PUBLICATION UPDATE

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New York Civil Practice: CPLR Second Edition

Publication 805 Release 166 December 2017

HIGHLIGHTS

Release 166 features:

- Analysis of key issues of interest to New York civil practitioners.

Issues of interest addressed in this release include the following:

VOLUME 1, ARTICLE 2 LIMITATIONS OF TIME

¶ 217.02 Four-Month Period Applies to Article 78 Proceedings

It has been held that a request for reconsideration of an administrative determination does not toll the statute of limitations. Nevertheless, "where 'the agency conducts a fresh and complete examination of the matter based on newly presented evidence,' an aggrieved party may seek review in a CPLR Article 78 proceeding commenced within four months of the new determination". *See Matter of Riverso v. New York State Dept. of Envtl. Conservation*, 125 A.D.3d 974, 977, 3 N.Y.S.3d 414, 417 (2d Dep't 2015). *See also Matter of Kaneev v. City of New York Envtl. Control Bd.*, 149 A.D.3d 742, 52 N.Y.S.3d 107 (2d Dep't 2017) ("Generally, a request for discretionary consideration does not serve to extend the statute of limitations or change a final determination into a nonfinal one (citation omitted). 'However, where the agency conducts a fresh and complete examination of the matter based on newly presented evidence,' an aggrieved party may seek review in a CPLR Article 78 proceeding commenced within four months of the new determination' (citations omitted). Here, the ECB conducted a fresh and complete examination of the matter in response to the petitioner's October 21, 2013, letter, in which he sought dismissal of the March NOVs due to the ECB's dismissal of the June NOV. In its responsive letter to the petitioner dated November 8, 2013, the ECB expressly stated that the rejection of the appeal would become final on November 18, 2013. Thus, contrary to the Supreme Court's finding that the ECB's determination became final on September 4, 2008, it actually became final on November

18, 2013. Nonetheless, the proceeding was time-barred since the petitioner commenced this proceeding on April 8, 2014, more than four months after the determination became final on November 18, 2013.").

VOLUME 2, ARTICLE 3 TEST JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

¶ 320.10 Objection May Be Raised by Motion or Pleading

Service of a notice of appearance or demand for a complaint in response to a summons with notice should not constitute a waiver of jurisdictional objections, so long as that objection (defense) is later asserted in the answer or motion to dismiss. *See Balassa v. Benteler-Werke A. G.*, 23 A.D.2d 664, 257 N.Y.S.2d 211 (2d Dep't 1965). *See also Hsu v. Shields*, 111 A.D.3d 674, 675, 974 N.Y.S.2d 800 (2d Dep't 2013) ("[T]he defendants' demand for a complaint did not constitute an appearance in this action (*see* CPLR 3012(b)).").

However, it is important to note that there are circumstances where a notice of appearance is not served in response to a summons with notice. For example, a defendant may serve a notice of appearance so as to be apprised of the progress of a case. *See e.g.*, *Tsionis v. Eriora Corp.*, 123 A.D.3d 694, 998 N.Y.S.2d 117 (2d Dep't 2014) ("Contrary to the plaintiffs' contention, the appellant was not required to serve an answer where the complaint did not set forth any allegations that the appellant was required to defend against (citations omitted). 'A defendant who has no defense, and therefore serves no pleading, might nevertheless serve a notice of appearance so as to be kept apprised of the progress of the proceeding' (citation omitted). Such was the situation here.") **(citing Weinstein, Korn & Miller, New York Civil Practice, CPLR ¶ 320.03**).

Moreover, particularly in the area of mortgage foreclosure actions, there can be an occasion where a notice of appearance is served after entry of a default judgment, in which case the defendant can be found to have waived his or her jurisdictional defenses. *See American Home Mtge. Servicing, Inc. v. Arklis*, 150 A.D.3d 1180, 56 N.Y.S.3d 332 (2d Dep't 2017). In mortgage foreclosure action, defendant initially failed to answer, resulting in entry of default judgment a year and a half after alleged service and appointment of referee to compute what was due. At foreclosure settlement conference two and a half years thereafter, defendant's attorney executed form notice of appearance. When plaintiff's assignee moved for leave to enter judgment of foreclosure and sale almost 2 years later, defendant cross-moved to dismiss for lack of personal jurisdiction. Appellate Division holds defendant waived jurisdictional defense. "Subject to certain exceptions not applicable here (see CPLR 320[c]), 'an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under [CPLR 3211(a)(8)] is asserted by motion or in the answer as provided in [CPLR 3211]' (CPLR 320[b]). 'By statute, a party may appear in an action by attorney (CPLR 321), and such an appearance constitutes an appearance by the party for purposes of conferring jurisdiction' (citations omitted). Here, the defendant's attorney appeared in the action on her behalf by filing a notice of appearance on July 25, 2012, and neither the defendant nor her attorney moved to dismiss the complaint on the ground of lack of personal jurisdiction at that time or asserted lack of personal jurisdiction in a responsive pleading (citations omitted). Accordingly, the defendant

waived any claim that the Supreme Court lacked personal jurisdiction over her in this action (citation omitted)." *See also*, David L. Ferstendig, *The Potential Trap of Serving a Notice of Appearance*, 682 NYSLD 3 (2017).

VOLUME 5, ARTICLE 30 REMEDIES AND PLEADING

¶ 3012.13 Demand for Complaint May Follow Service of Summons with Notice

Note that the defendant cannot serve the demand and trigger the 20-day time period for the plaintiff to serve the complaint until after the plaintiff has served the summons with notice. However, a defendant can serve a demand after the plaintiff serves the defendant pursuant to CPLR 308(2), but before service is complete, that is, before the plaintiff has filed the proof of service. *See Wimbledon Fin. Master Fund, Ltd. v. Weston Capital Mgt. LLC*, 150 A.D.3d 427, 55 N.Y.S.3d 1 (1st Dep't 2017) ("Plaintiff commenced this securities fraud action against 26 defendants by filing a summons with notice on October 16, 2015, and served defendant Manley pursuant to CPLR 308(2) twelve days later. On November 3, 2015, before plaintiff had filed proof of service, defendant served a demand for a complaint pursuant to CPLR 3012(b). Plaintiff, taking the position that the demand was a nullity, asked defendant to agree to accept a complaint served by the end of December. Defendant refused, and instead moved to dismiss the action on November 24, the 21st day after service of its demand. Plaintiff served a complaint on December 24, 2015. We agree with the motion court that under CPLR 3012(b), defendant was permitted to serve a demand for a complaint after being served, notwithstanding that service was not technically 'complete.' The time frames applicable to defendants set forth in CPLR 3012(b) are deadlines, not mandatory start dates (citations omitted). In the cases relied on by plaintiff, the defendants' demands were ineffective to trigger plaintiff's time to serve a complaint pursuant to CPLR 3012(b) because the defendants had not yet been served with a summons with notice, and the CPLR makes no provision for an appearance or a demand for a complaint before the summons is served (citations omitted).").

VOLUME 6, ARTICLE 31 DISCLOSURE

¶ 3101.52a Party Entitled to Disclosure of Trial Experts

Note that there is a conflict among the Appellate Division departments as to whether a treating physician who testifies at trial as an expert must provide the CPLR 3101(d)(1)(i) expert disclosures. The First, Second, and Fourth departments do not impose such a requirement. (*See Hamer v. City of New York*, 106 A.D.3d 504, 509, 965 N.Y.S.2d 99 (1st Dep't 2013); *Jing Xue Jiang v. Dollar Rent a Car, Inc.*, 91 A.D.3d 603, 604, 938 N.Y.S.2d 90 (2d Dep't 2012); *Andrew v. Hurh*, 34 A.D.3d 1331, 1331, 824 N.Y.S.2d 546 (4th Dep't 2006) cert. denied 8 N.Y.3d 808 (2007). However, the Third Department does impose this requirement. (*See most recently*, *Schmitt v. Oneonta City Sch. Dist.*, 151 A.D.3d 1254, 55 N.Y.S.3d 834 (3d Dep't 2017). *See also* David L. Ferstendig, *Another Conflict Among Appellate Division Departments*, 680 N.Y.S.L.D. 4 (2017); *Norton v. Nguyen*, 49 A.D.3d 927, 929, 853 N.Y.S.2d 671, 673 (3d Dep't 2008)).

VOLUME 7, ARTICLE 32 ACCELERATED JUDGMENT

¶ 3217.02 Discontinuance by Notice Authorized

There is a conflict in the Appellate Divi-

sion as to whether a motion to dismiss is a "responsive pleading" within the meaning of CPLR 3217(a)(1). The First Department concludes that it is because otherwise, "a plaintiff would be able to freely discontinue its action without prejudice solely to avoid a potentially adverse decision on a pending dismissal motion." BDO USA, LLP v. Phoenix Four, Inc., 113 A.D.3d 507, 511–512, 979 N.Y.S.2d 45, 49–50 (1st Dep't 2014).

"Thus, BDO's notice was ineffective and a nullity, and the motion court should not have deemed defendants' motions withdrawn (citations omitted). That BDO served its notice of discontinuance in an attempt to circumvent the Administrative Judge's order denying its request to have its action assigned to the Commercial Division may be a valid basis for granting a discontinuance with prejudice (citations omitted). However, given the unusual procedural history that led to the commencement of this action, we decline to discontinue the action with prejudice. Specifically, this action arose from defendant SRC's failure to properly notify this Court of the settlement the parties had reached in the contribution action before the mediator. Indeed, although the parties had reached a settlement, and the mediator specifically directed the parties to inform this Court of the settlement, SRC unilaterally took the position that the settlement was not effective and that the appeal should continue. As a result, this Court dismissed the contribution action before the parties finalized a written agreement, thus precluding BDO from enforcing the oral agreement (citations omitted)."

The Fourth Department has come to a contrary conclusion based "on the statute's language and the legislative history." *See* Harris v. Ward Greenberg Heller & Reidy LLP, 151 A.D.3d 1808, 58 N.Y.S.3d 769 (4th Dep't 2017) ("Based on the statute's language and the legislative history, we conclude that a determination that a motion to dismiss is a responsive pleading is contrary to the statute. Moreover, if the Legislature intended for a motion to dismiss to defeat a plaintiff's absolute right to serve a notice of discontinuance, it could easily have said so. Thus, in appeal No. 1, we conclude that plaintiff's notices of discontinuance were timely, and we therefore reverse the order therein.").

VOLUME 10, ARTICLE 50 JUDGMENTS GENERALLY

¶ 5003-a.02 Ninety-Day Requirement Applies to Municipalities, Public Corporations, and State

Where legislative approval was a condition of a proposed settlement, and that approval was not given, the matter was not "finally settled" for the purposes of CPLR 5003-a. *Azbel v. County of Nassau*, 149 A.D.3d 1020, 53 N.Y.S.3d 656 (2d Dep't 2017) ("Here, the Supreme Court properly denied the plaintiffs' motion pursuant to CPLR 5003-a(e) to direct entry of a judgment awarding them interest on the amount of the parties' settlement, plus costs and disbursements. Contrary to the plaintiffs' contention, legislative approval was a condition of the proposed settlement entered into between the plaintiffs and the County. The Nassau County Administrative Code provides that the County Attorney shall not be empowered to settle any rights, claims, demands, or causes of action against the County unless authorized by the County Legislature (citation omitted). '[A] party that contracts with the State or one of its political subdivisions is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them' (citations omitted). Inasmuch as the County Legislature did not approve the bond ordinance, a condition of the parties' settlement was not met. Therefore, the matter was not

finally settled and the 90-day period within which the County would have been required to make payment of the settlement amount was not triggered (citation omitted).").

¶ 5015.05 Grounds Constituting Excusable Default Described

Generally, "the unexplained delay of defendant's insurance broker in forwarding the summons and complaint to defendant's insurance carrier" constitutes a reasonable excuse for the defendant's failure to appear (*Romero v. Alezeb Deli Grocery, Inc.*, 115 A.D.3d 496, 981 N.Y.S.2d 696, 697 (1st Dep't 2014).

However, where the defendant received the summons and complaint, two default judgment motions, a letter from the court and a court decision referencing a $900,000 judgment against him, defendant's assertion that he believed the broker was forwarding the paperwork to the insurer was found to be unreasonable. *See Gecaj v. Gjonaj Realty & Mgt. Corp.*, 149 A.D.3d 600, 51 N.Y.S.3d 74 (1st Dep't 2017) ("Surely Mr. Gjonaj knew that if his insurance company had retained a lawyer to appear for defendants, he and his corporations would not have continued to receive legal documents directly from plaintiff's attorney and the court for over three years. The fact that Sarasky kept assuring Mr. Gjonaj 'that everything in this matter was under control and that the claim was being handled by the proper insurance company,' does not help to establish reasonableness, objective or otherwise, on the part of Mr. Gjonaj, who should have known that everything was not under control after years of receiving so many legal documents from plaintiff's counsel relating to the same lawsuit. The dissent, however, would have us find that defendants presented a reasonable excuse for their delay because they forwarded all documents upon receipt to their insurance broker, and thus, were entitled to blindly rely on their belief that the insurer would take appropriate action.").

VOLUME 13, ARTICLE 75 ARBITRATION

¶ 7503.32 Twenty-Day Statutory Time Limit for Application for Stay

The CPLR 7503(c) time restrictions do not apply where "respondent waived her right to arbitrate by initiating litigation on the same claims." *See Matter of Allstate Ins. Co. v. Howell, 151 A.D.3d 461*, *56 N.Y.S.3d 89* (1st Dep't 2017) ("The motion court erred in dismissing the motion to stay as untimely. The time restrictions set forth at CPLR 7503(c) do not apply where, as here, respondent waived her right to arbitrate by initiating litigation on the same claims (citations omitted). '[O]nce waived, the right to arbitrate cannot be regained, even by the respondent's failure to [timely] seek a stay of arbitration' (citations omitted). That petitioner participated, under objection, in the arbitration is immaterial. Even if the arbitration had been completed and an award issued, the award would be subject to vacatur on the ground that the arbitrator lacked authority to conduct the arbitration (citations omitted).").

VOLUME 14, ARTICLE 78 PROCEEDING AGAINST BODY OR OFFICER

¶ 7801.02 Availability and Effect of Relief Described

It has been held that a request for reconsideration of an administrative determination does not toll the statute of limitations. (*Matter of Shields v. Prack*, 131 A.D.3d 748, 13 N.Y.S.3d 916 (3d Dep't 2015)). Nevertheless, "where 'the agency conducts a fresh and complete examination of the matter based on newly presented evidence,' an aggrieved party may seek review in a

CPLR Article 78 proceeding commenced within four months of the new determination".

See Matter of Riverso v. New York State Dept. of Envtl. Conservation, 125 A.D.3d 974, 977, 3 N.Y.S.3d 414, 417 (2d Dep't 2015). *See also Matter of Kaneev v. City of New York Envtl. Control Bd.*, 149 A.D.3d 742, 52 N.Y.S.3d 107 (2d Dep't 2017) ("Here, the ECB conducted a fresh and complete examination of the matter in response to the petitioner's October 21, 2013, letter, in which he sought dismissal of the March NOVs due to the ECB's dismissal of the June NOV. In its responsive letter to the petitioner dated November 8, 2013, the ECB expressly stated that the rejection of the appeal would become final on November 18, 2013. Thus, contrary to the Supreme Court's finding that the ECB's determination became final on September 4, 2008, it actually became final on November 18, 2013. Nonetheless, the proceeding was time-barred since the petitioner commenced this proceeding on April 8, 2014, more than four months after the determination became final on November 18, 2013.").

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