Defendants had moved to dismiss the action, pursuant to CPLR 3216, for failure to file a note of issue after being served with a 90-day notice. Plaintiff *pro se* was able to show sufficient merit and justification for the delay, as well as lack of intent to abandon the action, to satisfy the trial court and the Appellate Division majority.

The two-judge dissent, by Justice Catterson, would have required the plaintiff to show justifiable excuse for the general five-year delay in the entire action. In support of this, he cited to *Sortino v. Fisher*,[12] a 1963 decision in which the First Department held that an action could be dismissed for "general delay." *Sortino* set off a tug-of-war between the courts and the Legislature, in which the Legislature enacted successively blunter versions of CPLR 3216 to forestall "general delay" dismissals.[13]

The Court of Appeals has now reversed the Appellate Division and dismissed the action.[14] It did not, however, revive the "general delay" issue. Rather, in a brief review-of-submissions memorandum, it relied on the current attitude towards CPLR 3216 motions, requiring (1) a justifiable excuse for the specific delay in failing to file a note of issue pursuant to the 90-day notice, and (2) proof of a meritorious cause of action. The Appellate Division majority had found good cause for the delay in the efforts by the *pro se* plaintiff to find counsel, which indicated a lack of intent to abandon the action. Clearly, this was not enough for the Court of Appeals.

Collateral Estoppel - Res Judicata

In *Roddy v. Nederlander Producing Co. of America, Inc.*,[15] the issue before the Court of Appeals was whether a prior motion had

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Answers to Marital Quiz

ANSWERS TO MARITAL QUIZ ON PAGE 5

Question #1 - Did the Supreme Court improvidently exercise its discretion in, sua sponte, enjoining a party from bringing any further motions without the permission of the court?

Answer: No, "While public policy generally mandates free access to the courts, (citations omitted) the record reflects that the father forfeited that right by abusing the judicial process through vexatious litigation. (citation omitted) *Scholar v. Timinisky* 2011 NY Slip Op 6226 (2nd Dept.)

Question #2 - May the court properly appoint a parenting coordinator to mediate between parties and oversee the implementation of their court-ordered parenting plan?
Answer: Yes, *Silbowitz v. Silbowitz* 2011 NY Slip Op 7026 (2nd Dept.).

Question #3 - May a court delegate to a parent coordinator the authority to resolve issues affecting the best interests of the children?

Answer: No, *Silbowitz v. Silbowitz* 2011 NY Slip Op 7026 (2nd Dept.).

Question #4 - In a visitation proceeding, may a court order a parent to undergo counseling or treatment?

Answer: Yes, *Matter of Smith v. Dawn F.B.* 2011 NY Slip Op 7062 (2nd Dept.).

Question #5 - In a visitation proceeding, may a court order a parent to undergo counseling or treatment as a condition of future visitation or re-application for visitation rights?

Answer: No, *Matter of Smith v. Dawn F.B.* 2011 NY Slip Op 7062 (2nd Dept.).

Question # 6 - If parties acquired title to real property prior to their marriage as joint tenants with right of survivorship, does their marriage transform the joint tenancy into tenants by the entirety?

Answer: No, *L.L. v. B.H.* 2011 NY Slip Op 21316 (Sup. Ct. Nassau County Falanga J.)

Question #7 - Can the rights of the parties in Question 6 be resolved in a matrimonial action or is a partition and recoupment action necessary?

Answer: A partition and recoupment action is unwarranted as the rights and remedies can be decided in a matrimonial action. *L.L. v. B.H.* 2011 NY Slip Op 21316 (Sup. Ct. Nassau County Falanga J.)

Questions #8 - If a so-ordered stipulation of settlement does not contain the specific recitals mandated by CSSA, are the provisions, concerning basic child support payments, "add-ons" for child care and unreimbursed health care expenses enforceable?

Answer: No, *Bushlow v. Bushlow* 2011 NY Slip Op 7795 (2nd Dept.)

Question #9 - Does an appeal lie from an order entered upon the consent of the appealing party?

Answer: No, *Matter of Polche v. Polche* 2011 NY Slip Op 8158 (2nd Dept.)

Question #10 - Is it necessary to have a pension valued, if the party seeking part of the pension is not asking for an immediate payout?

Answer: No, *Felix v. Felix* 2011 NY Slip Op 6821 (2nd Dept.)

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given the plaintiff a full and fair opportunity to litigate the issue of the defendant's negligence. Plaintiff had not been directly involved in the prior motion, and did not appreciate that it might determine a crucial issue.

Plaintiff, a theatrical dancer, had been injured in a fall on stage allegedly due to excess moisture from a dry ice machine used to create a fog. Defendant Gershwin Theater had moved for contractual indemnification from plaintiff's employer, Abhann Productions, on the claim that the machine as well as the stage floor were under Abhann's exclusive control. The motion was granted on appeal.[16]

On the present motion, Gershwin moved to dismiss plaintiff's claim on the theory that the earlier determination established its lack of control over the machine and the floor, as being res judicata, collateral estoppel and law of the case. The Appellate Division noted that the proper theory was law of the case, since res judicata and collateral estoppel deal with preclusion after judgment. It held that the issue of Gershwin's control over the machine and stage floor had been apparent on the first motion, that plaintiff had been given full notice and an opportunity to be heard (on the appeal as well as the motion) and had chosen to "sit on his hands." That the first motion was addressed to contractual indemnification against Abhann and not to the dismissal of the complaint against Gershwin, or that plaintiff might not have appreciated the effect of the order did not deprive him of the opportunity to litigate the issue of control. It therefore affirmed Supreme Court in granting summary judgment on a law of the case basis.

The Court of Appeals reversed, and reinstated the complaint in a brief memorandum on review of submissions. The earlier motion concerned third-party indemnification, a matter in which the plaintiff had no interest. He thus had no incentive to litigate the issue at that time nor any notice that the issue might be conclusively determined against him. Therefore, he did not have a full and fair opportunity to litigate the issue of Gershwin's negligence, and the law of the case doctrine could not be invoked to preclude him from litigating it now.

Commencement of Action

An action is commenced by filing a summons and complaint.[17] Once the action is commenced, jurisdiction over the defendant is acquired by serving the summons and complaint upon him.[18] Filing first, service after. If the summons and complaint are never filed, no action has been commenced, and the complaint is subject to dismissal. As set forth by the Court of Appeals in *Harris v Niagara Falls*, the defect is waivable, and is in fact waived if the defendant fails to assert an objection.[19]

In *Goldenberg v Westchester County Health Care Corp.*,[20] the Court of Appeals reaffirmed that a plaintiff who manages to serve a summons and complaint without filing them first cannot be saved by the 2007 amendment to CPLR 2001, which allowed correction of minor defects in the filing. Along the way, it reaffirmed that a defendant who pleads affirmative defenses of lack of personal jurisdiction and the statue of limitations has effectively objected to the lack of filing.

Plaintiff initially commenced a special proceeding for leave to file a late notice of claim. A complaint was attached to the petition as an exhibit. The petition was granted, and plaintiff served the notice of claim.

With the notice of claim plaintiff served a summons and complaint, not bearing any index number. Plaintiff had not, in fact, purchased an index number for the action.[21] The affidavits of service were filed, under the index number for the special proceeding. The complaint as served contained a cause of action for medical malpractice due to lack of informed consent, and an allegation of continuous treatment for a period of seven months, neither of which was in the complaint filed in the special proceeding.

The defendant served an answer, which included defenses of lack of jurisdiction and statute of limitations. It does not appear that either of these defenses were framed so as to specifically assert that the action had not been properly commenced. The defendants waited until after the statute of limitations had expired, and then moved to dismiss. Defendants purchased an index number for the action in order to make the motion.

Supreme Court granted the motion and dismissed. The complaint filed with the special proceeding did not suffice, since no summons was filed, and the complaint differed from the one served in material respects. The amended CPLR 2001 did not allow the court to excuse a complete failure to file the summons and complaint. The Appellate Division affirmed,[22] as did the Court of Appeals.

The affirmative defenses of lack of personal jurisdiction and statute of limitations were sufficient to preserve the objection to the failure to file the summons and complaint. The defendants were under no obligation to move to dismiss within 60 days of the serving the answer, since the objection was not to the manner of service.[23]

The error could not be excused under the amended CPLR 2001, since the amendment was specifically not intended to excuse a complete failure to file the summons and complaint. Recall that the amendment was specifically intended to ameliorate so much of the *Harris* holding as required dismissal in the situation where the plaintiff had in fact filed the summons and complaint, but had not bought an index number specifically to start a new action.[24] The legislative memorandum in support of the amendments stated that it was in response to the determinations of the Court of Appeals in *Harris*, as well as in the cases harmonized by *Harris*: *Matter of Gershel v Porr*,[25] and *Matter of Fry v Village of Tarrytown*.[26] The intent of the amendment was to avoid dismissals for "technical, non-prejudicial defects." Clearly stated in the legislative memorandum, however, was the intent not to excuse all mistakes. A complete failure to file within the limitations period continues to be dismissable, as is the failure to file the appropriate initiatory papers. "The purpose of this measure is to clarify that a mistake in the method of filing, AS OPPOSED TO A MISTAKE IN WHAT IS FILED, is a mistake subject to correction in the court's discretion."[27]

The plaintiff here, having never filed the summons and complaint at all, was not entitled to the benefit of the amended CPLR 2001. The proposed complaint filed with the special proceeding, with no summons attached, did not suffice.

Note that the mistake here differs from the mistake made in *Harris*, which the amendment does allow the court to excuse. The classic *Harris* mistake was to file a summons and complaint intended to commence the action, but to use an index number obtained in a prior proceeding (as a proceeding for leave to file a late notice of claim) instead of purchasing a new one. Under the amended CPLR 2001, such a mistake is excusable.

Judgments

The Appellate Division, Second Department has issued two major opinions on default judgments, one concerning the failure to serve a reply to a counterclaim, the other on default judgments obtained from the clerk.

Giglio v NTIMP, Inc.,[28] presented the question of default judgments on counterclaims.

Robert Giglio, Sr., his brother Shawn Giglio, and his son Robert Giglio, Jr. had been drinking at Napper Tandy's Pub, owned by the defendant NTIMP. Shawn drove away from the pub, with Robert, Jr. as his passenger, in a vehicle owned by Kathleen D'Agostino. Both Shawn and Robert, Jr., were killed when the vehicle crashed into a tree. Both Shawn and Robert, Jr., were intoxicated at the time.

This action was commenced by Robert, Jr.'s mother, Susanne Giglio, together with Robert, Sr., against Napper Tandy and D'Agostino. The claims against Napper Tandy were that the sale of alcohol to Robert, Jr., was unlawful as he was a minor, and that it continued to sell alcohol to Shawn while he was visibly intoxicated. The claim against D'Agostino was that she was liable for Shawn's operation of her vehicle, since he had done so with her consent.

Napper Tandy's answer was served, by mail, on plaintiffs' counsel on May 2, 2007. The answer included a cross-claim against D'Agostino and a counterclaim against Robert, Sr., for contribution. The court presumed, as may we, that the claim was that Robert, Sr., was negligent in allowing Robert, Jr., to consume alcohol, and in allowing him to drive away in a vehicle driven by Shawn. No reply to the counterclaim was served.

The action as against D'Agostino and Shawn's estate was settled some 11 months later, and the parties entered into a general release in favor of D'Agostino and Shawn's estate. The settlement was approved by the Surrogate's Court, and the proceeds were paid.

On June 5, 2008, Napper Tandy served a notice of motion for a default judgment on the counterclaim against Robert, Sr. Note that this is over 13 months after the service of the answer with the counterclaim, on May 2, 2007. Plaintiffs cross-moved to dismiss the counterclaim, since the motion came more than a year after the reply was due. Pursuant to CPLR 3215 (c), a complaint "shall" be dismissed as abandoned if the plaintiff fails to move for a default judgment within a year after default.

Napper Tandy disputed that its motion was untimely. It claimed that the counterclaim was served on plaintiff's attorney pursuant to CPLR 303, and that therefore the time to reply was 30 days, extended to 35 days by virtue of service having been made by mail. By this reasoning, the last day for service of the reply was June 6, 2007; the plaintiff was in default as of June 7, 2007; and the motion deadline was Monday, June 9, 2008, since June 7, 2008, was a Saturday. It argued that its motion, made on June 5, 2008, was therefore timely.

The Appellate Division disagreed. CPLR

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303 does not apply to this action. Where a non-domiciliary plaintiff commences an action in the state, CPLR 303 operates to make its counsel its agent for the service of process in any separate action between the parties. In such a case, CPLR 320 (a) states that an appearance in the separate action must be made within 30 days. Since Robert, Sr., is in fact domiciled in New York, and resides in Farmingdale, his attorney was not an agent for the service of process in separate actions. It might also be noted that the counterclaim does not constitute a separate action, but is part of the main action.

Therefore, the time for the reply on the counterclaim was 20 days, as required by CPLR 3012 (a). The counterclaim having been served by mail on May 2, 2007, the reply was due 25 days later, on May 27, 2007. No reply having been served, Robert, Sr., was in default on the counterclaim on May 28, 2007, and the deadline for a default judgment was a year later, or May 28, 2008. The motion, not made until June 5, 2008, was untimely.

Could the lateness be excused? It is clear that CPLR 3215 (c) applies to counterclaims as well as complaints. The court noted the mandatory language of CPLR 3215 (c): the failure to move for the default timely requires the court to dismiss the pleading to be dismissed as abandoned unless sufficient cause is shown. This requires a showing of a reasonable excuse for the failure to move timely, as well as of a meritorious cause of action. Here, Napper Tandy made no showing of a reasonable excuse, focusing all of its arguments on the timeliness issue. Without a reasonable excuse, the lateness is inexcusable and the court "shall" dismiss the pleading.

The court noted that this "pitfall" does not necessarily apply to cross-claims, depending on whether or not the pleading asserting the cross-claim demands an answer. By virtue of CPLR 3011, where a cross-claim does not demand an answer, and no answer is made, the cross-claim is "deemed denied or avoided." In such a case, there can be no motion for default judgment on the cross-claim. Where, however, the pleading asserting the cross-claim does demand an answer, the parties responding to the cross-claim and asserting it are both required to act, by answering pursuant to CPLR 3011, and if necessary moving for a default judgment pursuant to CPLR 3215.

A second issue concerned whether or not Napper Tandy was precluded from claiming contribution from Shawn's estate by the settlement and release. Napper Tandy commenced a third-party action against the administrator of Shawn's estate, on or about April 30, 2009. The administrator served an answer, which pleaded the affirmative defense of the release and its effect under General Obligations Law § 15-108.

GOL § 15-108 provides that a release from an injured party to a tortfeasor protects the settling tortfeasor by relieving it from liability to third persons for contribution. The settlement here clearly fell within the ambit of GOL § 15-108. Napper Tandy attempted to avoid the result, by pointing to the 2007 amendment to GOL § 15-108. That amendment removed settlements for no or nominal consideration from the protections of the statute, and was intended to foster the release of parties who turn out to be clearly free from liability. The trigger amount is a settlement of greater than one dollar.

Napper Tandy argued that Shawn's estate was not protected from contribution by GOL § 15-108, since it had not in fact contributed to the settlement, which was paid entirely by D'Agostino's insurer. Here, the release in favor of D'Agostino and Shawn's estate recited consideration of $50,000. The Appellate Division refused to look behind the language of the release to the details of the payments made. The administrator of Shawn's estate was therefore entitled to dismissal of the third-party complaint against her.

In *Stephan B. Gleich & Assoc. v Gritsipis*,[29] the Second Department considered the claims for which a default judgment may and may not be entered by the clerk, and the effectiveness of a default judgment improperly entered by the clerk.

Recall that CPLR 3215 (a), a default judgment may be entered by the clerk, without consideration by a judge, if the claim is for a sum certain, or a sum which may be rendered certain by computation, and if proper proof is submitted to the clerk, and if the application is made within one year after the default.[30]

Plaintiff commenced this action by filing a summons with notice in the Supreme Court on August 17, 1993. The summons with notice described the claim as being for unpaid legal fees and disbursements, for unjust enrichment and on an account stated. Service upon the defendant was made, according to the affidavit of service, by delivery to a person of suitable age and discretion at the defendant's place of business, followed by mailing to the defendant's last known place of business. There were follow-up mailings to the defendant's last known residence and place of business. The mailings to the place of business were in envelopes were marked "personal and confidential." The defendant failed to appear or answer.

On January 7, 1994, plaintiff submitted to the clerk an affidavit of the facts constituting his claim, setting forth the defendant's agreement to pay fees, the hours of work performed by the various partners and associates, and disbursements, all adding up to $66,875.41. The claim on an account stated was supported by invoices. The clerk entered judgment on February 7, 1994, for the stated sum, plus costs and disbursements, for a total judgment of $67,245.41. This amount remained unpaid.

In 2009 plaintiff commenced a second action against the defendant, this time to renew the 1994 judgment pursuant to CPLR 5014 (1). This time the defendant answered, and moved separately to vacate the 1994 judgment, using the index number assigned to it. In the motion to vacate, the defendant asserted lack of personal jurisdiction in that the summons with notice had not been properly served, and that he was unaware of the judgment until the 2009 action was commenced. Plaintiff opposed the motion, arguing that the defendant failed to show a lack of jurisdiction, sufficient to justify vacatur under CPLR 5015 (a)(4); or a reasonable excuse for default and a meritorious defense sufficient to justify vacatur under CPLR 5015(a)(1).

Supreme Court denied the motion, finding the defendant's denials of service to be conclusory, that there was no showing of either a reasonable excuse or a meritorious defense.

On appeal, the defendant continued arguing for vacatur under CPLR 5015 (a)(1) and (4). For the first time, however, defendant also argued that the plaintiff's inclusion of an equitable claim in the summons with notice left the clerk without authority to enter the judgment in the first place, regardless of the sufficiency of jurisdiction.

The Appellate Division began by sustaining so much of the order as held that defendant failed to show that either CPLR 5015 (a)(1) or (4) justified vacatur of the 1994 judgment. The process server's affidavit was sufficient to show that jurisdiction had been obtained, and the defendant failed to adequately rebut it. As to a reasonable excuse for the default, the only excuse tendered by the defendant was the claimed lack of jurisdiction, and the court also found insufficient the claimed meritorious defense.

The court then considered whether the judgment was properly entered by the clerk under CPLR 3215. Even though the defendant had not raised the issue below, the Appellate Division held that he could argue that the claim was not one for the clerk, since the issue was one of law only, which was apparent on the face of the record, and which could not have been avoided if raised properly in the first instance.

As noted, CPLR 3215 (a) allows the clerk to enter judgment where the claim is for a sum certain or for a sum which can be made certain by computation. This means that the remedy is allowed where there can be no doubt as to the amount due; that is, to liquidated and indisputable claims such as money judgments and negotiable instruments. Here, the claim was for legal fees which were not set forth in a retainer agreement. If anything, the claim sounded in quantum meruit, which requires proof of (1) performance of services in good faith, (2) acceptance of the services; (3) expectation of compensation; and (4) the reasonable value of the services. To the extent that the summons with notice alleged a claim for unjust enrichment, proof was required that (1) the defendant was enriched; (2) at the plaintiff's expense, and (3) the defendant should not be allowed in equity and good conscience to retain the amount claimed. These are both equitable claims, which depend on there being no contract between the parties. They are not for sums certain, and cannot properly be entertained by the clerk on an application under CPLR 3215 (a). The claim for an account stated, however, is based upon the defendant's retention of billing statements and failure to object within a reasonable time. These allow an inference that the recipient agrees with the statements as to the amount owed. An account stated therefore does allow entry of a clerk's default judgment.

The Second Department agreed with the First Department[31] in holding that a clerk's default judgment may not be entered where, as here, the plaintiff claims both a sum certain and other claims which are not for sums certain. The Second Department noted that by entering judgment in such a case the clerk is either severing the non-certain causes of action or rendering them academic, either of which are properly judicial functions. Therefore, the clerk had been without authority to enter the default judgment, which was rendered void.

Finally, the court considered the position of the parties after vacatur of the judgment. Does the vacatur leave the finding of default intact? In that case, the matter need only proceed to a judicial inquest. Or, does the vacatur of the judgment also vacate the finding of default, opening the possibility that the default might be found to be excusable and the parties placed in pre-default status. The court found numerous opinions on both sides, which it reconciled by considering whether there had been consideration of the issues of reasonable excuse and meritorious defense. Where these issues had been considered and it had been determined that the defendants had not made a sufficient showing, there was no basis to vacate the finding of default and the matters proceeded to inquest. Where the issues had not been raised or considered, or where the default had been found excusable at the appellate level, upon vacatur of the unauthorized judgment the finding of default should also be vacated and the matter remitted for further proceedings on that basis. That is to say, the plaintiff would be free to move for a proper judicial default judgment, and the defendant would be equally free to move for leave to answer, awaiting a determination by the court on the merits of the respective motions. A defendant who has not answered timely may still move to compel an acceptance of his answer pursuant to CPLR 3012 (d), upon a showing of reasonable excuse. That showing of reasonable excuse is the same that must be made on a motion to vacate a default judgment.

Here, where the Supreme Court had found that there was neither a reasonable excuse for the default or a meritorious defense, and the findings had been affirmed on appeal, there was nothing left to do but conduct an inquest on the claims raised in the 1993 summons with notice.

The court closed by noting that a plaintiff who has asserted both sum certain and non-sum certain claims is not completely foreclosed from applying to the clerk in the event of a default. The plaintiff is allowed to voluntarily withdraw one or more claims before the answer is served or within 20 days of service of its pleading, whichever is earlier.[32] Assuming that the plaintiff makes the application within that time, it can include in his affidavit of facts a statement of voluntary discontinuance of the non-sum certain claims.[33] The clerk could then properly enter judgment on the sum-certain claims. If the plaintiff has not acted within that time, application for leave to discontinue the non-sum certain claims would have to be made to the court, in which case the application for default judgment might as well be made, too.

There has been a statutory amendment which eases the plaintiff's burden here. As part of a package of technical changes, the Legislature has amended CPLR 3217 (a)(1) to extend the plaintiff's time in which to make a voluntary discontinuance.[34] The voluntary discontinuance may now be made at any time before the responsive pleading has been served, which means for purposes of discussion of this case the plaintiff may voluntarily discontinue the non-sum certain causes of action at any time while seeking a clerk's default judgment. So much of CPLR 3217 (a)(1) as refers to a 20-day limitation is now restricted to cases where a responsive pleading is not required.

Jurisdiction

CPLR 306-b has been amended, to provide that the time for service of initiatory papers (i.e., a summons and complaint, summons with notice, third-party summons and complaint, petition with notice of petition or order to show cause) is to run from the commencement of the action, and not necessarily from the filing of the initiatory papers. Ordinarily, of course, the action is commenced when the initiatory papers are filed, and so there would seem to be little need for this change. Recall, however, that where a court finds that circumstances prevent the immediate filing of the initiatory papers, it may make an order allowing the filing at a time and date not more than 5 days later. This can happen where a party seeks a temporary restraining order at a time when the Clerk's office is closed. In that case, it is the signing of the order that commences the action. The initiatory papers may then have to be served before the filing, which might be interpreted as violating the terms of the old 306-b ("Service. . .shall be made within 120 days *after* the filing. . ."). The amendment removes any ambiguity.

In *Penguin Group (USA) v American Buddha*[36] the Court of Appeals considered the impact of Internet commerce on long-arm jurisdiction in copyright-infringement cases. The precise question concerned the place of injury.

American Buddha is a non-profit corporation, based in Arizona, which operates two online libraries, allowing its members free access to, and downloading of, the stored works. The servers for the libraries are in Oregon and Arizona. Penguin is a prominent publisher, based in New York. It alleges that American Buddha violated its copyrights by uploading four copyrighted works to the libraries. The copying and uploading was done in Oregon or Arizona. American Buddha maintains that its activities are fair

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use by a library.

Penguin sued in US District Court for the Southern District of New York. Jurisdiction was predicated on CPLR 302 (a)(3)(ii), providing for long-arm jurisdiction over non-domiciliaries committing tortious acts out of the state which cause injuries in the state. American Buddha moved to dismiss for lack of jurisdiction, on the grounds that Penguin had not suffered any injury in New York.

The District Court agreed with American Buddha and dismissed. It viewed the injury as taking place in Oregon or Arizona, with any in-state injury being "purely derivative" as a result of Penguin's residence here. The injury took place where the copying and uploading took place, in Oregon or Arizona.

The Second Circuit asked the Court of Appeals to resolve the question of whether the site of injury in such cases is "the location of the infringing action or the residence. . .of the copyright holder?" The question as originally certified was not limited to Internet cases. Interestingly, the Court of Appeals accepted the Second Circuit's invitation to reformulate the question, specifying that it was limiting the question to "copyright infringement cases involving the uploading of a copyrighted printed work onto the Internet". The only element of jurisdiction before the Court was the situs of the injury.[37]

The Court contrasted two of its prior decisions. In *Fantis Foods v Standard Importing*[38] the Court had found that there was no direct injury in New York where the claim was for cheese intended to be shipped to Standard (the third-party plaintiff) in Chicago, but which was diverted by the third-party defendant either in Greece or while in transit at sea. The mere fact that Standard was incorporated and had its offices in New York was not sufficient to locate the injury here. In *Sybron Corp., v Wetzel*,[39] the Court found a New York injury where Sybron was a New York manufacturer, and the defendant had hired had hired one of its employees in order to obtain Sybron's trade secrets. The claim there was based on more than Sybron's New York domicile, being supported by Sybron's claim that the trade secrets were acquired here and that the defendant was likely to use them to obtain Sybron's New York customers. Both *Fantis Foods* and *Sybron* had relied upon a federal case, *American Eutectic Welding Alloys v Dytron Alloys*,[40] where the court had allowed the place where a plaintiff lost business as a permissible situs of injury.

In *Penguin Group (USA) v American Buddha*, the problem was that the "intangible and ubiquitous" nature of the Internet made it difficult to identify and locate the injury. The plaintiff's claim was that the defendant had made the copyrighted materials available to anyone with an Internet connection, in New York or anywhere in the world. Unlike the situation in *American Eutectic* and in traditional commercial torts, there is no one place where the plaintiff may be said to have lost business. The Court therefore found it "illogical" to extend the analysis of those cases here.

The Court found a more persuasive rationale by looking to the "unique bundle of rights" given to copyright holders under federal law. These rights result in the "right to to exclude others from using his property."[41] The New York resident copyright holder therefore suffers a greater injury from infringement than the indirect loss held insufficient in *Fantis Foods.* Consider, for example, the lessening of the holder's profit motive to publish the works, which have already been published by the alleged pirate. This is especially true in the case of books such as those involved here, which while classics surely fit the description of "marginally profitable."[42]

The nature of Internet commerce, therefore, takes this case out of the analytical framework applicable to traditional tort cases. In the traditional case, the location of lost sales or customers can more readily be ascertained, but in Internet copyright infringement cases the entire purpose of the tort is to make the work accessible to anyone with an Internet connection, including New York. The loss to a New York copyright holder is more direct than the loss to a New York importer of cheese (as in *Fantis Foods*). The Court found that the nature of Internet commerce and the particular rights accorded to copyright holders made the case closer to the cognizable New York injury in *Sybron* than the merely indirect injury in *Fantis Foods*. It therefore found that the plaintiff had indeed suffered an injury in New York, for purposes of long-arm jurisdiction under CPLR 302 (a)(3)(ii).

The Court noted that it was not holding that jurisdiction would exist in favor of any New York resident alleging copyright infringement. There were important elements of jurisdiction which were not part of the certified question, notably whether or not the the non-New York defendant could reasonably expect the tortious act would have consequences in New York, and whether it derives substantial revenue from interstate or international commerce. There is also the constitutional due process questions of whether the non-New York defendant has "minimum contacts" with New York, and whether compelling it to defend its conduct here comports with fair play and substantial justice. Those questions were retained by the Second Circuit and must be determined by it.

Miscellaneous

CPLR 2101(f) has been amended[43] to extend the permissible time to raise objections to defects in form of documents, from two days to fifteen days, running from the receipt of the objectionable paper. The objecting party is still required to return the documents to the serving party, with a statement of particular objections. Since the stated consequence of an untimely objection is the waiver of the objection, the legislative memo accompanying the amendment stated a concern that an unreasonably short period did not give the recipient sufficient time to consider its objection. The purpose of the amendment is to change the focus of any litigation over the objections from the time limit to the merits of the objection.

The same chapter amended CPLR 3217 (a)(1) to extend the time in which a plaintiff may voluntarily discontinue a claim, by allowing the voluntary discontinuance at any time before a responsive pleading is served.

Motion Practice

Yun Tung Chow v Reckitt & Colman[44] ostensibly concerned the standards for a design-defect products liability case. It is mentioned here for the concurrence by Judge Smith, who pointed out that the result was actually due to New York's view of the burden of proof on summary judgment motions, and that in a federal court the motion probably would have been granted.

The product involved consisted of pure sodium hydroxide crystals. Sodium hydroxide, commonly known as lye, is highly corrosive and dangerous to deal with.[45] Yet, it was marketed to ordinary consumers as a drain cleaner. The package bore warnings that the user should wear eye protection and rubber gloves, and that the product should be spooned into the clogged drain one tablespoonful at a time, and that the user should pour water down the drain only after waiting for 30 minutes. The plaintiff, who could not read English and testified that he had never read the instructions or warnings on the label, made a solution of 3 spoonfuls of the lye with 3 cups of water in an aluminum container, and poured the solution down the drain.[46] Immediately, there was a splashback of the solution onto his face. He sustained burns and lost the sight in an eye.

Plaintiff sued, claiming defective design and failure-to-warn product liability claims. Defendant moved for summary judgment, and its proof apparently consisted only of an attorney's affirmation that the product is inherently dangerous, and that the dangers are well known. Supreme Court granted the motion, as to both causes of action. The Appellate Division affirmed, with a two-judge dissent as to the dismissal of the defective design cause of action. Plaintiff appealed as of right on the defective design issue.

The Court of Appeals reversed. The essence of the defective design claim lies in a risk vs utility analysis. That is, "knowing how dangerous lye is, was it reasonable for defendants to place it into the stream of commerce as a drain cleaning product for use by a layperson?" The mere affirmation of defendant's counsel as to the nature and risks of the product being common knowledge, did not address this issue and so defendants failed to show that they were entitled to judgment as a matter of law. Having failed to make this showing, the burden never shifted to the plaintiff to establish a triable issue of fact.[47]

Judge Smith concurred, pointing out that at trial it is the plaintiff who will have the burden of establishing a prima facie case as to defective design. In response to the motion, plaintiff offered an expert affidavit, which proposed alternatives to lye, but failed to show that any safer alternatives would have performed as well at a reasonable cost. The only specific alternative mentioned by the expert would concededly take longer to work, without any specification of how much longer. If this were all the plaintiff advanced at trial, the result would be directed verdict for the defendant. Why, then, was summary judgment denied?

In federal cases, where the burden at trial is would be on the responding party, a summary judgment movant can satisfy its burden by showing the absence of evidence to support the respondent's case.[48] This record in federal court might then "probably" lead to granting the motion.

Pleadings

CPLR 3025(b) has been amended[49] so as to require a motion to amend a pleading to be accompanied by a copy of the proposed amended pleading, clearly showing the proposed changes.

CPLR 1008 allows a "third-party defendant to assert against the plaintiff in his or her answer any defenses which the third-party plaintiff has to the plaintiff's claim." In 2008, in *Charles v Long Island College Hospital*,[50] the Second Department held that a third-party defendant was entitled to dismissal of the third-party complaint on the grounds that the summons and complaint had not been served on the defendant/third-party plaintiff, even though the defendant itself had not raised any objection to jurisdiction. Worse, the complaint against the defendant/third-party plaintiff was not dismissed. That decision can be criticized, since the defendant/third-party plaintiff was within its rights to waive the jurisdictional objection, and its service of an answer without raising it was the equivalent of proper service upon it. Nevertheless, this was not the only appellate case so holding.[51] A prudent defendant, anticipating commencing a third-party action, would therefore be compelled to raise any jurisdictional defenses it might otherwise waive, lest it be subjected to the same double whammy.

The Legislature has now overruled the holding in *Charles*, by amending CPLR 1008 to prohibit third-party defendants from asserting that the summons and complaint (or summons with notice, or notice of petition and petition) was not properly served or that jurisdiction was not obtained over the third-party plaintiff.[52]

Settlements and Releases

CPLR 3217(a)(1) has been amended[53] to extend the time in which a plaintiff may voluntarily discontinue an action. The old provision allowed a voluntary discontinuance, without order or stipulation, before the responsive pleading was served or within 20 days of the service of the pleading asserting the claim, whichever was earlier. This was felt to be too restrictive, and so it has been amended to allow a voluntary discontinuance before the responsive pleading is served or 20 days after service of the pleading asserting the claim, whichever is later.

When a party releases another from claims, known or unknown, in language broad enough to include unknown fraud claims, it is bound by that release as to the unknown fraud claims. It cannot avoid the release thereafter by claiming that it did not understand the depth of the fraud. Rather, a fraud will avoid the release only if the releasor can point to a fraud separate from the transactions which are the subject of the release.

In *Centro Empresarial Cempresa S.A. v América Móvil*,[54] the Court of Appeals dealt with such a situation. The transactions involved an Ecuadorian telecommunications company, Conecel, in which the defendants held a 60% interest, and the plaintiffs each had a minority.[55] In 2002 the plaintiffs became convinced that the defendants were not acting in good faith, and were not providing them with financial information concerning Conecel and TWE. Pursuant to one of the parties' underlying agreements[56] the plaintiffs were able to sell the defendants 50% of their holdings. Over the course of 2002, plaintiffs claim that the the defendants refused to negotiate in good faith concerning the buyout of their remaining holdings, but that the defendants refused to negotiate, thus violating another of their underlying agreements.[57]

In 20023, the defendants provided Conecel's balance sheet and made other representations, all of which tended to show that Conecel was not performing as anticipated. Defendants then offered to buy out the plaintiffs' remaining interest at the lowest price allowed under their agreements, the "floor price." Plaintiffs, allegedly relying on the defendants' representations, agreed. The agreements embodying the sale provided for two releases relevant here. The first, the "Members Release," released the defendants from

> "all manner of actions. . .claims and demands, liability, whatsoever, in law or equity, whether past, present or future, actual or contingent, arising under or in connection with the Agreement Among Members."

The second relevant release, the "Master Release," was in similar language, but had a proviso specifically excepting fraud claims from the scope of the release.

Plaintiffs claimed, in this action, that they found out that the information about Conecel's financial condition was false only in 2008, when the results of an audit by the Ecuadorian government were released. Plaintiffs claimed $900 million in damages.

Defendants moved to dismiss, pursuant to CPLR 3211 (a)(1 and 5), based on the release. Supreme Court denied the motion. The Appellate Division reversed and granted the motion. The Appellate Division held that the "Members Release" included any potential claim that the defendants had misrepresented Conecel's true worth. Other than the potential fraud covered by the release itself, plaintiffs did not allege any fraud in the inducement. Plaintiffs knew that they had not been given a complete account of Conecel's finances, yet did not except fraud claims from the "Members Release," or take

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other steps to protect themselves.

There was a two-judge dissent, which found fraudulent inducement in the failure of the defendants, who as majority shareholders had a fiduciary responsibility to the plaintiffs, to fully reveal their tortious conduct prior to obtaining the release.

The unanimous Court of Appeals began by repeating the well-known principles that a valid release is a bar to actions on claims it covers. As with other contracts, a release may be set aside for duress, illegality, fraud or mutual mistake. The burden rests on the defendant to show the existence of the release, and once that burden is met the burden shifts to the plaintiff to show circumstances which might render it void. Releases may include unknown fraud claims, if that is what the parties intend and the release is "fairly and knowingly made."[58] In order to challenge the release of a fraud claim on the grounds of fraudulent inducement, the plaintiff must show a fraud separate from the subject of the release. Otherwise, no fraud claim could ever be validly released.

Here, the "Members Release" was sufficiently broad so as to cover fraud claims unknown at the time. The release could be avoided if there had been a fraud in the inducement other than those actually released, but plaintiffs did not allege one. Rather, the fraud alleged by the plaintiffs was the fraud covered by the release: false information concerning Conecel and TWE. Plaintiffs seek to be avoid the release in that they were unaware of the value of the fraud claims they were releasing. A release should not be a starting point for new litigation.

The Court was unpersuaded by the argument based on fiduciary duty. While defendants, as majority shareholders, were fiduciaries with regard to the plaintiffs, the plaintiffs were sophisticated principals, and the relationship was no longer one of trust. Plaintiffs were aware that the defendants were acting in their own interest. The defendants, in these circumstances, were not required to reveal their tortious conduct as a condition of obtaining their release.

Further, the plaintiffs did not allege justifiable reliance on the defendants' alleged misrepresentations. Where a party is able to ascertain the truth or falsity of the representations made, it must do so. If it fails to make use of ordinary means of protecting itself, it will not be allowed to assert that it was defrauded. Plaintiffs here knew that they had not received adequate information as to the value of Conecel and TWE, yet chose to accept the offers made by the defendants without insisting on proper disclosure, warranties or even excepting fraud from the scope of the release. Having been so lax, the plaintiffs cannot ask for the law's protection.

Similarly, in *Arfa v Zamir*,[59] decided the same day as *Centro Empresarial*, the plaintiffs knew that the defendant was untrustworthy, yet chose to enter into an agreement concerning their real estate management business which contained a general release. They later sued, based on allegations of fraud predating the release. Since the plaintiffs did not allege that they were induced to sign the release by a fraud other than that which the subject of the lease, the action was precluded by the release. As in *Centro Empresarial*, plaintiffs in *Arfa* also failed to show justifiable reliance, since they entered into the release without investigating his actions.

Trial

CPLR 2302 and 3122 have been amended to make clear that trial subpoenas duces tecum for medical records can be issued to non-party record custodians without an authorization by the patient, but only by a court and not by an attorney.[60]

The problem was an unforeseen consequence of the 2002 amendments to these and other sections, allowing the service of disclosure subpoenas for medical records by counsel, but only where the subpoenas were accompanied by authorizations from the patients. The subpoenas were required to bear a warning in bold-face type that they need not be responded to unless they were accompanied by the authorizations. The intent of the amendments was to protect medical providers, served with subpoenas during disclosure, from violating the physician-patient privilege.

The problem came when a Civil Court judge held, in *Campos v Payne*, that the amendments applied to trial subpoenas as well as disclosure subpoenas.[61] The judge held that the absence of an authorization left the court, as well as the attorneys, without authority to issue a subpoena duces tecum for trial records. This allowed a recalcitrant plaintiff to frustrate the production of records for trial. The legislative memorandum states that the decision in *Campos* is "widely followed."

CPLR 2302 has been amended by adding a sentence providing that in the absence of an authorization, a trial subpoena may be issued, but only by a court. CPLR 3122 has been amended by the addition of a new paragraph (2), providing that a trial subpoena issued by a court does not have to be accompanied by an authorization. Other subpoenas are still subject to the authorization requirement.

In *People v Guay*,[62] the Court of Appeals addressed the issue of a hearing-impaired juror. While sustaining the decision of the trial court to dismiss the juror for cause, the Court also noted that the trial court should have addressed the prospective juror's limitations and the possible accommodations that might have allowed him to serve despite them. The determination, made under the State Constitution and the Judiciary Law, is applicable to civil trials as well as this criminal trial.

This was a criminal prosecution for first-degree rape of a child and related offenses. During jury selection, one of the jurors indicated that he was having trouble hearing. It became apparent during questioning of the panel by counsel that this juror was not understanding the questions. He responded affirmatively to a question as to whether he knew someone who had confessed to a crime he did not commit, when further questioning revealed that he did not know if the person (his son) had confessed and in fact felt that he was guilty. When asked whether he would have problems hearing if counsel remembered to speak up, the juror said that he would be "pretty good" as long as he was in the front row of the jury box. The People moved to dismiss the juror for cause, on the grounds that he had trouble hearing the court. Since the matter would require child witnesses, and that such witnesses frequently had trouble speaking up, the People argued that the juror could miss parts of the child's testimony. The defense opposed, on the grounds that the juror had indicated he would not have a problem during trial. The trial court noted its own observation that the juror was having difficulty hearing the court and counsel, despite his answer to the contrary. The court concluded that the juror's hearing was a sufficient problem to disqualify him, and granted the challenge for cause.

The defendant was convicted and appealed, in part due to the disqualification of the juror. The Appellate Division affirmed the conviction.

In the Court of Appeals, defendant argued that the court should have inquired further into the juror's impairment, and should have accommodated the impairment rather than dismissing the juror. The Court began by noting that jury service is a privilege and duty of citizenship. This is balanced, of course, by the rights of the accused and the requirements of a fair trial. The Judiciary Law specifies that a juror must be able to understand and communicate in the English language.[63]

It was held in *People v Guzman*[64] that a hearing impairment does not itself disqualify a juror. A court confronted with a hearing-impaired juror must determine the juror's ability to understand the evidence, evaluate it rationally, deliberate with other jurors effectively, and comprehend the legal principles as instructed by the court. If the court is aware of a reasonable accommodation that would allow the prospective juror to perform his duties while not interfering with the defendant's rights, the accommodation should be made. The determination is left to the trial court's discretion.

Here, the record supported the conclusion that the particular juror's impairment would have interfered with the performance of his duties. His incorrect answer to the question about false confessions combined with the trial court's observations of his actions during the voir dire showed that the juror was not understanding everything going on in front of him. Further, the trial court was not asked to provide any accommodation for the prospective juror. The record was bare of any indication that audio equipment was available that might have helped the juror, or whether he was in fact willing to use it. Thus, the trial court did not err in failing to order an accommodation on its own motion.

While not finding error, however, the Court did state that it would have been better if the trial court had acted on its own to inquire about the juror's limitations and possible accommodations, such as an assistive amplification device. The inquiry should be "reasonable and tactful."

Venue

There are many things in the CPLR so basic that most of us never give them a thought, secure in our thorough understanding. So, it comes as something of a shock when a court construes one of them in a way contrary to the common understanding, especially when it tells us that it is simply applying the "plain meaning" of the words. That is what the Court of Appeals did in *Simon v Usher*,[65] which looked at CPLR 2103(b)(2) and came away with a different reading than most lawyers would have reached.

Recall that CPLR 2103 (b)(2) deals with one of the simplest, most matter-of-fact acts in civil practice, the service of interlocutory papers by mail. Service is made by simply dropping them in the mailbox (properly addressed, sealed and stamped, of course). You've still got that right. The problem came with the next part of 2103(b)(2), which provides that for a five-day extension to any time period running from the service of a paper, where the service is made by mail. That provision was commonly understood to benefit the recipient of the service, so that if the recipient had a specified time in which to react to the paper being served, the time would be extended to account for possible delays in mailing. Thus, Professor Siegel's *New York Practice*, in a thorough discussion, observes that 2103(b)(2) includes "the provisions about the additional days *the recipient gets* for responding to a paper when it is served by mail. . . .the party required to take the *responsive* step... The 5 days are added to the stated period when any mail-served paper requires a *responsive* step..."[66]

In *Simon v Usher*, it was the party making the service who was subject to the time limit, and who needed the 5-day extension in order to meet it. The action had been commenced in Bronx County, and on August 20, 2009, the defendants served, by mail, their answer with a demand for a change of venue to Westchester County. Pursuant to CPLR 511(b), unless the plaintiff consents to the change of venue within 5 days, the defendant may move for a change of venue within 15 days of service of the demand. Plaintiffs did not consent to the change of venue, but defendants did not make the motion until 20 days after service of the demand, that is, on September 9, 2009. Supreme Court granted the change of venue, but the Appellate Division reversed.[67] The Appellate Division held, without discussion, that the motion was untimely, and that the defendants were not entitled to the 5-day extension. It cited to *Thompson v Cuadrado*,[68] where it had denied the extension to a defendant whose motion to dismiss on jurisdictional grounds was made 61 days after service of its answer. CPLR 3211(e), of course, provides that the defense is waived unless the motion is made within 60 days. The court in *Thompson* noted that the legislative history of the 1999 amendment to CPLR 5513 evidences the Legislature's understanding that the 5-day extension for service by mail did not apply to the party making the mailing unless there was a specific provision providing that it did. [69]

The Court of Appeals majority, however, felt that the plain meaning of CPLR 2013(b)(2) was otherwise. It provides to any situation where a time limit runs from the service of a paper and service is made by mail, and not only to those situations where the party relying on the extension is responding to papers served by its adversary. Moreover, the defendants were, in effect, responding to the plaintiffs' failure to consent to the change of venue.

There was a dissent, by Judge Pigott, who relied on the legislative history of the 1982 amendment to CPLR 2103(b)(2), which extended the extension to 5 days from the original 3. That history set forth the legislative purpose as being to allow the party receiving the mailed papers to prepare its response. Here, the plaintiffs were entitled to the 5-day extension in deciding whether or not to consent to the change of venue, since the demand had been mailed to them. The defendants, however, were not responding to any papers, and were not entitled to any extension.

Note, however, that this ruling is applicable only to time periods running from the *service* of a paper, not to those running from the *filing* of a paper. Service is effective upon mailing, but filing is effective only upon receipt by the clerk. So, to take the most prominent example, the time in which to move for summary judgment runs from the filing of the note of issue, not from the service of a copy upon the moving party.[70] Or, similarly, the ruling is inapplicable to those time periods running from a party's receipt of the papers served. So, for example, the time in which to object to defects in form of a paper runs from receipt and not service.[71] Note, also, that under the facts of this case the defendants' motion would have been untimely had they chosen to serve the demand for a change of venue by overnight delivery service instead of by mail. That service only gets an extension of one business day.[72]

** David H. Rosen served in the Supreme Court, Queens County, as Principal Law Clerk to Justice Arthur W. Lonschein from 1980 to 2000, and as Court Attorney/Referee from 2001 to 2010. He is now in private practice. Any comments may be addressed to davidhrosenesq@gmail.com*

1. *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 81 A.D.3d 260, 919 N.Y.S.2d 1 [1 Dept., 2010]; *Leave to Appeal Granted in Part, Dismissed in Part*, 17 N.Y.3d 936 [2011]

2. *Matter of Aho*, 39 N.Y.2d 241, 383 N.Y.S.2d 285 [1976]

3. *Matter of Kowaleski (New York State Dept. of Correctional Servs.)*, 16 N.Y.3d 85, 917 N.Y.S.2d 82 (December 21, 2010)

4. *Cadichon v Facelle*, 18 NY3d 230, ___

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NYS2d ___, 2011 NY Slip Op. 08447 [November 21, 2011]

5. *Cadichon v Facelle*, 15 N.Y.3d 877, 913 N.Y.S.2d 121 [2010]

6. *Cadichon v Facelle*, 15 N.Y.3d 767, 906 N.Y.S.2d 811[July 1, 2010]

7. *Parkin v Ederer*, 27 A.D.3d 633, 810 N.Y.S.2d 901 [2d Dept., 2006]; *Rezene v Williams*, 22 A.D.3d 656, 804 N.Y.S.2d 335 2d Dept., 2005]

8. Truly automatic dismissals, that is, those taking effect without a judge's order, are few and far between in the CPLR. CPLR 3404 is one, taking effect where an action is stricken from the trial calendar and not restored within a year. Off the top of my head, I can't think of another example.

9.*Baczkowski v D. A. Collins Const. Co.*, 89 NY2d 499, 655 NYS2d 848 [1997]

10.*Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 768 NYS2d 735 [2003] discussed above.

11. *Umeze v. Fidelis Care New York*, 76 A.D.3d 873, 908 N.Y.S.2d 186 [1 Dept., 2010]

12. *Sortino v. Fisher*, 20 A.D.2d 25, 245 N.Y.S.2d 186 [1963]

13. This history is discussed in *Cohn v. Borchard Affiliations*, 25 N.Y.2d 237, 303 N.Y.S.2d 633 [1969]

14. *Umeze v. Fidelis Care New York*, 17 N.Y.3d 751, 929 N.Y.S.2d 67 [2011]

15. *Roddy v. Nederlander Producing Co. of America, Inc.*, 15 N.Y.3d 944, 916 N.Y.S.2d 578, [2010]; *reversing* 73 A.D.3d 583, 904 N.Y.S.2d 5 [1 Dept., 2010]

16. *Roddy v. Nederlander Producing Co. of Am., Inc.*, 44 A.D.3d 556, 844 N.Y.S.2d 231 [2007]

17. Or, a summons with notice (CPLR 304).

18. This basic point used to be specified by CPLR 304. An amendment left the language out. Fascinatingly, there is no longer any explicit statement in the CPLR that service of the summons confers jurisdiction.

19. *Harris v Niagara Falls Bd. of Ed.*, 6 N.Y.3d 155, 811 NYS2d 299 [2006]

20. *Goldenberg v Westchester County Health Care Corp.*, 16 N.Y.3d 323, 921 N.Y.S.2d 619 [March 23, 2011]

21. The most common mistake is to recycle the index number of the notice-of-claim proceeding on the summons and complaint, but plaintiff here didn't even do that.

22. *Goldenberg v Westchester County Health Care Corp.*, 68 A.D.3d 1056, 892 N.Y.S.2d 463 [2d Dept., 2009]

23. See CPLR 3211 (e)

24. L. 2007, ch. 529

25. *Matter of Gershel v Porr*, 89 NY2d327, 653 NYS2d 82 [1996]

26. *Matter of Fry v Village of Tarrytown*, 80 NY2d 714, 658 NYS2d 205 [1997]

27. L. 2006, ch. 529, Legislative Memorandum. Emphasis in original.

28. *Giglio v NTIMP, Inc.*, 86 A.D.3d 301, 926 N.Y.S.2d 546 [2d Dept., 2011]

29. *Stephan B. Gleich & Assoc. v Gritsipis*, 87 A.D.3d 216, 927 N.Y.S.2d 349 [2d Dept., 2011]

30. Also pursuant to CPLR 3215 (a), the clerk may enter judgment for costs where there is a dismissal for neglect to proceed, and the application is made within a year after the default.

31. *Geer, Du Bois & Co. v Scott & Sons Co.*, 25 A.D.2d 423, 266 N.Y.S.2d 580 [1 Dept., 1966]; *Accord, Woodward v. Eighmie Moving & Storage, Inc.*, 151 A.D.2d 892, 543 N.Y.S.2d 187 [3 Dept.,1989]; *White v. Weiler*, 255 A.D.2d 952, 680 N.Y.S.2d 784 [4th Dept., 1998]

32. CPLR 3217 (a)

33. I confess to having been unclear how that was to work in practice. Even where service of the summons and complaint (or, as here, the summons with notice) is made by personal delivery, the defendant has 20 days in which to answer. The time for a voluntary discontinuance was, at most, 20 days from the service of the summons. On what day could the plaintiff have both applied for a default judgment and made a voluntary discontinuance? Now that the time for a voluntary discontinuance has been extended by amendment, the conundrum disappears.

34. L. 2011, ch. 473, § 4, eff. January 1, 2012

35. L. 2011, ch 473, eff. 1-01-2012

36. *Penguin Group (USA) Inc. v. American Buddha*, 16 N.Y.3d 295, 921 N.Y.S.2d 171 [March 24, 2011]

37. "a plaintiff relying on [CPLR 302 (a)(3)(ii)] must show that (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce. If these five elements are met, a court must then assess whether a finding of personal jurisdiction satisfies federal due process". [citation omitted]

38. *Fantis Foods v Standard Importing Co.*, 49 N.Y.2d 317, 425 N.Y.S.2d 783 [1980]

39. *Sybron Corp. v. Wetzel*, 46 N.Y.2d 197, 413 N.Y.S.2d 127 [1978]

40. *American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428 [2d Circ., 1971]

41. Citing *eBay Inc. v MercExchange, L.L.C.*, 547 US 388, 392 [2006]

42. The books were: "Oil!" by Upton Sinclair; "It Can't Happen Here" by Sinclair Lewis; "The Golden Ass" by Apuleius, as translated by E.J. Kenney; and "On the Nature of the Universe" by Lucretius, as translated by R.E. Latham

43. L. 2011, ch 473, eff. 1-01-2012

44. *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 N.Y.3d 29, 926 N.Y.S.2d 377 [May 10, 2011]

45. Not only is it corrosive, when it dissolves in water the reaction liberates a great of heat and is consequently liable to spatter, as any high school chemistry student should know. But, many ordinary consumers never took (or learned) high school chemistry, and many who did have forgotten all about it.

46. Allowing pure sodium hydroxide to come into contact with aluminum is a particularly bad idea. Look at this video to understand why: http://www.youtube.com/watch?v=16dshZ5GHZw The product label warned against using aluminum utensils, apparently without any explanation. I don't remember my high school chemistry class mentioning this reaction.

47. *See, Gilbert Frank Corp. v Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 [1988]; *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986]

48. *Celotex Corp. v Catrett*, 477 US 317, 325 [1986]

49. L. 2011, ch 473, eff. 1-01-2012

50. *Charles v Long Island College Hospital*, 47 A.D.3d 665, 850 N.Y.S.2d 173 [2008]

51. See, *Prigent v Friedman*, 264 A.D.2d 568, 695 N.Y.S.2d 79 [1st Dept., 1999]

52. L. 2008, ch. 264, effective August 3, 2011

53. L. 2011, ch 473, eff. 1-01-2012

54. *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 929 N.Y.S.2d 3 [June 7, 2011]

55. The details of this deal, involving hundreds of millions of dollars in international finance, have been simplified for purposes of discussion. The plaintiffs had originally owned a substantial portion of Conecel, and in the original deal the parties created a new entity, Telmex Wireless Ecuador ("TWE"). TWE held the actual shares of Conecel, and the parties held their interest in Conecel through it. There were several agreements between the parties, including a "Master Agreement" governing the parties' interests in TWE; a "Limited Liability Company Agreement," governing the parties' responsibilities in running TWE; an "Agreement Among Members," governing the parties rights if defendants chose to "roll up" Conecel with its other Latin American telecom companies for the purpose of selling securities; and a "Put Agreement," giving plaintiffs the right to compel defendants to buy plaintiffs' shares in TWE at a set price during set times.

56. The "Put Agreement."

57. The "Agreement Among Members."

58. *Mangini v McClurg*, 24 NY2d 556, 566-567 [1969]

59. *Arfa v Zamir*, 17 N.Y.3d 737, 929 N.Y.S.2d 11 [June 07, 2011]

60. L. 2011, ch. 307, effective August 3. 2011

61. *Campos v Payne*, 2 Misc.3d 921, 766 N.Y.S.2d 535 [Civ. Ct., Richmond Cty., 2003]

62. *People v Guay*, 18 NY3d 16, 935 NYS2d 567 [November 15, 2011]

63. Judiciary Law § 510(4). The Court noted that the provision of Judiciary Law § 512 (3), allowing dismissal of a juror due to mental or physical conditions which caused the juror to be incapable of performing in a reasonable manner, was repealed in 1995.

64. *People v Guzman*, 76 NY2d 1 [1990]

65. *Simon v Usher*, 17 N.Y.3d 625, 934 N.Y.S.2d 362 [October 20, 2011]

66. Siegel, *New York Practice*, § 202 [5th Ed] [emphases added]

67. *Simon v Usher*, 73 A.D.3d 415, 899 N.Y.S.2d 601 [1st Dept., 2010]

68. *Thompson v Cuadrado*, 277 A.D.2d 151, 717 N.Y.S.2d 109 [1st Dept., 2000]

69. The amendment to CPLR 5513 did make a specific provision to the contrary, in the case of a party's time to appeal being extended where service of the notice of entry was made by mail, regardless of which party made the service.

70. *Coty v County of Clinton*, 42 A.D.3d 612, 839 N.Y.S.2d 825 [3rd Dept., 2007]; *Mohen v. Stepanov*, 59 A.D.3d 502, 873 N.Y.S.2d 687 [2d Dept., 2009]; *Group IX, Inc. v Next Print. & Design Inc.*, 77 A.D.3d 530, 909 N.Y.S.2d 434 [1st Dept., 2010] [overruling previous 1st Department cases to the contrary]

71. CPLR 2101(f), recently amended to increase the time to fifteen days from receipt (L. 2011, ch 473, eff. 1-01-2012)

72. CPLR 2103(b)(6)