PUBLICATION UPDATE

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New York Civil Practice: CPLR Second Edition

Publication 805 Release 169 September 2018

HIGHLIGHTS

- **Release 169** features many revisions to **Article 9**, including the addition of **¶ 908.06 Disclosure-Only Settlements**, as well as comprehensive analysis of the **below key issues** of interest to New York civil practitioners:

VOLUME 1, ARTICLE 2 LIMITATIONS OF TIME

¶ 214.07 Provision Applies to Liability of State, Public Authorities and Political Subdivisions Under Human Rights Law

In *Contact Chiropractic, P.C. v. New York City Tr. Auth.*, 31 N.Y.3d 187, 75 N.Y.S.3d 474, 99 N.E.3d 867 (2018), a majority of the Court of Appeals applied a three-year statute of limitations under CPLR 214(2) to no fault claims asserted against a self-insurer. CPLR 214(2) provides for a three-year limitation period to actions to recover upon a liability created or imposed by statute. The majority based its decision on the fact that the no-fault law was unknown at common law and was created by statute. Moreover, the benefits provided in this case were by a self-insurer pursuant to statute, not via a contract with a private insurer. The dissent saw no reason, however, why there should be two sets of limitation periods: one for actions against self-insurers with a three-year statute of limitations; and another for actions against insurers, where the Appellate Division has found there to be a six-year statute of limitations. *See* David L. Ferstendig, *Majority of Court of Appeals Applies Three-Year Statute of Limitations to No-Fault Claims Against a Self-Insurer*, 691 N.Y.S.L.D. 1–2 (2018).

The dissent reasoned that the no-fault law did not distinguish between insurers and self-insurers, the accrual dates for both claims are identical, and the obligations of the insurer and the self-insurer to provide no-fault benefits are not fundamentally different.

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

¶ 306-b.03 Completing Service within Required Time

VOLUME 3, ARTICLE 4 SPECIAL PROCEEDINGS

¶ 403.02 Time of Service Specified

¶ 403.04 Order to Show Cause May Be Granted and Served in Lieu of Notice of Petition

The practitioner should beware of a potential danger associated with using an order to show cause where the statute of limitations is about to expire. The jurisdictional time limits established by CPLR 306-b for service of process apply. Thus, where the 15-day period following the expiration of the statute of limitations had expired prior to the date the court signed the order to show cause, it was held the lower court properly dismissed the action. *See Matter of Genting N.Y., LLC v. New York City Envtl. Control Bd.*, 158 A.D.3d 684, 73 N.Y.S.3d 68 (2d Dep't 2018):

"Contrary to the petitioner's contention, the fact that CPLR 403(d) permits a court to grant an order to show cause to be served "in lieu of a notice of petition at a time and in a manner specified therein" does not abrogate the jurisdictional time limit established by CPLR 306-b, and the Supreme Court properly granted the respondents' cross motion pursuant to CPLR 3211(a)(8) to dismiss the amended petition for lack of personal jurisdiction based upon the petitioner's failure to comply with CPLR 306-b (citations omitted)."

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

¶ 306-b.05 Extending Time for Service Upon Good Cause Shown or in Interest of Justice

VOLUME 5 ARTICLE 30 REMEDIES AND PLEADING

¶ 3025.09 Relation Back Doctrine May Apply to Amendment Under CPLR 3025(a)

In *Vanyo v. Buffalo Police Benevolent Ass'n*, 159 A.D.3d 1448, 73 N.Y.S.3d 827 (4th Dep't 2018), the plaintiff filed a summons and complaint but never served it. Over three months later, the plaintiff filed and served an amended complaint which added a cause of action. The defendants moved under CPLR 3211(a)(5) and (7) to dismiss the amended complaint and the plaintiff moved under CPLR 306-b for an order seeking an extension of time to serve the original complaint and to deem the original complaint timely served nunc pro tunc. A majority of the Fourth Department held that the lower court did not abuse its discretion in denying plaintiff's motion for an extension under CPLR 306-b, and properly dismissed the first two causes of actions of the amended complaint as untimely. The court held that the amended complaint was untimely, as it was filed beyond the applicable CPLR 217's four-month statute of limitations. It refused to apply the relation back doctrine under CPLR 203(f), because the original timely filed complaint, having never been served, "did not give defendants notice of the transactions or occurrences to be proved pursuant to the amended complaint. The claims in the amended complaint, therefore, are measured for timeliness by service (or filing in this case) of the amended complaint." (159 A.D.3d at 1451). In addition, the court held that the plaintiff's amended complaint was filed and served without leave outside the time limits provided in CPLR 3025(a) for an amendment as of right. The dissent concluded that because the defendants never served a formal notice of cross motion under CPLR

306-b, the lower court could not grant defendants relief under CPLR 306-b. Furthermore, since the defendants did not move to dismiss under CPLR 3211(a)(8) on personal jurisdiction grounds, they waived their service objection as to the original complaint. The dissent asserted that plaintiff's action was timely because it was uncontested that she filed her original complaint in a timely fashion; she then amended her complaint as of right within the time constraints of CPLR 3025(a); and under CPLR 203(f) and the relation back doctrine, the claims in the amended complaint were deemed interposed for statute of limitations purposes when the original complaint was filed. The dissent criticized the majority for confusing commencement by filing with service-related issues:

Here, defendants simply assume that the commencement of the action by the original filing disappeared or was somehow purged by the failure to serve the original summons and complaint and the filing and service of the amended complaint. While the complaint may have been superseded by the amended complaint, the commencement of the action was not and clearly could not have been superseded by the amended complaint. . . . The Legislative change from a commencement-by-service system to a commencement-by-filing system segregated these concepts and made them mutually exclusive. Under the new system, problems with service no longer prevent timely commencement of an action.

Id. at 1457.

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

¶ 314.20 Attachment as a Basis of Quasi In Rem Jurisdiction Has Some Continuing Viability Despite the Demise of Seider v. Roth

VOLUME 11, ARTICLE 53 RECOGNITION OF FOREIGN COUNTRY MONEY JUDGMENTS

¶ 5304.01 Non-Recognition Mandatory Absent Due Process and Personal Jurisdiction in Foreign Forum

In *Abu Dhabi Commercial Bank PJS v. Saad Trading*, 117 A.D.3d 609, 986 N.Y.S.2d 454 (1st Dep't 2014), the First Department held that a plaintiff who seeks to recognize and enforce a foreign country money judgment in New York does not have to establish a "separate" jurisdictional predicate over the debtor in New York. Subsequently, in *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, 160 A.D.3d 93, 73 N.Y.S.3d 1 (1st Dep't 2018), the court clarified its earlier decision, stating that the *Abu Dhabi* holding applies only where the defendant opposing recognition of the foreign judgment does not assert any of the statutory defenses to the recognition. Where the defendant does raise "colorable statutory grounds for denying the foreign judgment recognition . . . there must be either an in personam or an in rem jurisdictional basis for maintaining the recognition and enforcement proceeding against defendants in New York." 160 A.D.3d at 94, 73 N.Y.S.3d at 3.

"This appeal arises from a proceeding to recognize and enforce a foreign country judgment under CPLR article 53. Defendants have raised colorable statutory grounds for denying the foreign judgment recognition. Under these circumstances, we hold that there must be either an in personam or an in rem jurisdictional basis for maintaining the recognition and enforcement proceeding against defendants in New York. Because plaintiff does not claim that such jurisdiction is demonstrated on the

existing record, and, on appeal, does not seek an opportunity to gather evidence to demonstrate that such jurisdiction exists, we conclude that New York lacks jurisdiction to entertain this proceeding. Accordingly, we reverse the order appealed from and grant defendants' motion to dismiss the proceeding pursuant to CPLR 3211(a)(8)."

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

¶ 325.19a Removal to a Court of Lesser Jurisdiction Without Consent; 1968 Amendment

In *Caffrey v. North Arrow Abstract & Settlement Servs., Inc.*, 160 A.D.3d 121, 73 N.Y.S.3d 70 (2d Dep't 2018), the Second Department ruled that where a court with subject matter jurisdiction erroneously transfers an action to a lower court lacking subject matter jurisdiction, it may retransfer the action to itself under CPLR 325(b) after the lower court has already tried the matter and rendered a judgment. However, the court cannot adopt the findings of fact and conclusions of law of the lower court and substitute the lower court's judgment with its own judgment.

"The first and most basic reason the action was still pending is that the Civil Court judgment was rendered in the absence of subject matter jurisdiction. A judgment rendered by a court without subject matter jurisdiction is void as a matter of law (citations omitted). It follows that if the Civil Court judgment is void, then the action was never disposed of and remained pending. A second and more nuanced reason that Caffrey's action had not concluded by the time of its retransfer to the Supreme Court involves the appeal that had been taken to the Appellate Term. Although a judgment had been entered by the Clerk of the Civil Court on January 17, 2014, that judgment was the subject of an appeal still pending in the Appellate Term as of February 25, 2015, the date of the order by which the Supreme Court removed the Civil Court action to itself. The action may therefore be deemed an active and continuing one at the time of its retransfer to Supreme Court (citation omitted). Our holding that the Civil Court action was still viable and pending in order for the Supreme Court to remove it to itself is consistent with cases determined in analogous CPLR contexts. For example, in actions involving the six-month window for recommencing certain actions pursuant to CPLR 205(a) that would otherwise be time-barred, the Court of Appeals has held that the termination of a prior action from which the six months is measured occurs when appeals as of right are exhausted (citations omitted) or when discretionary appellate review is granted, upon final determination of the discretionary appeal (citations omitted). The First Department has interpreted the meaning of the phrase 'termination of the action' in connection with CPLR 203(e). That statute provides that the time the action was commenced and the time the action was terminated is not to be counted as part of the time to commence an action to recover upon a defense or counterclaim. The First Department defined 'termination of the action' as including the exhaustion of discretionary appeals (citations omitted). By analogy, the appeal of the Civil Court's judgment meant that this action had not concluded at the time it was retransferred to the Supreme Court."

VOLUME 4, ARTICLE 14–A DAMAGE ACTIONS: EFFECT OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

¶ 1412.01 Claimant's Culpable Conduct Is Affirmative Defense to Be

Pleaded and Proved by Party Asserting It

VOLUME 7, ARTICLE 32 ACCELERATED JUDGMENT

¶ 3212.03 Summary Judgment Available in All Actions

Until resolved recently by the Court of Appeals (see below), the question had arisen as to whether the plaintiff must establish that he or she is free from comparative negligence in order to make out a prima facie showing of entitlement to partial summary judgment on liability only. The Second Department held that the plaintiff was required to make such a showing. *See Roman v. A1 Limousine, Inc*., 76 A.D.3d 552, 907 N.Y.S.2d 251 (2d Dep't 2010). The First Department had issued conflicting decisions. Most recently, in *Rodriguez v. City of New York*, a majority of yet another First Department panel sought to adopt its "original approach," placing the burden of proof on the plaintiff to show freedom from comparative negligence. *Rodriguez v. City of New York*, 142 A.D.3d 778, 37 N.Y.S.3d 93 (1st Dep't 2016). *See* David L. Ferstendig, C*onfusion Continues in First Department*, 672 N.Y.S.L.D. 2–3 (2016). We suggested that this uncertainty within the First Department begged for resolution by the Court of Appeals or legislation. Our request was granted when a majority of the Court of Appeals reversed in Rodriguez, holding that plaintiffs did not have the burden to establish that they were free from comparative negligence in order to obtain partial summary judgment on liability. *Rodriguez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898, 101 N.E.3d 366 (2018). The Court noted that placing such a burden on the plaintiff was inconsistent with the comparative negligence principles of CPLR Article 14-A. In fact, CPLR 1412 provides that "[c]ulpable conduct claimed in diminution of damages" is an affirmative defense which is "to be pleaded and proved by the party asserting the defense." As a result, the defendant's approach was "at odds with the plain language of CPLR 1412, because it flips the burden, requiring the plaintiff, instead of the defendant, to prove an absence of comparative fault in order to make out a prima facie case on the issue of defendant's liability." The majority assured that its prior decision in *Thoma v. Ronai*, 82 N.Y.2d 736, 602 N.Y.S.2d 323, 621 N.E.2d 690 (1993), "never addressed the precise question we now confront." *See also* David L. Ferstendig, *Majority of Court of Appeals Holds Plaintiffs Need Not Establish the Absence of Their Own Comparative Negligence to Obtain Partial Summary Judgement on Liability Only*, 690 N.Y.S.L.D. 1-2 (2018).

VOLUME 10, ARTICLE 50 JUDGMENTS GENERALLY

CPLR 5003-b. Nondisclosure agreements

¶ 5003-b.01: Barring Nondisclosure Provisions in Settlement of Sexual Harassment Claims

As part of comprehensive sexual harassment legislation, CPLR 5003-b was enacted, effective July 11, 2018. CPLR 5003-b provides that an employer (or its employee or officer) cannot include in a settlement agreement (including an agreed judgment, stipulation, decree, agreement to settle, assurance or discontinuance "or otherwise") in connection with a sexual harassment claim a nondisclosure agreement preventing the disclosure of the underlying facts and circumstances of the claim or action unless it is the plaintiff's (settling individual's) preference. In addition, the plaintiff must have 21 days to consider whether to accept the provision; and even after signing the agreement, the plaintiff

has an additional seven days to revoke the agreement.

VOLUME 13, ARTICLE 75 ARBITRATION

¶ 7515.01: Barring Mandatory Arbitration Provisions in Connection with Sexual Harassment Claims

As part of a comprehensive sexual harassment legislation, CPLR 7515 was enacted, effective July 11, 2018. CPLR 7515 bars mandatory arbitration clauses in connection with sexual harassment claims, except where inconsistent with federal law. Specifically, it prohibits "any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment."

The mandatory arbitration clause concerns a provision in a written contract (1) requiring the submission of a matter to arbitration (as defined in CPLR Article 75) prior to bringing any legal action, and (2) providing that an arbitrator's determination with respect to an alleged "unlawful discriminatory practice based on sexual harassment [is] final and not subject to independent court review." If such provisions are included, they will be deemed null and void. However, it will not impair the enforceability of other provisions in the agreement.

The amendment does not prohibit employers from including a non-prohibited clause or other mandatory arbitration provisions, agreed upon by the parties. Where there is a conflict between provisions of this section and a collective bargaining agreement, the latter controls.

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